manitoba**LawJournal**

2019 Volume 42(4), Special Issue

# Criminal Law Edition (Robson Crim)

## PUBLICATION INFORMATION


Cite as (2019) 42:4 Man LJ
Printed in Canada on recycled and acid-free paper.
Published annually on behalf of the Faculty of Law, University of Manitoba.
Annual Subscription Rate: Canada: $35.00 CDN; Foreign: $35.00 U.S.
Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
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Winnipeg, Manitoba R3T 2N2
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## ACKNOWLEDGEMENTS

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

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

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

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


THE LEGAL RESEARCH INSTITUTE OF THE UNIVERSITY OF MANITOBA promotes research and scholarship in diverse areas.

## REFEREE AND PEER REVIEW PROCESS

All of the articles in the *Manitoba Law Journal Robson Crim Edition* are externally refereed by independent academic experts after being rigorously peer reviewed by Manitoba faculty editors, as well as reviewed by student staff. Usually 3 external peer reviewers assess each piece on a double-blind basis.

## INFORMATION FOR CONTRIBUTORS

The editors invite the submission of unsolicited articles, comments, and reviews. The submission cannot have been previously published. All multiple submissions should be clearly marked as such and an electronic copy in Microsoft Word should accompany the submission. All citations must conform to the *Canadian Guide to Uniform Legal Citation*, 9th Edition. Contributors should, prior to submission, ensure the correctness of all citations and quotations. Authors warrant that their submissions contain no material that is false, defamatory, or otherwise unlawful, or that is inconsistent with scholarly ethics. Initial acceptance of articles by the Editorial Board is always subject to advice from up to three (or more) external reviewers.

The Editorial Board reserves the right to make such changes in manuscripts as are necessary to ensure correctness of grammar, spelling, punctuation, clarification of ambiguities, and conformity to the *Manitoba Law Journal* style guide. Authors whose articles are accepted agree that, at the discretion of the editor, they may be published not only in print form but posted on a website maintained by the journal or published in electronic versions maintained by services such as Quicklaw, Westlaw, LexisNexis, and HeinOnline. Authors will receive a complimentary copy of the *Manitoba Law Journal* in which their work appears.

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# Criminal Law Edition (Robson Crim)

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# Towards Dialogue in the Crim Disciplines

DAVID IRELAND AND
RICHARD JOCHELSON

We are thrilled to bring you the latest edition of the Criminal Law Special Edition of the Manitoba Law Journal. Academics, students and the practicing bench and bar continue to access this publication and contribute to it their knowledge and experience in the criminal law. The fact that we have, once again, elected to publish a double volume is a testament to the quality of submissions we have received over the last twelve months. We present twenty-five articles from twenty-nine authors, highlighting the work of some of Canada's leading criminal law, criminological and criminal justice academics.

The Manitoba Law Journal remains one of the most important legal scholarship platforms in Canada with a rich history of hosting criminal law analyses.[1] With the help of our contributors, the Manitoba Law Journal was recently ranked second out of thirty-one entries in the Law, Government and Politics category of the Social Sciences and Humanities Research Council (SSHRC). We continue to be committed to open access scholarship and our readership grows with each Criminal Law Special Edition released.

Our content is accessible on robsoncrim.com, themanitobalawjournal.com, Academia.edu, CanLII Connects, Heinonline, Westlaw-Next and Lexis Advance Quicklaw. Since our first edition in 2017, our Special Edition has ranked as high as the top 0.1% on Academia.edu where we have had 4,000 downloads and close to 7,000 total views. In the last twelve months, our own website, robsoncrim.com, has added almost 600 engagements with the Special Edition, attracting hits from Canada, the United States, United Kingdom, Australia and India.

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1 David Ireland, "Bargaining for expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38:1 Man LJ 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37:2 Man LJ 365.

Our readership engages with articles on subjects as diverse as the Tragically Hip and wrongful convictions,[2] bestiality law,[3] and the British Columbia courts sentencing response to fentanyl trafficking.[4]

Since launching in 2016, the Robsoncrim research cluster at the Faculty of Law, University of Manitoba, has continued to develop a unique interdisciplinary platform for the advancement of research and teaching in the criminal law. Robsoncrim.com has now hosted over 350 Blawgs,[5] with contributions from across the country and beyond. Our cluster has over 30,000 tweet impressions a month and our website has delivered almost 600 reads in the past twelve months. We are as delighted as we are humbled to continue delivering quality academic content that embraces and unites academic discussion around the criminal law. Our team of collaborators extends from coast to coast and is comprised of top academics in their respective crim fields.

The peer review process for the Special Edition in Criminal Law remains rigorously double blind, using up to five reviewers per submission, and has generated some truly wonderful articles for our readers. We are delighted to welcome long time contributors Dr. James Gacek and Dr. Rebecca Bromwich to our Robsoncrim.com online editorial team this year. James and Rebecca bring tremendous experience and an impressive body of law scholarship.[6] As editors, we know they will continue to provide their

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

3 James Gacek & Richard Jochelson, "Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40:3 Man LJ 337.

4 Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149.

5 Amar Khoday, "Against the Clock: Criminal Law & the Legal Value of Time" (17 June 2019), online (blog): *Robson Crim* <tinyurl.com/y3npys9g> [perma.cc/KKN6-6N8C]; L Campbell, "A Reasonable Expectation of Privacy and the Criminal Code: Two Cases, Two Different Definitions" (30 July 2019), online (blog): *Robson Crim* <robsoncrim.com/single-post/2019/07/30/A-Reasonable-Expectation-of-Privacy-and-the-Criminal-Code-Two-Cases-Two-Different-Definitions> [perma.cc/DG4U-E2FE]; T Sicotte, "The Supreme Court Needs to Clean up the Sex Offender Registry" (18 July 2019), online (blog): *Robson Crim* <tinyurl.com/y6p5cg27> [perma.cc/VPN9-KFQG].

6 Rebecca Bromwich, "Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies" (2017) 40:3 Man LJ 193; Rebecca Bromwich & Jennifer M Kilty, "Introduction: Law, Vulnerability, and Segregation: What Have We Learned from Ashley Smith's Carceral Death?" (2017) 23:2 CJLS 157;

collective wisdom to our publication and remain steadfastly committed to interdisciplinary and collaborative scholarship.

As has become our tradition, we would like to preview for our readers the contents of this year's special edition. The edition is divided into two volumes. Each volume contains a number of thematic sections. These sections host our articles.

## I. VOLUME 42(3)

This volume is divided into two sections. The first section is entitled Sexual and Domestic Violence: Evidence, Critical Discussions and Law Reform. The second thematic section is entitled Injustice in Criminal Process: Legal and Socio-Legal Approaches. The first section engages timely discourse around topics of sexual violence, the criminalization of HIV, the charging of women in domestic violence matters and the complex world of sexual assault jury instructions.

Leading off the *Sexual and Domestic Violence: Evidence, Critical Discussions and Law Reform* section is Professor Lucinda Vandervort's engaging discussion of the *R v George* case in the context of errors that constitute judicial misconduct. *George* concerned the trial of a 35-year-old woman accused of sexually assaulting a 14-year-old boy. This fascinating case went to the Supreme Court of Canada in 2017 where Ms. George was finally acquitted after a frightening journey through the criminal justice system. Vandervort delves into the judicial reasons of the trial decision to interrogate themes of misogyny and entrenched attitudes towards sexual violence.

Paul M Alexander and Kelly De Luca delve into the complex world of jury instructions in sexual assault trials in "The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong." The authors argue that standard charges for the offence of sexual assault contain a legal error in that they identify knowledge of the complainant not consenting as an essential element of the offence. They further identify issues with the defence of honest but mistaken belief in consent as it concerns the *Mens*

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James Gacek, "Species Justice for Police Eagles: Analyzing the Dutch 'Flying Squad' and Animal-Human Relations" (2018) 21:1 Contemporary Justice Rev 2; Richard Jochelson & James Gacek, "Ruff Justice: Canine Cases and Judicial Law Making as an Instrument of Change" (2018) 24:1 Animal L 171.

*Rea* of the offence. This is an intriguing discussion that takes the reader into a complicated world where practitioners must exhibit extreme caution.

Professor Karen Busby and law student, Dr. Davinder Singh, co-author "Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law." This timely article looks at Supreme Court of Canada cases that effectively criminalize the non-disclosure of HIV status, arguing that a fundamental misunderstanding of the science has created flawed legal outcomes. The authors then discuss the implications of the recent directive of the Attorney-General of Canada to the Director of Public Prosecutions concerning HIV non-disclosure prosecutions.

In the article, "Elements of Superior Responsibility for Sexual Violence by Subordinates", Gurgen Petrossian interrogates the doctrine of superior responsibility to examine the circumstances in which a superior officer may be held liable for sexual violence perpetrated by his or her military subordinates. This article offers an international law perspective and identifies key issues around the use of the doctrine in an international war crimes context.

Following this, Anita Grace has authored a compelling piece looking at women charged with domestic violence in Ottawa, Ontario. Her empirical work draws on interviews with eighteen women charged in situations of intimate partner violence. These interviews highlight potential police misidentification of aggressors and thus inappropriate charging practices. Disturbingly, Grace highlights that some of the charged women would not turn to the police for protection given their negative experiences in the system.

Next, Kyle McCleary's article, "'Alluring Make-Up or a False Moustache': *Cuerrier* and Sexual Fraud Outside of HIV Non-Disclosure", presents an intriguing look at the seminal 1998 Supreme Court of Canada decision where it has been applied in cases not involving HIV non-disclosure. Here, we find a world where the *Cuerrier* standard is not operating as intended, in some cases shielding reprehensible acts from criminal liability.

The first section of this volume is closed out by Colton Fehr's article on "Consent and the Constitution". Fehr argues that any constitutional role for the consent principle in sexual assault law must derive from its purpose of protecting the morally innocent.

The second section of this volume, *Injustice in Criminal Process: Legal and Socio-Legal Approaches,* includes seven articles dealing with various issues in

criminal process. Professor Kathryn M Campbell begins our journey with "Exoneration and Compensation for the Wrongfully Convicted: Enhancing Procedural Justice?", a fascinating look at the post-conviction review and compensation processes in Canada. Campbell argues that these systems raise questions of legitimacy. This is an important discussion given the continued identification of wrongful convictions across the country.

Jonathan Avey examines the question of judicial delay in rendering a decision in the post-*Jordan* world. Avey uses the *K.G.K* case in Manitoba, where a judicial decision took nine months to come out, to highlight the tensions between the constitutional rights of an accused and the desirability of judges taking time to craft well-reasoned decisions. *K.G.K.* will provide the Supreme Court of Canada with the opportunity to address this tension and provide guidance to practitioners and judges on the correct balance to be struck in a post-*Jordan* environment, where expedience has become the watchword of the criminal process.

Maeve McMahon delves into the sphere of Canadian extradition law when she examines the shortcomings of the *Extradition Act* as highlighted by the case of Hassan Diab. Diab was arrested in 2008 for the 1980 bombing of a Paris Synagogue. Upon his extradition, Diab spent three years in a French jail despite the fact that he was never charged. McMahon offers us an engrossing look at the extradition and its aftermath, all while highlighting the problems of a low evidentiary threshold in these proceedings.

Paetrick Sakowski's timely look at Canadian remediation agreements, made so famous by the SNC-Lavalin affair, draws on a comparative analysis with other jurisdictions to highlight the potential benefits of deferred prosecutions when handled correctly. To maintain legitimacy and public trust, these controversial agreements must be fully understood as mechanisms to balance competing societal values.

Following this article, and continuing our theme of comparative legal analysis, law student Nathan Phelan delves into the world of Mr. Big in "Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to 'Mr. Big'". Phelan gives a detailed account of the admissibility requirements in Canada, New Zealand and Australia.

The final article in this volume sees Lauren Chancellor tackle the effect of media bias on wrongful convictions. Building on Professor Campbell's examination of the post-conviction review process, Chancellor investigates

the role of news and social media in Canadian wrongful convictions. Using the well-known examples of Guy Paul Morin, Robert Baltovich and James Driskell, the paper argues that the presumption of juror impartiality should be re-evaluated in the face of media coverage. Recommendations are made to address trial fairness and limit wrongful convictions.

## II. VOLUME 42(4)

The second volume is divided into four sections: Reflections on Evidence, Critical Issues in National Security, Critical Approaches to Evidence and Knowledge and Animal Rights: Legal and Socio-Legal Approaches. Leading off our first section, *Reflections on Evidence*, is Heather Cave and Peter Sankoff's article, "What's Left of Marital Harmony in the Criminal Courts? The Marital Communications Privilege After the Demise of the Spousal Incompetence Rule." This article explores the 2015 amendments to the *Canada Evidence Act* that abolished the spousal incompetence rule and poses a reconsideration of spousal communication privilege in the wake of this change.

Professor Jason Chin, Michael Lutsky, and Itiel Dror explore "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges." These authors, each from a different continent, offer an intriguing case analysis both pre and post the seminal *White Burgess* case on expert witness impartiality. While they find that more experts were challenged for partiality after *White Burgess*, there was no significant increase in the number of experts excluded.

John Burchill, a frequent and valued contributor to the Criminal Law Special Edition, provides an update to his academic work on penile swabs used in sexual assault prosecutions. This review, looking at cases 2010-2015 where both a penile swab was taken from the accused and a vaginal swab taken from the complainant, highlights the evidentiary value of taking swabs from both parties. Burchill goes on to compare and contrast the approach to admitting this type of evidence in Canada, Australia and South Africa, determining that, though different regimes exist, the value of such evidence remains high across jurisdictions.

Chis Sewrattan provides an article for our "From the Practitioner's Desk" section, where he engages the reader in a detailed historical analysis of the origins of the hearsay rule in evidence. This comprehensive work draws on the author's practical courtroom experience working with the

hearsay rule over the years as well as his academic research and will be of particular interest to litigators.

Our second section titled *Critical Issues in National Security* features two articles. Our 'Featured Article' by Professor Craig Forcese delves into the world of national security in "Threading the Needle: Structural Reform & Canada's Intelligent-to-Evidence Dilemma." Forcese deftly leads the reader through the clandestine world of Canadian intelligence agencies and the real issues surrounding disclosure and information security in the post-9/11 security environment. The article skillfully posits a hypothetical intelligence operation to highlight potential and actual difficulties that this area of the law presents to trial fairness and the rights of an accused.

Also, in this section on national security law, we present Nicolas Rosati's article, "Canadian National Security in Cyberspace" as a 'Critical Commentary'. The impact of legislative reform under Bill C-59 is discussed as it relates to operations under the current mandate of the Communications Security Establishment.

Our penultimate section: *Critical Approaches to Evidence and Knowledge* brings together four articles from prominent voices in legal scholarship. "Over Indebted Criminals in Canada" by Professor Stephanie Ben-Ishai and Arash Nayerahmadi offers an intriguing look at the often-overlooked issue of indebtedness arising from state punishment of criminal acts. This article explores 'justice debt' as a concept and offers ideas for future research and reform.

Professor Prashan Ranasinghe then explores the role of anxiety in the fear of crime. This article skillfully theorizes anxiety in socio-legal detail and engages Martin Heidegger's insightful analysis of fear and anxiety. The author then explores the 'risk-fear' paradox and concludes that this paradox is more apparent than real.

Dr. Rebecca Bromwich presents reasons for law reform in "Cross-Over Youth and Youth Criminal Justice Act Evidence Law: Discourse Analysis and Reasons for Law Reform." Youth in the child welfare system disproportionately 'cross-over' into the youth criminal justice system in Canada. Bromwich unpacks this reality and suggests that the use of evidence law in youth criminal justice further marginalizes 'cross-over' youth, setting them up for disproportionate criminalization and incarceration.

Alana Josey explores the tension between the trials' search for truth, protection of constitutional rights and the proper administration of justice by reference to the utilitarian philosophy and jurisprudential theory of

Jeremy Bentham. This interesting examination of evidence law and philosophy uses the example of a mistrial application to illustrate that Benthamite theory and the Canadian law can be reconciled.

Finally, the *Animal Rights: Legal and Socio-Legal Approaches* section unites two articles in this fast-developing area of legal scholarship. Dr. James Gacek contextualizes the Canadian animal cruelty law regime in "Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals." This critical take on the legislative regime in Canada examines our current understanding of 'animal cruelty' and frames arguments for and against advancing progressive animal welfare reforms.

Ryan Ziegler brings us our last article in this Special Edition: "The Constitutional Elephant in the Room: Section 8 *Charter* Issues with *The Animal Care Act*." Here, the author unpacks the legislation and applies a *Charter* analysis to the salient provisions of the legislation that authorize state intrusion on the privacy rights of the individual. Ziegler concludes the legislation should attract *Charter* protections with searches under the act being conducted under the *Hunter v Southam* framework.

## III. WHAT'S NEXT?

The upcoming year holds a number of exciting developments for the Robsoncrim.com collective. On October 26, 2019 we will be holding a national conference entitled "Criminal Justice and Evidentiary Thresholds in Canada: the last ten years" which will feature fifteen nationally established experts in criminal law and criminology discussing their original research in respect of evidence and knowledge production, marking the anniversary of the *R v Grant*[7] decision from 2009. The conference will be free and will also go towards meeting the Law Society of Manitoba's continuing professional development requirement. The event will feature Professor Kent Roach as a keynote speaker. The event will culminate in a special edition of the Criminal Law Edition slated for publication for 2020 and is supported by a Connections Grant from SSHRC as well a grant provided by the office of the University of Manitoba's Vice President (Research and International). In addition, we will announce new membership to our editorial and collaborative team – visit Robsoncrim.com early and often for emerging details.

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7 *R v Grant*, 2009 SCC 32.

Our goal remains to provide a leading national and international forum for scholars of criminal law, criminology and criminal justice to engage in dialogue. Too often, these disciplines hide in silos, afraid to engage in cross-disciplinary exchanges. We believe that high quality publications in these disciplines, and indeed, other cognate disciplines, ought to exist in dialogue. We view this as crucial to enhancing justice knowledge: theory and practice, policy and planning, and even, in resistance to injustice. We strive to break down the barriers that keep these works in disciplinary pigeon holes. This is, of course, an ambitious path to embark upon, but the two volumes we have released this year represent another incremental step towards our goals. We hope you enjoy these volumes, and we thank our interdisciplinary collaborator team (https://www.robsoncrim.com/collaborators), our editorial team, our student editors and all of the MLJ staff.

# CALL FOR PAPERS: Closes February 1, 2020
# Manitoba Law Journal - Robson Crim's Fourth Special Issue on Criminal Law

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We seek submissions related to two major areas: **1) general themes in criminal law; and 2) evidentiary developments in criminal law over the last 10 years** since the Supreme Court case of R v. Grant 2009 (see details below). This is our sixth specialized criminal law volume, though Manitoba Law Journal is one of Canada's oldest law journals. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. We are in press for volumes 42(3) and 42(4) of the Manitoba Law Journal and have published papers from leading academics in criminal law, criminology, law and psychology and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

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

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections and court settings
- Regulation of policing and state surveillance

- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances
- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

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

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

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

## SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2020. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

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

Submissions are due February 1, 2020 and should be sent to info@robsoncrim.com. For queries please contact Professors Richard Jochelson or David Ireland, at this email address.

## THE JOURNAL

*Aims and Scope*

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

*Peer Review*

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

and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

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

# What's Left of Marital Harmony in the Criminal Courts? The Marital Communications Privilege After the Demise of the Spousal Incompetence Rule

HEATHER CAVE[*]
AND PETER SANKOFF[**]

## ABSTRACT

Amendments to the Canada Evidence Act in 2015, abolishing the spousal incompetence rule, have recently thrust the surviving marital communications privilege into the spotlight. Now that the spousal incompetence rule no longer prevents the Crown from calling a spouse as a witness, the privilege is being more frequently asserted in courtrooms across the country. Unfortunately, the approach courts have taken to interpreting the privilege remains fraught with confusion and inconsistency. In focusing solely on a strict interpretation of the literal wording of the statutory provision, which has remained virtually unchanged since the provision was first enacted, the courts have crafted a peculiar form of privilege that simultaneously fails to keep pace with modern developments in privilege law in general, and is ineffective at upholding the underlying rationales on which it supposedly exists.

We argue that in the wake of the recent repeal of the spousal incompetence rule, it is time to reconsider the current approach to marital communications privilege. Courts should re-evaluate whether a literal interpretation of the provision remains appropriate given the objectives underlying the privilege, and in light of broader developments in the law

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that afford greater protection to privileged communications in general. While complex policy questions may remain as to whether the protection of spousal communications is important enough to justify impeding the truth-seeking function of trials, the privilege must be given a sensible, contemporary interpretation that allows it to achieve a meaningful purpose if it is to be retained.

## I. INTRODUCTION

In July 2015, the law of evidence underwent a subtle but significant modification. Through a statutory amendment to the *Canada Evidence Act*,[1] the husbands and wives of accused persons began being treated as competent and compellable witnesses for the prosecution regardless of the type of offending being tried.[2] Since spouses have been compellable in civil proceedings across Canada for decades, the change means that marital status has virtually ceased to be a reason to avoid having to give evidence in court.[3]

The death of the spousal incompetence regime is a welcome development that many had called for.[4] The rule was erratic in operation, with a myriad of oddly connected exceptions. When it did preclude the Crown from calling a witness, the rationale for doing so - to advance the

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1 *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]The amendment occurred through the *Victims Bill of Rights Act*, SC 2015, c 13, s 52. The Act received Royal Assent in April 2015, and came into force 90 days later: *Ibid*, s 60(1).

2 *CEA*, *supra* note 1, s 4(2) now makes it clear that "[n]o person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused."

3 The sole exception pertains to regulatory offences, where in four provinces rules rendering spouses either incompetent or uncompellable remain in place for the time being: see *Evidence Act*, RSBC 1996, c 124, s 6; *Evidence Act*, RSNB 1973, c E-11, s 5; *Evidence Act*, RSNL 1990, c E-16, s 4(a); *Evidence Act*, RSNS 1989, c 154, s 48.

4 For a particularly scathing commentary on the rule, see Lee Stuesser, "Abolish Spousal Incompetency" (2007) 47 CR (6th) 49. The rule's deficiencies did not go unnoticed by the judiciary either: see e.g. the comments of Iacobucci J in *R v Salituro*, [1991] 3 SCR 654 at 673, 9 CR (4th) 324: "The grounds which have been used in support of the rule are inconsistent with respect for the freedom of all individuals...The common law rule making a spouse an incompetent witness involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marriage bond." Iacobucci J and Lamer CJC also critiqued the rule in *R v Hawkins*, [1996] 3 SCR 1043 at para 42, [1996] SCJ No 117 (QL) [*Hawkins*], calling on Parliament to craft an alternative approach.

objective of maintaining "marital harmony" between the spouses - was hotly contested as being a sound reason for precluding access to key evidence. Though the repeal of the rule has ended this controversy, it would be wrong to assume that marital harmony is no longer a consideration in Canadian courtrooms. Despite abolishing the spousal incompetence rule, Parliament made the deliberate, albeit somewhat unusual, decision to retain s. 4(3) of the *Canada Evidence Act*. Section 4(3) provides that:

> No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication to her by her husband during their marriage.[5]

Section 4(3) recognizes the "marital communications" privilege, a protective device ostensibly designed to allow spouses to communicate freely together.[6] Though the privilege has existed for as long as the spousal incompetence rule, it was rarely invoked when spouses could not be called as witnesses for the Crown at all in the vast majority of cases.[7] But with the abolition of the incompetence rule, the marital communications privilege has now been thrust into the spotlight. Unfortunately, it is not clear whether the privilege is ready for "prime time." A number of recent decisions have grappled with its parameters, raising important questions about the nature of the privilege, how it can be asserted, and what types of evidence it extends to.

As we intend to explore, the current jurisprudence surrounding s. 4(3) simultaneously reveals serious confusion about the purpose behind the marital communications privilege and an approach that is inconsistent with the way evidence law, and particularly its treatment of privilege, has evolved generally over the past century. In short, the rule is difficult to apply and premised on an uncertain principled foundation. Given that marital communications privilege is being more frequently asserted in courtrooms

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5 *CEA*, *supra* note 1, s 4(3).

6 See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst: *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at 1068-1069.

7 Under the former spousal incompetence regime, spouses were not compellable witnesses for the prosecution, unless specific statutory or common-law exceptions applied: for example, if the offence was "against the spouse" or against a child of the spouse, if the accused was charged with certain sexual offences if the complainant or victim was under the age of 14, or if the spouses were irreconcilably separated, they could be called to testify for the Crown. In these situations, the marital communications privilege could potentially still be asserted. For a discussion of the common law exceptions to the spousal incompetence rule, see *R v Schell*, 2004 ABCA 143.

across the country, we argue that it is time for the current approach to be reconsidered. Rather than conforming strictly to the outdated wording of a statutory provision that has never been modernized, courts should strive to interpret the rule in a way that gives meaningful effect to the underlying rationale behind it. In the alternative, Parliament should reform the rule, either making it a true privilege with clear parameters, or abolishing it entirely. The status quo should not be an option, as the current application of s. 4(3) is marked mainly by inconsistent and unprincipled treatment that borders on incoherence. More importantly, the privilege as interpreted completely fails to achieve the supposed purpose for which it exists, as it is ineffective at protecting communications between spouses from being accessed by the state and put before the courts.

The article will begin by outlining the current scope of s. 4(3) and the cases that have considered it, highlighting in particular the approach courts have taken to the nature of the privilege as being "testimonial" only. It then examines in detail some of the problems with the current jurisprudence from a principled perspective. In particular, we explore the discord between the way marital communications privilege is currently treated and contemporary developments in the law of evidence more generally, as well as the ways in which the current approach to the privilege undermines its very rationale for existing. Finally, we will suggest a path forward.

## II. THE CURRENT STATE OF SECTION 4(3)

It is helpful to begin an assessment of s. 4(3) by outlining a few basics. The privilege is rife with ambiguities, many of which stem from the fact that the wording of the statutory provision is virtually identical to what it looked like when first enacted in 1893, and it uses the language of the time.[8] Parliament has never attempted to modernize the privilege, owing to

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[8] By virtue of the *Canada Evidence Act*, *1893*, SC 1893, c 31, s 4, which read as follows: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, where the person so charged is charged jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage." [Emphasis Added]. As spouses were not competent to testify at common law, with few exceptions, the question of privilege was not an issue prior to the enactment of this statutory provision, which made spouses competent witnesses (see *R v Couture*, 2007 SCC 28 at para 41 [*Couture*]).

inadvertence, a general reluctance to legislate in the area of evidence,[9] or perhaps because the necessity of doing so was not readily apparent when the spousal incompetence regime resolved most questions about a spouse giving evidence, and the privilege played only a supplemental role.

Tasked with applying s. 4(3)'s archaic wording in practice, courts have generally applied a literal interpretation of the provision's plain text. Under this interpretation, marital communications privilege is incredibly limited. It is worded as a "testimonial privilege," only permitting a testifying witness to refuse to answer questions posed to him or her about what their husband or wife told them, so long as the communication was made during the period in which they were married.[10] Though the issue has never been definitively settled in Canada, the weight of authority suggests that because of the wording of the statute, which refers to "husband" and "wife," the parties must also be married when the witness is called to testify.[11] The privilege extends to communications only, and anything observed by the testifying witness is not covered by the privilege.[12] In contrast to most other privileges, confidentiality may not even be a core requirement, as the statutory wording does not require it.[13]

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9 See David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 7. Parliament has a long tradition of neglecting evidence law, leaving much of its substance to the courts to sort out. As such, the common law remains the main source of evidence law in Canada today, with legislation merely supplementing specific areas of the common law.

10 *R v Coffin* (1954), 19 CR 222 (Que QB), [1954] JQ No 16 (a statement made to a witness during period in which they were cohabiting was not protected, even where the witness married the accused prior to trial). See also *R v Couture*, *supra* note 8 at para 41.

11 *Shenton v Tyler*, [1939] 1 Ch 620 (CA). See also *Layden v North American Life Assurance Co* (1970), 74 WWR 266 (Alta SC), [1970] AJ No 105 (QL); *R v Kanester*, [1966] 4 CCC 231 (BC CA) at 240, 48 CR 352, per Maclean JA, dissenting, leave to appeal to SCC granted,[1967] 1 CCC 97 (SCC). Appeal to SCC was allowed on the basis of dissenting reasons but without any discussion. But see *Connolly v Murrell* (1891), 14 PR 187 at 188 (Ont PC), [19811] OJ No 170 (QL), aff'd (1891) 14 PR 270 (Ont CA) (spousal privilege was found to still apply even though the wife was no longer alive- The court commented that "the death of a husband or the wife did not remove the seal from the lips of the survivor; even their divorce did not compel them to break their silence.").

12 *R v Gosselin* (1903), 33 SCR 255, 7 CCC 139. See also *R v Meer*, 2015 ABCA 141 at para 69 [*Meer*].

13 *MacDonald v Bublitz* (1960) 24 DLR (2d) 527 (BC SC), [1960] BCJ No 100 (QL). However, the jurisprudence is not completely clear on this point, given the recent

As this basic overview reveals, marital communications privilege has very little in common with the other class privileges in existence today. First, the privilege belongs to the recipient of the communication only. Every other privilege recognized in Canadian law protects the person who makes the communication, rather than the person who receives it.[14] A client is entitled to speak to a lawyer, and the lawyer cannot waive privilege without the client's consent.[15] Informants speak to police, who are then precluded from turning over the informant's identity without the informant's agreement.[16] This approach is sensible. Given that the objective of all privileges is to encourage socially desirable communications between parties, it makes sense to protect the interests of the person who makes the otherwise incriminating statement. But with marital communications privilege, the privilege belongs exclusively to the testifying spouse. A testifying spouse has the right to waive the privilege if he or she so chooses,[17] and statements can be disclosed without the consent of the spouse who made them.

Second, the privilege does not protect the statement, only the witness. There is a fair amount of recent jurisprudence applying the provision literally, regarding the privilege as being a "testimonial" one only.[18] As a result, even if a witness invokes the privilege to refuse to testify in court, a marital communication acquired by the Crown outside of court can still become admissible evidence. The implications of this are made clearer by considering the following two scenarios in which it commonly arises:

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comments of the Alberta Court of Appeal in *Meer*, *supra* note 12 at para 70: "If the spouses communicate in public, requiring them to repeat those conversations while testifying is not within the purpose of the privilege. Disclosing communications that are already public cannot reasonably affect the marital relationship."

14 Or in some cases, belongs to both parties. Informer privilege, for example, cannot be waived without the consent of both the informant and the Crown.

15 Paciocco & Stuesser, *supra* note 9 at 243.

16 *Ibid* at 302.

17 *Couture*, *supra* note 8 at para 41. See also *Meer*, *supra* note 12 at para 69; *R v Cuthill*, 2016 ABQB 60 at para 12 [*Cuthill*].

18 *Couture*, *supra* note 8 at para 41; *Meer*, *supra* note 12 at para 70; *R v Oland*, 2015 NBQB 247 at para 12 [*Oland*]; *R v Grewal*, 2017 ONSC 4099 at para 52 [*Grewal*]; *R v Nguyen*, 2015 ONCA 278 at para 135 [*Nguyen*]; *R v* Nero, 2016 ONCA 160 at para 186 [*Nero*]; R *v Siniscalchi*, 2010 BCCA 354 at para 53 [*Siniscalchi*]. See also *Rumping v Director of Public* Prosecutions, [1962] 3 All ER 256 (HL) [*Rumping*]; *Lloyd v The Queen*, [1981] 2 SCR 645 at 654-55, [1981] SCJ No 109, per McIntyre J, dissenting [*Lloyd*].

(a) The accused's wife is interviewed by police prior to trial, and she tells them that her husband confessed to the crime. At trial, she is entitled to invoke the privilege to avoid having to testify about what her husband told her, but the Crown could nonetheless attempt to admit her prior statement to police under a hearsay exception.[19]

(b) The police intercept a letter, email or text message from the accused husband to his wife that is incriminating, or a conversation is directly overheard by a third party who can testify to the accused's admission. At trial, the wife wishes to invoke the privilege, but may not even be called as a witness. Regardless, the Crown could attempt to admit the evidence notwithstanding that it qualifies as a marital communication.

Scenario B in particular has been the subject of recent litigation with respect to text messages and recorded phone conversations between spouses that have been obtained later by police.[20] Though defence counsel often argue to have such communications excluded, their efforts tend generally to be unsuccessful. The courts commonly reject this line of argument by applying a strict interpretation of s. 4(3)'s wording, holding that text messages or recordings of phone conversations between spouses are not privileged in and of themselves, and therefore are not inherently protected from admission under s. 4(3).[21] The result is that the privilege is often ineffective at actually preventing conversations between spouses from being used as evidence.

It should also be noted, however, that the jurisprudence is inconsistent with respect to Scenario B, yet another unusual aspect of the privilege. In the context of wiretapped conversations between spouses authorized under

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19 Or in some cases, the evidence might be advanced for a purpose other than truth, rendering the hearsay rule irrelevant.

20 Scenario A has arisen in the case law recently as well, however. In *R v Willier*, 2015 ABCA 185, the accused's wife gave an audiotaped statement to police prior to trial. The statement was admitted through a hearsay exception, as the former spousal incompetency rule prevented the Crown from being able to call her as a witness at trial. While the case dealt with spousal incompetence rather than privilege, there is no meaningful distinction for the purposes of the example.

21 See e.g. *Grewal*, *supra* note 18; *Cuthill*, *supra* note 17; *Oland*, *supra* note 18; *Siniscalchi*, *supra* note 18.

s. 189(6) of the *Criminal Code*,[22] the combined effect of s. 189(6) and s. 4(3) of the *Canada Evidence Act* has resulted in these sorts of records being ruled inadmissible.[23] Section 189(6) reads as follows:

> Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

Courts have reasoned that communications between spouses are "information that a person has a right not to reveal,"[24] which is enough for them to fall within the definition of "privileged information" in this provision. As a result, the privilege looks and feels much more like a substantive privilege than a mere testimonial one in this one particular context. Consider, for example, the observations of the Alberta Court of Queen's Bench in *R v Lam*: "[I]n the context of s. 189(6), the s. 4(3) spousal privilege attaches to intercepted communications between spouses. Its recognition does not depend on the spouse claiming it. It exists unless it has been waived or lost."[25] On its face, this type of language is inconsistent with the notion of the privilege being "testimonial" only, though the incongruity is said to be justified on the basis of the wording of s. 189(6).[26]

Finally, although there has been no definitive jurisprudence on the issue, it has on occasion been speculated that the protection applies only to statements received – as opposed to statements made – by the testifying witness. For example, in *Rumping v Director of Public Prosecutions*,[27] Lord Morris suggested that "the enactment would protect a husband or wife from being obliged to disclose a communication made to him or her by the other but would not protect him or her from being obliged to disclose a communication made by him or her to the other."[28] In other words, even if

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22 *Criminal Code*, RSC 1985, c C-46.

23 *R v Jean and Piesinger* (1979), 46 CCC (2d) 176 at 187 (Alta SC(AD)), aff'd [1980] 1 SCR 400 [*Jean and Piesinger*]; *Lloyd*, *supra* note 18 at 650-51; *R v Lam*, 2005 ABQB 33 at para 14 [*Lam*].

24 *Jean and Piesinger*, *supra* note 23

25 *Lam*, *supra* note 23 at para 14.

26 *Siniscalchi*, *supra* note 18 at para 50.

27 *Rumping*, *supra* note 18 at 275. See also *Meer*, *supra* note 12 at para 69: "[t]he privilege...lies in the recipient of the communication, in this case the appellant's wife...she could not be compelled to testify as to anything that her husband...told her in confidence...The appellant, conversely, could be cross-examined on an anything he said to his wife, but not anything she said in reply."

28 *Rumping*, *supra* note 18 at 275.

the Crown calls the accused's wife as a witness and she invokes the privilege, if the accused then testified his own admissions to his wife would not be protected.

To summarize, the privilege currently protects nothing more than a witness' ability to refuse to answer questions in court about a communication made to them by their spouse – and only if they are legally married both at the time of making the statement and at the time of the trial. There is virtually no guaranteed protection for the statement maker that what was said will not be disclosed in court, given that their spouse can waive the privilege if he or she chooses. Further, an accused who makes a statement to his or her spouse may still be questioned at trial about it. In addition, the privilege does not prevent marital communications from being admitted as evidence through any other means, except for a narrow exception in the context of authorized wiretaps. Evidence of a marital communication obtained by a third party through phone recordings, intercepted text messages or letters, an overheard conversation, or a prior out-of-court statement might be admitted through a hearsay exception.

In short, an examination of the current state of marital communications privilege reveals a lack of coherence. In focusing almost exclusively on the strict wording of the provision, archaic and outdated though it may be, courts have interpreted the privilege in a manner that impedes its utility, rendering it functionally ineffective at protecting communications made within the marital relationship. As the next section of this article will explore, there are compelling reasons to re-evaluate this approach.

## III. Problems With The Current Approach To Section 4(3)

The major problems with the current approach to s. 4(3) can be broadly classified into two main categories. First, the privilege fails to accord with developments in privilege law generally, and also with an evolution in how the law treats traditional notions of marriage and marital status. Second, the privilege is ineffective at upholding the underlying rationales on which it supposedly exists, excluding evidence so erratically that one is left to wonder what purpose it actually serves.

One of the primary difficulties with the courts' interpretation of s. 4(3) is that it is inconsistent with how the law of privilege has otherwise evolved in Canada with respect to the disclosure of communications to third parties.

The current approach to the provision adopts an incredibly narrow view of the privilege that focuses exclusively on whether the information is being sought in court. This "testimonial" approach to privilege stands in stark contrast to the way Canada's other class privileges are approached today, though it would not have looked odd in 1892, when the section was first enacted. Indeed, at that time it made perfect sense to read marital communications privilege as merely being "testimonial" in nature, because all privileges worked that way at the time.[29] Where a third party somehow accessed information otherwise protected by a privilege, the traditional common law position was that the privilege was lost. Until relatively recently, privileges only protected the source of the information and not the information itself.[30]

Privilege law no longer operates in this manner, however, and today the courts provide much greater protection to privileged communications.[31] For example, since the Supreme Court of Canada's decision in *Descôteaux v Mierzwinski*,[32] courts have held that solicitor-client privilege is more than just a testimonial privilege or a rule of evidence. Rather, it creates a broad substantive right to avoid having to disclose communications made between lawyers and clients, unless specific and narrow exceptions apply. Information that is accessed by a third party almost always remains privileged. As the Alberta Court of Appeal summarized in *Royal Bank v Lee*, "[a]t one time privilege was thought to be a mere rule of evidence, a ground to resist a subpoena, and not a rule of property or other substantive law…[But] that is no longer the law in Canada…older cases saying that privilege is lost when a document is dropped on the street, or when a non-party steals it, seem very doubtful in Canada today."[33]

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29 For an example of a court interpreting section 4(3) by drawing upon the previous approach to loss of solicitor-client privilege when third parties accessed a communication, see *R v Kotapski* (1981), 66 CCC (2d) 78 at 85 (Que SC), [1981] QJ No 398 (QL).

30 Paciocco & Stuesser, *supra* note 9 at 241.

31 *Ibid.*

32 Descôteaux v Mierzwinski, [1982] 1 SCR 860 at 873. See also the more recent Supreme Court decisions of Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53 at paras 38-44; Canada (National Revenue) v Thompson, 2016 SCC 21 at para 17; Canada (AG) v Chambre des notaires du Québec, 2016 SCC 20 at para 28.

33 *Royal Bank v* Lee, 3 Alta LR (3d) 187, 1992 ABCA 166 (CanLii) at para 17.

The Supreme Court of Canada's recent approach to litigation privilege offers another example of how courts now view privilege as being more substantive in nature. In *Lizotte v Aviva Insurance Company of Canada*,[34] the Court confirmed that litigation privilege applies not only against opposing parties in litigation, but against third parties as well. The Court recognized that administrative or criminal investigators should be prohibited from accessing documents that fall within the privilege, because otherwise there would be nothing to prevent third parties from subsequently disclosing the documents to the public or the opposing party, and thus the documents could wind up in court notwithstanding the existence of the privilege. The Court quite sensibly pointed out that this type of approach would result in "the very kind of harm that [the] privilege is meant to avoid."[35]

Given the developments that have occurred with respect to other forms of privilege, then, it is not clear why courts should continue to refuse to reconsider the current approach to marital communications privilege as well. Rather than remaining beholden to the literal wording of the statute, there is certainly room for courts to consider applying an approach that reconciles s. 4(3) with modern developments in privilege law generally, recognizing that the wording of s. 4(3) was merely a product of its time. While it may have been unnecessary to carefully scrutinize how the section should be interpreted while the spousal competence rule remained in place, the elimination of the spousal incompetence rule should at least cause courts to reconsider whether a literal interpretation of s. 4(3)'s wording remains appropriate today.

Similarly, the modern approach to privilege warrants reconsidering the notion that marital communications privilege applies only to communications made *to* a testifying witness, as opposed to communications made by the witness, as the statute is ambiguous on this point. With respect to the scope of other privileges, courts now emphasize broad, substantive protection over narrow, technical readings. Consider, for example, the police informant privilege, which - at its most basic level - protects only "the identity of those who give information related to criminal matters in confidence."[36] Although at face value the privilege does not extend to the information that the informant provides, courts have recognized that restricting its scope to the strict boundaries of the

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

35 *Ibid* at para 48.

36 Application to proceed *in camera*, *Re*, 2007 SCC 43 at para 16.

informant's identity would severely undermine the rationales upon which the privilege rests: to protect informants and encourage disclosure of information to police. In *R v Leipert*,[37] the accused argued for a stricter interpretation, attempting to secure information attached to an anonymous tip that did not expressly reveal the informant's identity. The Supreme Court rejected the argument, recognizing that:

> Informer privilege prevents not only disclosure of the name of the informant, but *of any information which might implicitly reveal his or her identity*. Courts have acknowledged that the smallest details may be sufficient to reveal identity. In *R. v. Garofoli*, [1990] 2 SCR 1421, at p. 1460, Sopinka J. suggested that trial judges, when editing a wiretap packet, consider:
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> > ...whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name...[38]

The scope of solicitor-client privilege has been approached in a similar fashion. Although the privilege is technically restricted to communications made or received for the purpose of obtaining legal advice, courts have construed these terms broadly. The rationale for this type of interpretation has been to ensure that privileged communications are not revealed indirectly by the disclosure of other information arising from the lawyer-client relationship, such as a lawyer's bills. The judiciary's approach was summarized well in the British Columbia Court of Appeal's decision of *Wong v Luu*,[39] where the Court noted that:

> The privilege extends to administrative facts tending to reveal the nature or extent of legal assistance sought and received...[The prevailing jurisprudence] restates the importance of ensuring that disclosing factual information...does not give the recipient insight into protected communications he is not entitled to receive.[40]

If the privilege is retained, there is no good reason not to treat the scope of marital communications privilege in a similarly broad fashion. Under the current approach to s. 4(3), the protection for marital communications, presumably deemed to be important enough to justify the existence of the privilege in the first place, can effectively be lost. A more modern, principled approach to the privilege would at least recognize that a witness should not

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37 *R v Leipert*, [1997] 1 SCR 281, [1997] SCJ No 14 (QL).

38 *Ibid* at 293-294 [emphasis added].

39 *Wong v Luu*, 2015 BCCA 159.

40 *Ibid* at paras 39, 41.

be compelled to disclose any communication made between that witness and their spouse which would reveal a protected communication, whether it be by direct or indirect means.[41]

An even more obvious archaism found within s. 4(3) is its failure to accord with modern viewpoints about marriage and marital status. In referring to "husbands" and "wives" as being the only parties to which the privilege applies, the literal text of the provision excludes common-law spouses. A few lower courts have recognized how problematic this approach is, even going so far as to hold that the current wording of s. 4 is unconstitutional. As the Court noted in *R v Masterson*,[42] "the vast changes to the make-up of Canadian families over the last few decades have been recognized in a wide variety of provincial laws... Within many communities, across generations and cultures, the distinction between married and common law unions is no longer made."[43] However, to date this type of reasoning has not been adopted at the appellate level in relation to s. 4(3) specifically.[44] It is somewhat troubling that though the law has evolved in many other ways to recognize the "changing societal values regarding common law partnerships, and the importance of recognizing and protecting relationships that are functionally equivalent to marriage,"[45] s.

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41 For support of this interpretation, see *Moore v Whyte* (No 2) (1922), 22 SR (NSW) 570 at 583 (CA), where, in interpreting similar legislation in New South Wales, the Court of Appeal in that jurisdiction noted that "the word "communication" is a comprehensive word of wide meaning... To purport to observe the strict meaning of the words used, while so interpreting them as completely to nullify this intention is not permissible in our opinion." Note that the current New South Wales legislation now explicitly refers to the privilege as applying to communications *made between* spouses: See Lederman, Bryant & Fuerst, *supra* note 6 at 1066, n 460. Similar legislation also exists in some other Australian jurisdictions, as noted in Australian Law Reform Commission Report No 26 *Evidence* (Volume 1, Interim Report), [1985] ALRC 26 at 54.

42 *R v Masterson* (2009), 245 CCC (3d) 400 (Ont SC), [2009] OJ No 2941 (QL) [*Masterson*]. See also *R v Hall*, 2013 ONSC 834 at para 28.

43 *Masterson*, *supra* note 42 at para 51.

44 In *Nero*, *supra* note 18, the Ontario Court of Appeal expressly concluded at para 185 that section 4(3) does *not* apply to common-law spouses. Note that in coming to this conclusion, the Court relied on the decision *Nguyen*, *supra* note 18. *Nguyen* dealt with the constitutionality of the now defunct spousal incompetence rule, holding that the provision was *prima facie* discriminatory but justified on the basis of section 1 of the *Charter*. Other appellate courts have come to the opposite conclusion (see e.g. *R v Legge*, 2014 ABCA 213 [*Legge*]), and the issue was a long-running controversy prior to the abolishment of the spousal incompetence rule.

45 *Legge*, *supra* note 44 at para 38.

4(3) continues to be worded in language that allows courts to exclude any recognition of common-law relationships. Here again, the narrow scope of s. 4(3) is not in keeping with modern developments in the law.[46]

As the above analysis demonstrates, the application of s. 4(3) is problematic, and clashes mightily with modern thought about how privileges should operate, with no strong justification for the divergence. However, even if one were to accept that Parliament deliberately intended for the privilege to operate in an archaic fashion, there is another, even more glaring, difficulty: as interpreted, the privilege is completely ineffective at actually promoting the policy rationales that purportedly justify its existence. For this reason alone, there is a strong argument in favour of revising the status quo.

To the extent that the rule exists to encourage open and candid communications between spouses, the limited interpretation the courts have given to s. 4(3) renders it nearly incapable of doing so. After all, the privilege belongs only to the testifying spouse, who may "if he or she wishes, help or hinder the spouse who is charged, and there is nothing that spouse can do about it."[47] Further, the accused is not protected from having to answer questions about communications made <u>to</u> his or her spouse, and even if the accused doesn't take the stand, evidence of a matrimonial communication might be admitted anyway through a hearsay exception. In short, despite the fact that an accused's spouse <u>might</u> be able to refuse to testify about matrimonial communications, there is a strong possibility that the communications could find their way into court as admissible evidence anyway. How can this approach possibly be effective, then, at encouraging spouses to communicate freely with each other?

Similarly, if the purpose of the privilege is to promote candour between spouses, this goal is also undermined somewhat by the fact that the privilege ceases to exist if the spouses are no longer married at the time of trial. If widows/widowers or divorced persons are not to be protected by the rule, there is less assurance that a communication made in confidence to one's

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46 It should be noted that a number of provincial jurisdictions have already modernized the language of equivalent provisions to section 4(3) to refer to "spouses" or "adult interdependent partners", rather than "husbands" and "wives". See e.g. *Alberta Evidence Act*, RSA 2000, c A-18, s 8 (spouses or adult interdependent partners); *Evidence Act*, RSBC, c 124, s 8 (spouses); *Evidence Act*, RSNB 1973, E-11, ss 5, 10 (spouses); *Evidence Act*, RSO 1990, c E.23, s 11 (spouses); *The Evidence Act*, SS 2006, c E-11.2, s 7 (spouses), *Evidence Act*, RSNWT 1990, c E-8, s 6 (spouses).

47 *Jean and Piesinger*, *supra* note 23 at 185.

spouse will not ultimately be divulged sometime in the future, and consequently less support for the assertion that the rule effectively promotes open and honest communication between spouses.

Finally, even if one accepts that another underlying rationale for the privilege is to prevent "the indignity of conscripting an accused's spouse to participate in the accused's own prosecution,"[48] that justification can hardly be said to be supported by the current state of the rule either. With the death of the spousal incompetence regime, there is no doubt that an accused's spouse may now be compelled to participate in the accused's prosecution. Given that the privilege only covers "communications," narrowly construed, the spouse may be forced to testify to what he or she witnessed the accused do, or about any incriminating evidence he or she observed. Further, the spouse is not protected from having to testify about anything he or she said to the accused. On the right facts, any of these situations could make a significant contribution towards the prosecution of the accused. Moreover, if the rule is truly about protecting against the indignity of one spouse being made to assist in the prosecution of the other, why should it matter whether the spouses were married when the communication was originally made, so long as they are married at the time of the trial? Here again, the rule is inconsistent with another of its purported rationales. Surely there is little justification for retaining in its current form a privilege that is functionally ineffective, no matter how one attempts to rationalize the reason for its existence.

## IV. THE WAY FORWARD

Having outlined the problematic nature of s. 4(3) in its current form, the obvious question that follows is how these problems should be rectified. There are essentially two options available: either the nature and scope of the privilege should be expanded, in order to modernize it and render it effective at promoting the policy objective of encouraging free communication between spouses, or the privilege should be abolished entirely.

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[48] *Hawkins*, *supra* note 4 at para 38. Note that the Court in *Hawkins* was referring to the rationale underlying the now defunct spousal incompetence rule, but some commentators have posited that the same rationale also underpins spousal privilege: See e.g., Lederman, Bryant & Fuerst, *supra* note 6 at 1068-1069.

In *R v Oland*, the New Brunswick Court of Queen's Bench rejected an invitation from defence counsel to expand the current scope of marital communications privilege by interpretation, reasoning that the status quo should not be disturbed as the current legal trend is to give the privilege less prominence.[49] Indeed, it is true that in some other jurisdictions the privilege has been abolished entirely.[50] Nonetheless, the Court in *Oland* was incorrect to suggest that there has been no fundamental change in circumstances that would warrant re-assessing the current approach to marital communications privilege in Canada.[51] The fact that Parliament expressly chose to retain the privilege while abolishing the spousal incompetence rule is some evidence of its attachment to the rule and desire to preserve a measure of the "marital harmony" rationale in the law of evidence. Parliament made a clear policy choice that although all spouses should have to testify in criminal trials, regardless of the type of charge being tried, certain communications between spouses should retain protection. It is difficult to understand the unwillingness of courts to look afresh at this issue in light of the changed circumstances, and consider interpreting aspects of the law in a more principled fashion.

It would certainly not be unprecedented for the courts to focus more clearly on the underlying purpose of the privilege in delineating its boundaries. The Supreme Court of Canada's decision in *R v Couture*[52] provides direct support for this approach. In *Couture*, the Supreme Court considered a situation where the accused's wife had made prior statements to police relaying confessions made to her by the accused. Since the wife was incompetent to testify at trial, the question facing the Court was whether the wife's prior out-of-court statements could nonetheless be admitted under a hearsay exception. In holding that the statements could

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49 *Oland*, *supra* note 18 at para 18.

50 For example, in England the privilege was abolished for criminal matters by s 80(9) of the *Police and Criminal Evidence Act*, 1984, c 33, and for civil matters by s 16(3) of the *Civil Evidence Act (UK)*, 1968, c 64. In Australia, the privilege has been retained to some extent by s 18 of the *Evidence Act 1995*, which gives a spouse, who would otherwise be compellable, the right to object to disclosing a communication with the accused. The court can give effect to the objection if there is a likelihood of harm to the relationship that outweighs the desirability of hearing the evidence, having regard to a number of specified factors such as the nature and gravity of the offence, and the substance and importance of the information that the witness might give.

51 *Oland*, *supra* note 18 at para 17.

52 *Couture*, *supra* note 8.

not be admitted, the majority was concerned that to admit them would undermine the purpose behind the spousal incompetence rule. As Charron J summarized the majority's approach, "[t]he question…is whether, from an objective standpoint, the operation of the principled exception to the hearsay rule in the particular circumstances of the case would be disruptive of marital harmony or give rise to the natural repugnance resulting from one spouse testifying against the other."[53]

One could make the case that the reasoning from *Couture* applies as powerfully to marital communications privilege as it did to the spousal incompetence rule, given that the underlying rationale for both is said to have been the same. Consider once again Scenario A, outlined earlier in this article, where a wife gives a statement to police prior to trial in which she tells them that her husband confessed to the crime. In this scenario, s. 4(3) would permit the wife to refuse to testify at trial. The Crown would then attempt to tender the statement in another fashion, most likely by showing a video recording from the police station. *Couture* should be directly applicable here: allowing the admission of a prior out-of-court statement made by the accused should be precluded, since it would almost certainly undermine the privilege's purpose. In fact, it might even be argued that the rationale for extending protection is stronger for the privilege than it was for spousal incompetence, as Parliament's recent deliberate decision to retain s. 4(3) despite abolishing the spousal incompetence rule is a clear statement that communications between spouses are worthy of protection. Functionally then, the privilege could operate as more than just testimonial in nature through an application of the common law principles arising from *Couture*, at least with respect to Scenario A.

*Couture* is admittedly less directly applicable factually to Scenario B, where the police intercept a letter, email or text message from the accused husband to his wife that is incriminating, or a conversation is directly overheard by a third party who can testify to the accused's admission. Nonetheless, the broader principle arising from *Couture* – that communications should not be admitted as evidence if to do so would undermine the statutory protection afforded to spousal relationships – could be applied to Scenario B as well. Additionally, some support for a wider interpretation of the marital communications privilege with respect to Scenario B may also be found elsewhere in the case law. Although the

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53 *Ibid* at para 66.

cases have drawn a distinct line between the admission of wiretapped conversations authorized under s. 189(6) of the *Criminal Code* and evidence of spousal communications intercepted by third parties in other ways, the reasoning underlying the distinction is tenuous at best. Section 189(6) speaks of "privileged information"- as McIntyre J pointed out in dissent in *R v Lloyd*, if s. 4(3) is truly a testimonial privilege only then the information itself cannot be said to be privileged, which should make s. 189(6) inapplicable.[54] Nevertheless, the majority in *Lloyd* was willing to apply s. 189(6) to marital communications. Arguably, what the majority was really doing was signaling a willingness to view s. 4(3) as creating more than just a testimonial privilege.[55] It is somewhat illogical to essentially view the provision as creating a substantive privilege in one context (authorized wiretaps) but not in others. Why should the Crown be permitted to tender text messages between spouses that have been obtained by police as admissible evidence, when they are not allowed to do so had the police chosen to wiretap a telephone conversation instead?

Of course, some might be appalled at the idea that highly relevant evidence contained in a text message sent between spouses, perhaps confessing to a crime, would be inadmissible. However, it is not clear why. After all, a text message of the same variety sent to a lawyer would be excluded instantly. As L'Heureux Dubé J noted in *R v Gruenke*,[56] "[c]ourts and legislators have...been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy."[57] Further, as Charron J summarized in *Couture*, "[p]rivilege, unlike other rules of exclusion, is not intended to facilitate truth-finding. The evidence is excluded, not because it lacks probative value but, rather, on policy grounds based on broader social interests."[58] The basic idea of s. 4(3), as with all privileges, is to exclude probative evidence that points to guilt in restricted circumstances. The provision recognizes that the bond between spouses is important enough in

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54 *Lloyd*, *supra* note 18 at 655, McIntyre J, dissenting.

55 Of course, in citing with approval a passage from the dissenting opinion in *Lloyd*, Charron J in *Couture* seems to have expressly disagreed with that assertion (*Couture*, *supra* note 18 at para 41). Nonetheless, it is clear that there is at least some support in the Supreme Court's previous jurisprudence for the notion that section 4(3) is a broader protection than how it is currently being applied.

56 *R v Gruenke*, [1991] 3 SCR 263, [1991] SCJ No 80.

57 *Ibid* at 295.

58 *Couture*, *supra* note 18 at para 62.

society to allow the confession even of one's deepest, darkest, and most incriminating secrets. One can certainly debate the notion that this interest should trump the justice system's need to get at the truth,[59] but it is difficult to contest the fact that excluding evidence of this sort is exactly what s. 4(3) is designed to accomplish.

The question that must ultimately be asked then, as with any privilege, is whether "the benefit derived from protecting the relationship outweighs the detrimental effects of privilege on the search for the truth."[60] As has been noted above, in having made the deliberate decision to retain s. 4(3), a strong argument can be made that Parliament has already answered that question in the affirmative. If this is the case, the privilege should be given a sensible, contemporary interpretation by courts, enabling it to meaningfully protect communications arising from spousal relationships. Alternatively, Parliament should reform the privilege to the extent necessary to allow for the same result. If, on the other hand, the spousal relationship is not considered important enough to justify overriding the truth-finding process of trials, then only logical course of action seems to be to abolish the privilege entirely.[61]

## V. CONCLUSION

As the above critique has demonstrated, the current approach to s. 4(3) is in dire need of reform. As presently interpreted, marital communications privilege is difficult to apply, out of step with modern developments in the law of evidence, and generally ineffective at achieving its purported purpose for existence. Although these deficiencies may have previously gone unnoticed, the spotlight is now being shined on them by Parliament's decision to repeal the spousal incompetence rule. With the privilege now being given a "starring role," it is critical to reconsider what the nature and scope of that privilege is, to whom it applies, and how it should operate in practice.

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59 See e.g. Lederman, Bryant & Fuerst, *supra* note 6 at 1069-1070.

60 *A(LL) v B(A)*, [1995] 4 SCR 536 at para 34, [1995] SCJ No 102.

61 Were this to occur, it would eventually be necessary to assess whether the common law privilege could be used to exclude such communications, and in what circumstances. This would be an extremely interesting question. After all, it would be difficult to argue that the communications should be protected - even on a case by case basis - if Parliament were to make the deliberate decision to abolish their special status.

Parliament's intention in deliberately retaining s. 4(3) may well have been to protect the importance of communications between spouses. If this is indeed the case, the courts can and should strongly consider given the privilege a broader interpretation that would permit it to more fully achieve that goal. However, if courts continue to apply the wording of the provision in a literal fashion, without considering how this undermines the rule's underlying rationale, Parliamentary intervention will be necessary. Ultimately, what Parliament might choose to do with the privilege involves a complex public policy question. The key matter to be decided is whether the protection of spousal communications is important enough to justify impeding the truth-seeking function of trials. If so, the statute and case law should reflect this policy choice accordingly. The current half-measured approach is unsatisfactory no matter how one feels about marital communications more generally.

# The Biases of Experts: An Empirical Analysis of Expert Witness Challenges

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## ABSTRACT

Biased expert witnesses pose a distinct challenge to the legal system. In the criminal sphere, they have contributed to several wrongful convictions, and in civil cases, they can protract disputes and reduce faith in the legal system. This has inspired a great deal of legal-psychological research studying expert biases and how to mitigate them. In response to the problem of biased experts, courts have historically employed procedural mechanisms to manage partiality, but have generally refrained from using exclusionary rules. Canada diverged from this position in 2015, developing an exclusionary rule in *White Burgess Langille Inman v Abbott and Haliburton Co.* In this article, we assembled a database of 229 Canadian bias cases pre- and post-*White Burgess* to evaluate the impact that this case had on the

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We heartily thank Andrew Fell for invaluable feedback during the conception of this research project. Many of the ideas herein were also discussed at the annual meeting of the Evidence-based Forensics Initiative. Sarah Hamid provided tireless research and editorial support.

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jurisprudence. The data suggests that *White Burgess* increased the frequency of challenges related to expert biases, however, did not noticeably affect the proportion of experts that were excluded. This suggests that the exclusionary rule introduced in *White Burgess* did not significantly impact the practical operation of expert evidence law, as it pertains to bias. We conclude by recommending that one way for courts to better address the problem of biased experts is to recognize the issue of contextual bias.

## I. INTRODUCTION

One of the most formidable hurdles in generating and conveying knowledge is curbing one's own biases; we often see what we want to see.[1] This can occur unintentionally and even unconsciously.[2] In law, many wrongful accusations and convictions have been attributed to biased expert judgments (we will parse the term "bias" in Part II).[3] In this vein, a great deal of recent research in the field of psychology and law has

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1 Marcus Munafò et al, "A Manifesto for Reproducible Science" (2017) 1:1 Nature Human Behaviour 1 at 1 [Munafò, Science Manifesto].

2 See Emily Pronin, Daniel Y Lin & Lee Ross, "The Bias Blind Spot: Perceptions of Bias in Self Versus Others." (2002) 28:3 Personality & Soc Psychology Bull 369. This is known as the bias blind spot and has been specifically demonstrated in both forensic science experts, as well as forensic psychology experts. See Jeff Kukucka et al, "Cognitive Bias and Blindness: A Global Survey of Forensic Science Examiners" (2017) 6:4 J Applied Research in Memory & Cognition 452 [Kukucka et al, Forensics Survey]; Patricia A Zapf et al, "Cognitive Bias in Forensic Mental Health Assessment: Evaluator Beliefs About Its Nature and Scope" (2018) 24:1 Psychol Pub Pol'y & L 1 [Zapf et al, Forensic Mental Health Survey].

3 See e.g. Ontario, *The Commission on Proceedings Involving Guy Paul Morin: Report* (Toronto: Ministry of the Attorney General, 1998) vol 1 (The Honourable Fred Kaufman, C.M., Q.C.) at 100 [Morin Report]: "rather than remaining neutral and dispassionate, [the expert] acted in a manner favouring the objectives of the prosecution..."; Ontario, *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Toronto: Ministry of the Attorney General, 2008) vols 1–4 (The Honourable Stephen T Goudge) at 43, 69, 79, 153-156, 374-377 [Goudge Report]; US, *A Review of the FBI's handling of the Brandon Mayfield Case*. (Washington, DC: Department of Justice, Office of the Inspector General, 2006), online (pdf): <oig.justice.gov/special/s0601/final.pdf> [perma.cc/VT4K-SQ5V]. See generally Bruce MacFarlane, "Convicting The Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403; Emma Cunliffe, "Observations about the quality of the investigation of Colten Boushie's death should be assessed against the backdrop of wider systemic racism" (27 September 2018), online: *Policy Options* <policyoptions.irpp.org/magazines/september-2018/the-forensic-failures-of-the-stanley-trial/> [perma.cc/L6WW-A7B7].

studied the biases of forensic experts and how to limit them.[4] Despite the detrimental effect expert bias has on legal proceedings, courts around the world have traditionally refrained from excluding experts for non-independence, partiality, or bias. Instead, courts have let concerns of bias affect the weight ascribed to an expert's testimony.[5] In 2015, the Supreme Court of Canada deviated from this position in *White Burgess Langille Inman v Abbott and Haliburton Co.* ("*WBLI*"), holding that bias can be cause to exclude an expert's testimony.[6] In this article, we report the results of an empirical study attempting to measure the impact of the exclusionary rule put forth in *WBLI*. Our results suggest that *WBLI* did not change the practical operation of evidence law in Canada, as it pertains to bias. As a result, courts around the world may wish to learn from the Canadian experience and employ a more expansive and multi-faceted approach to the biases of expert witnesses.

There are many reasons to be concerned with the biases of expert witnesses: bias can reduce the accuracy of the expert's opinion, diminish the public's faith in the justice system, and create unjust, potentially life-ruining, outcomes. Exacerbating the problem, research has found that the vast majority of experts believe that they can overcome such biases through mere willpower, a naïve belief that psychologists have long concluded to be

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4 See Itiel E Dror, "Biases in forensic experts" (2018) 360:6386 Science 243 [Dror, Biases in forensic experts]; Itiel E Dror, "A Hierarchy Expert Performance (HEP)" (2016) 5:2 J Applied Research in Memory & Cognition at 121.

5 See e.g. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 41-44 [*WBLI*]; Paul Michell & Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005) 42:3 Alta L Rev 635 at 650; The Australian position, in *Uniform Evidence Law* jurisdictions (New South Wales, Victoria, Tasmania, the Northern Territories, and the Australian Capital Territory) was recently reaffirmed in *Chen v R*, [2018] NSWCCA 106; In the U.S., see Daniel J Capra et al "Forensic Expert, Testimony, Daubert, and Rule 702" (2018) 86:4 Fordham L Rev 1463.

6 *WBLI*, *supra* note *5*; About *WBLI*, Peter Sankoff writes: "The decision was an extremely important one. Previously, Canadian courts were divided about whether experts could be excluded where there were signs of bias or partiality, and, if so, in what circumstances. The Supreme Court attempted to provide more transparent standards for the admissibility inquiry, recognizing that questions of bias need to be treated seriously, though with an understanding of the basic realities of the adversarial process…" [emphasis added] Alan W Mewett & Peter J Sankoff, *Witnesses* (Toronto: Carswell, 2018) at chapter 16.8.

misguided.[7] Despite the threat they can pose to justice, experts often carry a lot of weight in the trial process, possessing knowledge the judge and jury cannot be expected to have.[8] As a result, the Supreme Court of Canada, in *WBLI,* was faced with a difficult task: in an adversarial system that is inherently inundated with bias, how much bias is too much? Or, put differently, when should trial judges intervene if it seems likely that the expert is biased and partial?

In what follows, we will first review the ways in which experts can become biased (Part II) and how courts have traditionally approached these issues (Part III). Then, in Part IV, we will discuss the Canadian approach for dealing with this issue, as it was laid down in *WBLI*. Part V includes an empirical analysis of the pre-and post *WBLI* case law, finding that any effect *WBLI* had on the biased expert witness jurisprudence was likely insignificant. Part VI concludes and offers some preliminary reflections on how courts in the future can more effectively deal with expert bias.

## II. A PANOPLY OF BIASES

> I propose that people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster of the evidence to support it. In other words, they maintain an 'illusion of objectivity'. To this end, they search memory for those beliefs and rules that could support their desired conclusion. They may also creatively combine accessed knowledge to construct new beliefs that could logically support their desired conclusion. It is this process of memory search and belief construction that is biased by directional goals. The objectivity of this justification construction is illusory because people do not realize that the process is biased by their goals, that they are accessing only a subset of their relevant knowledge, that they would probably access different beliefs and rules in the presence of different directional goals, and they might even be capable of justifying opposite conclusions on different occasions.[9]

Before discussing the Canadian approach and its effectiveness, it will be useful to parse the various types of biases and causes of bias that scholars

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7 Kukucka et al, Forensics Survey, *supra* note 2; Zapf et al, Forensic Mental Health Survey, *supra* note 2.

8 *R v D(D)*, 2000 SCC 43 at para 57 [*DD*]; Jason M Chin & William E Crozier, "Rethinking the Ken Through the Lens of Psychological Science" (2018) 55:3 Osgoode Hall LJ 625.

9 Ziva Kunda, "The Case for Motivated Reasoning" (1990) 108:3 Psychological Bull 480 at 482-483 [emphasis added].

and courts have considered. Moreover, we will explain that biases are extensive and pernicious.[10] As Ziva Kunda describes in the above quote, cognitive scientific research finds that these biases can contaminate the expert's memory and reasoning processes in ways they cannot know.[11] Experts may therefore labour under what psychologists term a "bias blind spot" resulting in the "illusion of objectivity."[12] In law, this can result in expert witnesses seeing their own field and work as balanced and fair, while more easily seeing others as biased.[13] For instance, in a 2017 survey of forensic science examiners, approximately 71% agreed that cognitive bias is a cause for concern in forensics, but only 26% agreed that it impacted their own judgments.[14] These issues may be pronounced for intuitive, subjective, or experience-based forms of expertise, because such expertise does not follow a chain of reasoning that can be scrutinized for bias.[15]

We use the term "bias" broadly in this article to describe any systematic error in reasoning and thinking that can alter an individual's memory, perception, and decision making.[16] In this manner, there are several causes and forms of bias (and we do not intend to provide an exhaustive list). In the interest of brevity, and in light of the existing research examining these

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10 Richard H Thaler & Cass A Sunstein, *Nudge: Improving decisions about health, wealth and happiness* (London, England: Penguin, 2009) at 19-42; Munafò, Science Manifesto, *supra* note 1 at 2; D Michael Risinger et al, "The *Daubert/Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion" (2002) 90:1 Cal L Rev 1.

11 David M Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34:2 Queen's LJ 565 at 567 [Paciocco, Jukebox]; David E Bernstein, "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution" (2008) 93:2 Iowa L Rev 451 at 455-456 [Bernstein, Partial Failure].

12 Kathleen A Kennedy & Emily Pronin, "Bias Perception and the Spiral of Conflict" in Jon Hanson & John Jost, eds, *Ideology, Psychology, and Law* (Oxford University Press, 2012) 410; Kunda, *supra* note 9.

13 Kukucka et al, Forensics Survey, *supra* note 2; Zapf et al, Forensic Mental Healthy Survey, *supra* note 2.

14 Kukucka et al, Forensic Survey, *supra* note 2 at 454.

15 Paciocco, Jukebox, *supra* note 11 at 578; Jason M Chin, Jan Tomiska & Chen Li, "Drawing the Line Between Lay and Expert Opinion Evidence" (2017) 63:1 McGill LJ 89 [Chin et al, Opinion Evidence].

16 Martie G Haselton, Daniel Nettle & Paul W Andrews, "The Evolution of Cognitive Bias" in David Buss, ed, *The Handbook of Evolutionary Psychology* (Hoboken: John Wiley & Sons, Inc, 2015) 724.

concepts, we will provide only a cursory (and bulleted) overview:

- A relationship or what Paciocco referred to as an association bias.[17] Simply being assigned a side (even at random) can unconsciously bias an expert toward that side.[18] Additionally, many forensic experts work for the police (some forensic crime laboratories are even part of the prosecuting District Attorney's Office), which can also be a source of organizational relationship bias.
- A tangible reward. A financial stake in the outcome of a case (including the possibility of being retained again) may unconsciously bias the expert in favour of one side.[19]
- Pre-existing views and selection bias.[20] An expert may be selected because he or she has a particular view on an issue, which may diverge from the consensus in the field.[21] For example, there may be a dispute in real estate about how to most accurately assign a value to property. The court will have a hard time knowing whether the expert's view is orthodox because parties will be motivated to retain a witness whose opinion accords with their case theory. Pre-existing views (including whether an accused is guilty or innocent)

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17 Paciocco, Jukebox, supra note 11 at 577.

18 See Daniel C Murrie et al, "Are Forensic Experts Biased by the Side That Retained Them?" (2013) 24:10 Psychological Science 1889. In the Murrie et al study, practicing forensic psychologists were told they were retained by the defence or prosecution with minimal instructions as to how they should perform their assessment task: "The attorney addressed the defense-allegiance participants with statements that are typical of many defense attorneys (e.g. 'We try to help the court understand that the data show not every sex offender really poses a high risk of reoffending'). Likewise, he addressed participants in the prosecution-allegiance condition with statements that are typical of prosecutors (e.g. 'We try to help the court understand that the offenders we bring to trial are a select group whom the data show are more likely than other sex offenders to reoffend'). In both conditions, he asked participants to score the offenders using the two risk instruments. He also hinted at the possibility of future opportunities for paid consultation." [Murrie, Forensic Experts].

19 Paciocco, Jukebox, *supra* note 11 at 577; Bernstein, *supra* note 11 at 455.

20 Paciocco, Jukebox, *supra* note 11 at 575-584.

21 *Ibid.* This view may result from a "professional bias", such as a practitioner of a certain methodology seeking to defend that method despite evidence suggesting it is flawed. It may also flow from "noble cause distortion", with experts in some areas seeing themselves on the "side of good", thus making it morally acceptable (in their minds) to dissemble in their evidence and testimony.

may result in confirmation bias, as the expert tends to distort information to fit that view.[22]

- Contextual bias. Contextual information, such as emotional case facts or whether the accused confessed, has a demonstrable and well-supported impact on decision making.[23] This biasing contextual information can impact relatively robust domains of forensic science, such as fingerprinting[24] and DNA.[25] Oftentimes, such information is irrelevant to the expert's task.[26] Contextual bias, although the focus of a great deal of recent scientific research, is rarely expressly considered by courts.[27]
- Bias cascades. Biases not only impact an individual expert at one stage of the investigation, but they can cascade to other aspects of the investigation and also impact other experts and legal professionals.[28] For instance, a crime scene investigator may be impacted by irrelevant contextual information at the crime scene, and then also be impacted by the same biasing information when her or she analyzes the evidence back at the crime laboratory. Hence, the bias cascades from one aspect (CSI) to another aspect (analytic work in the crime laboratory) of the investigation.

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22 Raymond S Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2:2 Rev General Psychology 175; Alan D Gold, *Expert Evidence in Criminal Law: The Scientific Approach*, 2nd ed (Toronto: Irwin, 2009) at 98.

23 Gary Edmond et al, "Contextual Bias and Cross-contamination in the Forensic Sciences: the Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals" (2014) 14:1 L Probability & Risk 1 [Edmond et al, Contextual bias]; US, President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, Report to the President, September 2016* (Washington DC: Executive Office of the President, 2016) at 31 [PCAST Report].

24 Itiel Dror & Robert Rosenthal, "Meta-analytically Quantifying the Reliability and Biasability of Forensic Experts" (2008) 53:4 J Forensic Sciences 900.

25 Itiel Dror & Greg Hampikian, "Subjectivity and bias in forensic DNA mixture interpretation" (2011) 51:4 Science & Justice 204.

26 Edmond et al, Contextual bias, *supra* note 23 at 2.

27 See Part VI, *below*.

28 Dror, Biases in forensic experts, *supra* note 4; Itiel Dror et al, "The Bias Snowball and the Bias Cascade Effects: Two Distinct Biases That May Impact Forensic Decision Making" (2017) 62:3 J Forensic Sciences 832 [Dror, Snowball]. See *R v Howard*, [1989] 1 SCR 1337, 1989 CanLii 99 discussing the possibility that confession evidence may have cascaded into the expert shoeprint identification opinion.

- Bias snowball. Bias can also snowball when forensic examiners are exposed to irrelevant details about the case and then share these details as well as their biased conclusion or case theory with another examiner. Bias then snowballs (i.e., increases in magnitude) because the bias now has a double impact (i.e., the direct impact of the biasing information itself, as well as its indirect impact via the conclusion of the other examiner). Then, more bias snowballing can occur when the factfinder hears from both examiners, each presenting their finding as if they are independent lines of evidence.[29]

The various biases listed above can originate from three general sources: (1) specific case-related information, (2) wider factors relating to the expert and the environment, and (3) human nature (see Figure 1).

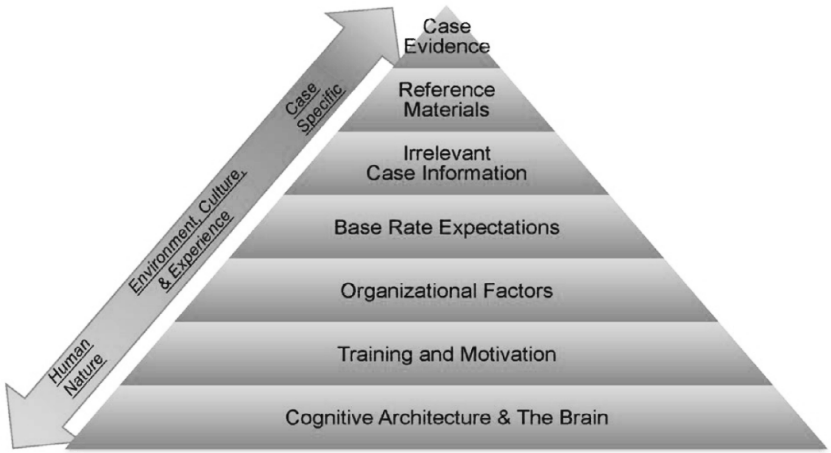


**Figure 1**. Taxonomy of seven sources of bias. These factors may relate to the specific case itself (top of the pyramid), may originate from factors arising from the specific expert making the decision and environmental factors (the middle of the pyramid), or from human nature itself (bottom of the pyramid).[30]

Specific case-related information includes any irrelevant information that experts do not need in order to do their work (e.g., police suspicions,

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29 Dror, Snowball, *supra* note 28.

30 Dror, Sources of Bias, *supra* note 37.

information about the investigation, emotionally evocative case facts, the suspect's past criminal record, their race or religion).[31] This is commonly referred to as "domain irrelevant information."[32] In addition, sometimes even relevant information, such as reference materials (e.g. the suspect's fingerprint, DNA, handwriting, etc) can bias an expert's opinion or analysis.[33] To illustrate, an expert who is presented with a suspect's reference materials may perceive or interpret the actual evidence from the crime scene in a way that is consistent with those of the suspect. That is, the expert goes backwards from the suspect to the evidence, rather than from the evidence to the suspect; this phenomenon has been termed "suspect/target driven bias."[34]

The wider factors that can bias experts include their experience, training, background, motivation, and organizational culture.[35] And lastly, the biasing factors related to fundamental human nature arise from cognitive architecture and how the brain processes information. For example, humans use unconscious mental shortcuts known as heuristics that produce economies but can slant judgment away from rational outcomes in many cases.[36] These are independent of the specific case and the expert involved.[37]

Before proceeding, it is important to emphasize that research findings are clear: experts are not immune to any of the biases and contextual influences discussed above.[38]

Influential legal decisions (and later, *WBLI* itself) generally do not engage with the science of cognitive bias, and, perhaps as a result, simply classify biases into two categories: independence and partiality.[39]

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31 Edmond et al, Contextual bias, *supra* note 23.

32 *Ibid.*

33 Jeanguenat, Budowle, & Dror, "Strengthening Forensic DNA decision making through a better understanding of the influence of cognitive bias" (2017) 57:6 Science & Justice 415

34 *Ibid.*

35 Murrie, Forensic Experts, *supra* note 18.

36 Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2013).

37 Itiel Dror, "Human Expert Performance in Forensic Decision Making: Seven Different Sources of Bias" (2017) 49:5 Australian J Forensic Sciences 541 [Dror, Sources of Bias].

38 See Itiel E Dror et al, "No one is immune to contextual bias—Not even forensic pathologists" (2018) 7:2 J Applied Research in Memory & Cognition 316

39 Paciocco, Jukebox, *supra* note 11 at 572: "As has been pointed out, bias can be a function either of a lack of independence or a lack of impartiality." *National Justice Compania Naviera SA v Prudential Assurance*, [1993] FSR 563 at 565, [1993] 2 Lloyd's LR

Independence concerns the expert's relationship with either the parties to the litigation (e.g., a friendship with the defendant) or with the litigation itself (e.g., a financial stake in the outcome.) Courts generally accept some level of non-independence, as experts are typically retained and paid by one party.[40] Partiality refers to the expert's biased state of mind or attitude, and generally manifests itself in some sort of behaviour.[41] It may flow from non-independence, a pre-existing belief, contextual cues, or other similar sources.

## III. ADDRESSING BIAS IN COURTS

> There is the tendency in every expert to have an unconscious bias in favour of the party who calls him as a witness.[42]

Given the many influences that can slant an expert's judgment, courts have, unsurprisingly, been concerned with the objectivity of experts for centuries.[43] However, an English decision from the early 1990s, *National Justice Compania Niveira S.A. v Prudential Assurance* ("*The Ikarian Reefer*") is often credited with the modern interest in bias.[44] In that case, Creswell J, troubled by a protracted battle of experts, laid out several duties and responsibilities of expert witnesses (e.g. independence, impartiality).[45] *The Ikarian Reefer* inspired a great deal of procedural reform (e.g. expert codes of conduct, jointly appointed experts) and wide acceptance that experts owed a duty of independence and impartiality.[46]

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68 [*The Ikarian Reefer*]; Michell & Mandhane, *supra* note 5 at 638-638; *WBLI*, *supra* note 5 at paras 48-49. See also Mewett & Sankoff, *supra* note 6 at chapter 16.8(ii)-(iii).

40 Paciocco, Jukebox, *supra* note 11 at 573.

41 *Ibid*; Michell & Mandhane, *supra* note 5 at 638-639.

42 *Earle Smith Construction Co v Aylmer High School Board*, [1940] OJ No 244 (QL) at para 26.

43 See *Lawrence v Pehlke (Trustee of)*, [1937] OJ No 63 (QL); *Abinger v Ashton* (1873), 17 LR Eq 358 at 374, 22 WR 582.

44 *The Ikarian Reefer*, *supra* note 39; *WBLI*, *supra* note 5 at paras 26-32; Gary Edmond, "After Objectivity: Expert Evidence and Procedural Reform" (2003) 25 Sydney Law Review 131 [Edmond, After Objectivity].

45 *The Ikarian Reefer*, *supra* note 39 at 565.

46 For a review in Canada see Paciocco, Jukebox, *supra* note 11 at 585; Michell & Mandhane, *supra* note 5 at 641-646. In Australia, see Edmond, After Objectivity, *supra* note 44. For post-*Ikarian Reefer* interest in the experts' duties, see *DD*, *supra* note 8; *R v K(L)*, 2011 ONSC 2562 [*KL*]; *Deemar v College of Veterinarians*, 2008 ONCA 600 [*Deemar*].

Still, the existence of such a duty and new procedures can only go so far. As we discussed above, experts will rarely be aware of their biases, and therefore simply reminding them of their duty to be objective and impartial may often prove ineffective. Moreover, even if experts are aware of their biases, such biases cannot simply be overcome through mere willpower.[47] Indeed, even in the face of admonitions from bodies like the National Academy of Sciences about the danger of cognitive biases in the forensic sciences, forensic examiners – testifying in court – continue to deny the importance of blinding themselves to biasing information.[48] As a result, it may be that simply demanding expert witnesses be "objective" (a somewhat nebulous notion itself) is not enough, raising the question of whether a potentially biased expert ought to be excluded altogether.[49]

In Canada, post-*Ikarian Reefer* cases disagreed about whether it was appropriate to exclude experts who appeared to violate their duty to the court (although, as we will see, many courts did opt to exclude experts for bias).[50] Some courts and commentators suggested that the influential Ontario appellate decision in *R v Abbey* opened the door to excluding biased testimony under the trial judge's residual discretion to exclude evidence when its costs exceed its benefits to the trial process (with bias diminishing the benefits of admitting the evidence through reduced reliability).[51] These

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47 Dror, Biases in forensic experts, *supra* note 4.

48 Gary Edmond, David Hamer & Emma Cunliffe, "A little ignorance is a dangerous thing: engaging with exogenous knowledge not adduced by the parties" (2016) 25:3 Griffith L Rev 383; Edmond, After Objectivity, *supra* note 44; Jason M Chin & D'Arcy White, "Forensic Bitemark Identification Evidence in Canada" (2019) 52:1 UBC L Rev 57.

49 Paciocco, Jukebox, *supra* note 11 at 589-591. Edmond, After Objectivity, *supra* note 44.

50 For exclusions, see *R v Kovats*, 2000 BCPC 176; *R v Docherty*, 2010 ONSC 3628; *R v Morrissey*, 8 CR (6th) 27, 2002 CarswellOnt 3439. For a prominent decision holding that bias goes only to weight, see *R v Klassen*, 2003 MBQB 253. For a review, see *WBLI*, *supra* note 5 at paras 35-40; *Van Bree*, 2011 ONSC 4273 at paras 36-49 [*Van Bree*]; *KL*, *supra* note 46 at paras 9-22. See also *Deemar*, *supra* note 46.

51 *R v Abbey*, 2009 ONCA 624 at para 87: "When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the extent to which the expert is shown to be impartial and objective". See *Van Bree*, *supra* note 50 at paras 36-56, 97; Lisa Dufraimont, "New Challenges for the Gatekeeper: The Evolving Law on Expert Evidence in Criminal Cases" (2012) 58:3/4 Crim LQ 531 at 553-554.

cases, along with influential academic scrutiny of the Canadian judicial approach to bias, set the stage for *WBLI*.[52]

## IV. *WHITE BURGESS LANGILLE V ABBOTT AND HALIBURTON CO*

*WBLI* expanded – in form – the Canadian approach to potentially biased experts in two principal ways. First, it confirmed that concerns about an expert's bias go to both weight and admissibility.[53] Second, Cromwell J, writing for the court, held that (some level of) unbiasedness is both a factor in the trial judge's discretionary exclusion of expert evidence (based on weighing its probative value and prejudicial effect) and a threshold requirement.[54]

As to the threshold inquiry, the Court held that bias ought to be considered under *Mohan*'s "properly qualified expert" element.[55] Moreover, this threshold can generally be met with the expert's recognition (and oath) as to his or her duty to the court to be independent and impartial.[56] A challenge establishing a "realistic concern" that the expert is "unable and/or unwilling to comply with that duty"[57] then shifts the burden to the party

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52 See Paciocco, Jukebox, *supra* note 11; Hon S Casey Hill et al., *McWillams' Canadian Criminal Evidence* (Toronto: Canada Law Book, 2008) (loose-leaf, 4th ed) at 12-58 [McWilliams]. The approach of the authors of McWilliams and Paciocco was, for the most part, ultimately adopted by the Supreme Court of Canada. Compare Paciocco, Jukebox, *supra* note 11 at 595-599 with *WBLI*, *supra* note 5 at paras 52-54. The Supreme Court in *WBLI* also relied heavily on Michell & Mandhane, *supra* note 5, which argued against an exclusionary rule in the context of civil trials.

53 See the sources at *supra* note 50.

54 *WBLI*, *supra* note 5 at paras 52-54.

55 *Ibid* at para 53. The full expert evidence admissibility rule (which gradually evolved from *Mohan* to *Abbey*, and then to *White Burgess*) can be summarized as follows: "Under the first step of the test, the opinion must meet four preconditions: logical relevance, absence of an exclusionary rule, a properly qualified expert, and necessity (note *Abbey* had relegated necessity to the second stage). Further, novel or contested science must receive special reliability scrutiny…If the evidence passes the first step, only then does it receive the discretionary costs-benefits weighing, which also includes reliability and any bias or partiality the expert may possess."; Jason M Chin, "Abbey Road: The (ongoing) journey to reliable expert evidence" (2018) Can Bar Rev 96:3 422 at 429 [citations omitted]. See *WBLI*, *supra* note 5 at paras 14-25.

56 The court largely adopted the framework proposed by Professor (as he then was) Paciocco and the authors of McWilliams, see *supra* note 52.

57 *WBLI*, *supra* note 5 at para 48.

proffering the expert to prove otherwise.[58] The Court was also careful to state that the threshold was "not particularly onerous" and that it would be "quite rare that a proposed expert's evidence would be ruled inadmissible."[59]

As to what level of biasedness would warrant exclusion, the Court seemed to rely on the two general categories of bias outlined above: independence and impartiality.[60] The court noted that independence can be interfered with by the expert's interest in or relationship to the current proceeding.[61] On this point, Cromwell J said that a direct financial interest in the outcome of the case or a very close familiar relationship with one of the parties may be cause for concern, but mere employment with a party would likely be insufficient to exclude the expert.[62] The second category includes any sort of demonstrable partiality, such as assuming "the role of an advocate."[63] In either case, the Court clarified that a mere reasonable apprehension of bias, the standard used for disqualifying judges and administrative decision makers, was inapplicable.[64] Rather, as stated above, the test is whether the expert is unwilling or unable to comply with his or her duty to the court.[65] The Court also held that concerns about

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58 *Ibid*. This must be established on a balance of probabilities.

59 *Ibid* at para 49.

60 *Ibid* at paras 32, 49. The first prong seems to align with what the Court referred to earlier as impartiality and bias: "The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand.... It must be unbiased in the sense that it does not unfairly favour one party's position over another." The second aligns with a lack of independence: "It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation." They also generally correspond with the categories provided by Peter Sankoff (Mewett & Sankoff, *supra* note 6 at 16.8(ii)-(iii)) in his analysis of case law: "interest in the proceeding" and "demonstrated absence of objectivity". See also Michell & Mandhane, *supra* note 5 at 642-644; Paciocco, Jukebox, *supra* note 11 at 573-574.

61 *WBLI*, *supra* note 5 at para 49.

62 *Ibid*.

63 *WBLI*, *supra* note 5 at para 49. Examples of this prong cited in *WBLI*, *supra* note 5 at para 37. See also Michell & Mandhane, *supra* note 5 at 648.

64 *WBLI*, *supra* note 5 at para 50.

65 In *WBLI* itself, the impugned expert was a partner at a the accounting firm that initially discovered the alleged accounting errors that formed the basis of the claim (albeit a different office than the one that found the errors). The defendants argued that the partner was not independent, *inter alia*, because she would have to opine on the work on her own firm. The Supreme Court found that this level of bias did not meet their

independence and impartiality should factor into the trial judge's residual discretion to exclude evidence when its costs outweigh its benefits.[66]

*WBLI* is undoubtedly an important case.[67] It provides useful clarification on the place of bias in the *Mohan* test. Indeed, as Cromwell J stated, inserting bias into the test, "ensures that the courts will focus expressly on the important risks associated with biased experts."[68] The case also walks a fine line. While arguably adding to the trial judge's gatekeeping responsibilities, it set a high bar for establishing bias. In doing so, it recognized that the reality of an adversarial system is that an expert witness will feel some level of allegiance with the party calling him or her.[69] Therefore, there is a question as to whether such an approach would actually lead to more exclusions, or if its main contribution would be in simply making courts and advocates more aware of issues of expert bias.

## V. BIAS CASES, PRE- AND POST-*WHITE BURGESS*

In our study of pre- and post-*WBLI* decisions, we sought to examine what effect an exclusionary rule would have on expert bias jurisprudence. Did it inspire more challenges? Were experts more likely to be excluded or see the weight accorded to their evidence reduced? And if there was a discernable effect, was it felt more in criminal or civil cases? Moreover, we hope that compiling these cases will be of use to practitioners and evidence scholars.

First, we created a database of decisions in which an expert was challenged for bias. To do this, we searched the WestlawNext Canada[70] online database under "All Cases and Decisions" for the following words in the body of the judgment: impartial, impartiality, partial, bias, biased, independent, independence, advocate, and advocacy.[71] For the pre-*WBLI*

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new test. The expert appeared to understand her duty to the court and the connection between her work and possible losses to her firm (e.g. should she find their initial work was shoddy) were speculative. See *WBLI, supra* note 5 at paras 56-62.

66 *Ibid* at paras 54-55.

67 See Sankoff & Mewett, *supra* note 6 at chapter 16.8.

68 *WBLI*, *supra* note 5 at para 53, citing McWilliams, *supra* note 52 and Paciocco, Jukebox, *supra* note 11 [emphasis added].

69 Edmond, After Objectivity, *supra* note 44.

70 Online: <www.westlawnextcanada.com/>.

71 We limited our search to expert evidence cases by restricting it to cases in which "expert" was in the headnote and (1) "Mohan" was anywhere in the case (for pre-*WBLI* cases), or

case law, we searched the five years before the *WBLI* decision was handed down (May 1, 2010 to April 30, 2015). For the post-*WBLI* case law, we searched from May 1, 2015 to May 28, 2018 (i.e., just over three years after the case was decided).[72] We pre-registered (predefined) our search parameters and time window before collecting and examining the data to help ensure that any expectations we had would not influence the results.[73] This practice is in line with current best practices in social scientific methods.[74]

The second author (Lutsky) then reviewed the cases and screened out those based on pre-registered specifications (e.g., "bias" was used in a different context or only to summarize the law, see Appendix A). The remainder were deemed "relevant." The first author (Chin) reviewed 10% of these choices, and Lutsky and Chin discussed any difficult-to-categorize cases.[75] We treated any distinct instance of an expert being challenged for bias as a "decision" for the purposes of our study (i.e., any given reported case could contain multiple "decisions" if multiple experts were challenged

(2) "White Burgess" or "Mohan" was anywhere in the case (for post-*WBLI* cases). See supplementary material, online: <https://osf.io/awy5v/> for the precise search strings we used.

72 We classified one case that was decided temporally after *WBLI* as a pre-*WBLI* decision because the case was heard before *WBLI* and decided not long after *WBLI*. As a result, we did not think that *WBLI* would have been available to the parties. That case is *R v J (N)*, 2015 ONSC 4347. For a full description of how we classified cases during the pre- and post-*WBLI* interstitial period, see Supplementary Materials, online <https://osf.io/awy5v/>.

73 Preregistration available online: <https://osf.io/ed8f5/>.

74 Brian A Nosek et al, "The Preregistration Revolution" (2018) Proceedings of the National Academy of Sciences 201708274 at 4, under "Challenge 3: Data Are Preexisting"; Brian A Nosek & D Stephan Lindsay, "Preregistration Becoming the Norm in Psychological Science" (28 February 2018), online: <www.psychologicalscience.org/observer/preregistration-becoming-the-norm-in-psychological-science> [perma.cc/29QY-VSS7]; Matthew Warren, "First analysis of 'pre-registered' studies shows sharp rise in null findings" (24 October 2018), online: <www.nature.com/articles/d41586-018-07118-1> [perma.cc/74NV-3MU4].

75 For example, we excluded from our database *Gaudet v Grewal*, 2014 ONSC 3542 because the expert was challenged but died before he could give evidence, making it difficult to know how the court would have ultimately decided. We also excluded *McKerr v CML Healthcare Inc*, 2012 BCSC 1712 because although the term objectivity was used with respect a description of the expert, it was not in the context of an admissibility challenge.

for bias for different reasons). This resulted in 229 "relevant decisions,"[76] comprising 113 pre-*WBLI* and 116 post-*WBLI* decisions.[77] A full list of these cases is available at Appendix B.

Lutsky then reviewed these cases and coded them according to pre-registered criteria (see Appendix A). Importantly, cases were coded according to whether the court found potential indicators of either the expert's (1) independence (through a connection to the party or possible interest in the outcome), (2) demonstrated partiality (usually through the behaviour of the expert), or (3) both. Appendix A contains a further description of how these decisions were made with examples of such categorizations. For instance, potential non-independence was described by courts in situations when the expert was an employee of a party,[78] a friend of a party,[79] or a police officer investigating the alleged crime.[80] Partiality included being argumentative,[81] discounting evidence consistent with the other side's case,[82] and straying into legal argument.[83]

Lutsky then coded these cases based on whether the evidence was: excluded (or assigned no weight, which we construed as an effective exclusion for the purposes of this study) for bias (i.e., non-independence or partiality); excluded for other reasons; admitted; or expressly assigned less weight by the trial judge for bias.[84] Once again Chin reviewed both 10% of these choices and difficult-to-categorize cases.[85]

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76 See the full database online: <https://osf.io/hqyv5/>. If two experts were challenged for the same reasons and the same reasons were given for admitting or excluding them, this was treated as one line of data.

77 See *supra* note 72.

78 *Ontario (Ministry of Labour) v Advanced Construction Techniques Ltd.*, 121 WCB (2d) 256, 2015 CarswellOnt 6803 [*Ontario v Advanced Construction*].

79 *MacWilliams v Connors*, 2014 PESC 12.

80 *R v Lee*, 2014 ONCJ 640.

81 *West Moberly First Nations v British Columbia*, 2018 BCSC 730.

82 *R v Carter*, 2014 ABPC 291.

83 *PM Snelgrove General Contractors & Engineers Ltd v Jensen Building Ltd*, 2015 ONSC 585 [*Snelgrove*].

84 For a full accounting of this process, see the online supplementary material, online: <https://osf.io/awy5v/>. For practicality, cases in which the expert was excluded for bias *and* other reasons were coded as excluded for bias. Those cases are flagged in the main data file, see online <https://osf.io/hqyv5/>. The exception is *R v Ennis-Taylor* 2017 ONSC 5797, in which the trial judge expressly said that bias alone would not have been enough to exclude the evidence.

85 For example, it was sometimes difficult to determine if an expert was excluded, given reduced weight, or neither. For instance, in *Uponor AB v Heatlink Group Inc.*, 2016 FC

Before reporting our findings, a key limitation of our study should be highlighted: our research contains only reported decisions (on one commercial database). Certainly, experts' alleged bias has been judicially considered in many decisions we do not have access to (e.g., mid-trial oral evidentiary holdings). In fact, one recent estimate found that only about 2% of criminal cases are ultimately reported.[86] Moreover, we have no information on the frequency at which potentially biased expert evidence produces settlements and plea deals. That said, we believe the cases we researched are important. It is the body of case law that litigators and courts have the most access to, and so these cases form the most accessible precedent on the issue of biased experts.

First, we calculated the total number of relevant decisions per year (i.e., the number of times in which an expert's bias was at issue). As shown in Figure 2, there was a relatively steady number of such reported cases (about 20-30) in years before *WBLI* was decided. The year immediately after *WBLI* saw a considerable uptick in bias cases (e.g., 26 challenges in 2014 nearly doubled to 51 in 2016). This increase may be attributable to parties testing the boundaries of the new doctrine.

320 at para 130, the trial judge said that the expert would be assigned "little if any weight [emphasis added]". We classified this as a reduction in weight, but it seemed very close to an exclusion. Similarly, in *R v Hood*, 2016 NSPC 19, the trial judge preferred one expert to another because of bias. We also categorized this as a reduction in weight, which seemed implicit from the judge's analysis.

86 Jennifer Chandler "The use of neuroscientific evidence in Canadian Criminal proceedings" (2015) 2:3 JL & Biosciences 550 at 556.

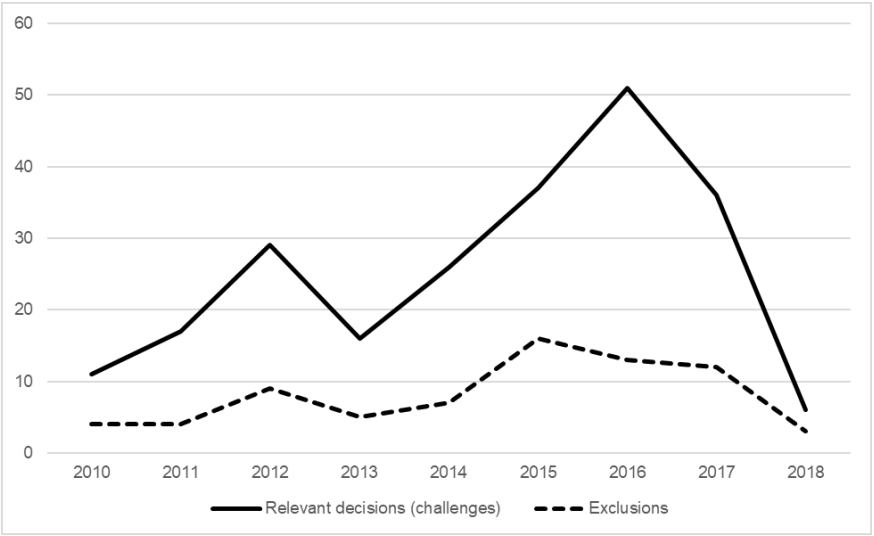


**Figure 2**. The number of relevant decisions (i.e., expert challenges) charted against the number exclusions per year (*WBLI* was decided on April 30, 2015).

As can also be seen from Figure 2, despite *WBLI* seeming to inspire more bias challenges, the actual number of exclusions for bias has remained relatively steady, with a slight increase after *WBLI* (9 in 2012, 5 in 2013, 7 in 2014, 16 in 2015, 13 in 2016, and 12 in 2016).

The rate of exclusion for bias (non-independence or partiality) was remarkably similar pre-and post-*WBLI*, with a slightly lower rate (31.0%) after the case was decided, as compared to before (32.7%). The year in which *WBLI* was decided may be particularly illustrative: in 2015, decisions that had the benefit of *WBLI* excluded experts 34.8% of the time, compared to 57.1% in 2015 cases that came before it. Similarly, judges pre-*WBLI* expressly assigned less weight to expert evidence because of bias in 11.5% of relevant decisions and in 10.3% of such decisions after *WBLI*. This suggests that either *WBLI* did not strongly expand the reasons for which an expert could be excluded for bias or that the post-*WBLI* challenges were less meritorious, or some combination of the two. In either case, it does not support the theory that *WBLI* changed the practical operation of the law in an extreme fashion (and perhaps not at all).

We also analyzed *WBLI*'s effect on the admission of experts in criminal and civil cases. Research in the U.S. has found that new (ostensibly more

rigorous) standards for admitting experts has affected civil trials more than criminal trials, with more demanding requirements disproportionately imposed on experts in civil trials.[87] We found that before *WBLI*, experts in civil cases were successfully excluded for bias in 42.4% of cases, but only in 19.1% of criminal cases. This considerable difference may be due, in part, to the fact that experts in criminal trials are typically tendered by the Crown. The defence is often limited in resources, and thus may not have the capacity to mount a successful challenge (as compared to more equally matched parties in civil trials).[88] This effect is also somewhat surprising because civil trials are typically decided by a judge alone and thus are cases when the judge is likely to relax his or her gatekeeping of expert evidence (it may also indicate some bias in our sample whereby evidentiary decisions in criminal trials are less likely to be reported).[89] For reasons that are not immediately clear, *WBLI* did appear to impact civil cases the most, with that 42.4% exclusion rate dropping to 34.2%. In the criminal sphere, those challenging experts for bias fared somewhat better, with the exclusion rate increasing about 5% to 24.3%.[90]

As to the type of bias experts are excluded for, there was not a dramatic change after *WBLI*. Before *WBLI*, independence challenges were successful (i.e., the expert was ultimately excluded for lack of independence when it was raised) 22.6% of the time and impartiality challenges were successful 42.9% of the time. After *WBLI*, independence challenges found slightly more success than they had before (25.8%), whereas the success rate for impartiality challenges slightly dropped (40.9%).

Finally, we examined the part of the expert evidence test that experts are evaluated under. Post-WBLI, challenges under the "properly qualified expert" criterion found success in 32.7% of such instances. This compares

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87 D Michael Risinger, "Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?" (2000) 64:1 Alb L Rev 99; Peter J Neufeld, "The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform" (2005) 95:1 American J Public Health 107.

88 Keith A Findley, "Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth" (2008) 38:3 Seton Hall L Rev 893.

89 *Chan v Erin Mills Town Centre Corp*, 2005 CarswellOnt 6741 at para 31, 143 ACWS (3d) 1143. Further, *WBLI* was a civil case and thus may present a more clearly relevant precedent in that area.

90 As to reductions in weight due to bias, that occurred in 7.6% of relevant civil decisions before *WBLI* and 8.9% of cases afterwards. This rate fell for criminal cases, from 17.0% to 13.5%.

to a 60% exclusion rate of such experts considered under the trial judge's discretionary gatekeeping exercise. This may be due to the high bar (for bias) set in out *WBLI's* enunciation of threshold non-biasedness and generally increased exclusion (as suggested in other work) at the discretionary gatekeeping stage.[91]

## VI. DISCUSSION AND CONCLUSIONS

Our findings suggest that, following *WBLI*, there was an increase in the frequency of challenges related to expert biases. This may be the result of parties testing the boundaries of the new precedent with relatively weak arguments for bias. Despite the increased activity in this area, it is surprising how little an impact *WBLI* had across the metrics we explored. Most notably, the number of experts excluded for bias remained relatively constant between pre- and post-*WBLI* cases. One explanation for this is that *WBLI* did not meaningfully change the law, but simply confirmed and formally articulated a rule that lower courts were already applying.[92] This is a theory that our empirical analysis is limited in its ability to address (we hope, however, that the database we have compiled will assist with such work). Still, in this section, we will offer some preliminary observations based on our review of the cases. In general, we will suggest that one way for the courts to develop the expert bias jurisprudence in a manner that is sensitive to the psychology of bias is to broaden their independence inquiry to include questions specifically about contextual bias.

Recall that both before and after *WBLI*, the success rate for impartiality challenges was higher than that for independence challenges (and both only changed by a few percentage points). This consistency suggests that courts

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91 *WBLI*, *supra* note 5 at para 49; Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts & Michael Stockdale, eds, *Forensic Science Evidence and Expert Witness Testimony: Reliability Through Reform?* (Cheltenham: Edward Elgar, 2018) 310. In generally balancing an expert's contribution to the case versus the prejudice he or she presents, and the defence's ability to address that prejudice, see Gary Edmond & Kent Roach, "A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence" (2011) 61:3 UTLJ 343.

92 Indeed, one post *WBLI* appellate decision noted that Professor (as he then was) Paciocco's framework, that was adopted in *WBLI*, was wholly adopted by the case's trial court. *R v Natsis*, 2018 ONCA 425 at para 9 [*Natsis* ONCA]; *R v Natsis*, 2014 ONCJ 532 [*Natsis* ONCJ].

are more sensitive to impartiality challenges, an observation buttressed by the fact that partiality is typically defined as being behavioural and attitudinal, making it relatively easy to observe.[93] Moreover, impartiality challenges may justify exclusion of an expert not simply because they indicate bias, but also because they cast doubt on the reliability of an expert's opinion (an exclusionary rule that predates *WBLI*).[94] To better illustrate what constitutes excludable partiality, the following list contains the expert behaviours that commonly led to exclusion in both pre- and post-*WBLI* cases:

- uncritically accepting the client's facts;[95]
- focusing on one set of research;[96]
- ignoring contradictory evidence;[97]
- focusing on weaker evidence;[98]
- drawing only the conclusions favourable to their client from the facts;[99]
- adopting an argumentative tone; [100] and
- straying into legal argument.[101]

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93 Michell & Mandhane, *supra* note 5 at 638.

94 See Chin, *Abbey* Road, *supra* note 55 at n 33.

95 For pre-*WBLI* exclusions see *Malenfant v Lavergne*, 2010 ONSC 2894 at para 38; *KL*, *supra* note 46; *Piccolo v Piccolo*, 2014 ONSC 5280 at paras 13-15. For post-*WBLI* exclusions see *Martin Marietta Materials Canada Ltd. v Beaver Marine Ltd*, 2016 NSSC 225 at para 83 [*Martin Marietta*].

96 For pre-*WBLI* exclusions see *G (CM) v S (DW)*, 2015 ONSC 2201 at para 65. For post-*WBLI* exclusions see *JP v British Columbia (Children and Family Development)*, 2017 BCAA 308 at para 200; *R v Colpitts*, 2016 NSC 219 at para 32.

97 For pre-*WBLI* exclusions see *DM Drugs Ltd v Bywate*, 2013 ONCA 356 at para 45 [*DM Drugs*]; *R v Phinney*, 2012 NSPC 68 at para 3 [*Phinney*]. For post-*WBLI* exclusions see *R v Giles*, 2016 BCSC 294 at para 124 [*Giles*].

98 For pre-*WBLI* exclusions see *Phinney*, *supra* note 97 at para 24. For post-*WBLI* exclusions see *Allard v Canada*, 2016 FC 236 at para 247.

99 For pre-*WBLI* exclusions see *Gould v Western Coal Corp*, 2012 ONSC 5184 at para 94. For post-*WBLI* exclusions see *Bruff-Murphy v Gunawardena*, 2016 ONSC 7 at para 123.

100 For pre-*WBLI* exclusions see *Carmen Alfano Family Trust v Piersant*, 2012 ONCA 297 at para 115 [*Carmen Alfano*]; D.M. Drugs, *supra* note 97 at para 29; *Snelgrove*, *supra* note 83 at para 11; For post-*WBLI* exclusions see *R v Sriskanda*, 2016 ONCJ 667 at para 39.

101 For pre-*WBLI* exclusions see *Carmen Alfano, supra* note 100 at para 115; *Snelgrove*, *supra* note 83 at paras 12, 14.

As to independence, both before and after *WBLI*, a rather strong connection to the case, parties, or issues was required to justify exclusion. Before *WBLI*, these included a direct financial interest,[102] being asked to opine on the reliability or quality of their own work,[103] strong professional advocacy on a relevant issue,[104] and deep involvement in the investigation or allegiance with investigators.[105] Very similar reasons resulted in exclusion after *WBLI*.[106] Moreover, a controversial case decided before *WBLI* was affirmed in light of the new doctrine.[107]

Despite its largely neutral effect, one positive outcome from *WBLI* is that it appeared to increase the discussion around confirmation bias. Within our search, none of the cases before *WBLI* mentioned confirmation bias, while eight cases expressly mentioned it after *WBLI*.[108] Some of this interest in confirmation bias may flow from Paciocco's influential pre-*WBLI* article, which contained a substantial treatment of confirmation bias.[109] Nevertheless, this recognition by the courts of a specific psychological bias marks a step forward in expert witness jurisprudence. To continue moving forward, and to further increase judicial control over biased experts in the

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102 *Dean Construction Co v MJ Dixon Construction Ltd*, 2011 ONSC 4629 at para 60.

103 *Decision No 858/12I2*, 2014 ONWSIAT 1105 at paras 20-21; *Kobilke v Jeffries*, 2014 ONSC 1786 at para 41.

104 *R v McPherson*, 2011 ONSC 7717 at para 31.

105 *R v Lauzon,* CarswellOnt 10976 at para 11; *Ontario v Advanced Construction*, *supra* note 78 at para 52. But see *Natsis* ONCA, *supra* note 92.

106 For a direct financial interest, see *McKinlay v Zachow*, 2018 ABQB 365 at para 99. For giving an opinion on one's own work, see *M(M) v M(R)*, 2016 ONSC 7003 at para 16. For previous advocacy work, see *McKitty v Hayani*, 2017 ONSC 6321 at para 35. For involvement in the investigation, see *BC Hydro & Power Authority and IBEW, Local 258 (Petersen Termination), Re*, 2015 CarswellBC 3847 at paras 28, 29, [2016] BCWLD 781 [*BC Hydro*]. It should be noted that experts both before and after *WBLI* have been excluded for a combination of partiality and non-independence, see *R v Livingston*, 2017 ONCJ 645.

107 *Natsis* ONCA, *supra* note 92 at para 9. The Court of Appeal for Ontario noted that the trial judge had applied Professor (as he then was) Paciocco's framework, which was adopted in *WBLI*.

108 *St Clair Boating & Marina v Michigan Electric Supply Co*, 2017 ONSC 23 at para 82; *R v Piechotta*, 2016 BCPC 463 at paras 185-186; *R v France*, 2017 ONSC 2040 at para 17; *Giles*, *supra* note 97 at 123; *AE v TE*, 2017 ABQB 449 at para 178; *R v Hood,* 2016 NSPC 19 at para 144; *Young v Insurance Corp. of British Columbia*, 2017 BCSC 2306 at para 6; *Van Bree*, *supra* note 50 at 103.

109 Paciocco, Jukebox, *supra* note 11 at 577-581.

future, we recommend courts broaden their bias analysis to include consideration of contextual bias.[110]

Recall that psychological research has found that contextual factors (e.g., emotionally evocative facts, the perceived exigency of the situation) substantially alter perception, memory, and judgment.[111] Notwithstanding this research, none of the judgements in our search included any express discussion of contextual bias (similar inadvertence has also been noted in Australia and the UK),[112] nor have there been any discussions on the use of bias countermeasures, such as Linear Sequential Unmasking (i.e., progressively exposing experts to just the evidence they must know to perform their task).[113] Moreover, independence challenges related to an expert's exposure to irrelevant and extraneous (but biasing) information are treated inconsistently. These types of challenges are most often raised when a proposed expert participated in a related investigation before the proceeding. Within our analysis, we found seven instances where an expert was permitted to testify despite their involvement in a related investigation,[114] and five instances where an expert's involvement in a related investigation was used as reason to reject their testimony.[115] What is likely contributing to this inconsistency is the absence of any discussion of contextual bias by the courts.

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110 See Edmond et al, Contextual Bias, *supra* note 23.

111 See Part II. See also Jennifer L Mnookin, "The Uncertain Future of Forensic Science" 147:3 Daedalus 99 at 104.

112 Edmond et al, Contextual Bias, *supra* note 23 at n 2: "We identified no sustained discussion or responses to 'contextual bias' or 'cognitive bias' in reported appellate judgments in England, Australia and Canada, though there are several passing references…" But, see *R v Smith-Wilson*, 2016 SKQB 33 at paras 150-151 in which the expert failed to mention in her report that she had been exposed to biasing information.

113 Itiel Dror et al, "Context Management Toolbox: A Linear Sequential Unmasking (LSU) Approach for Minimizing Cognitive Bias in Forensic Decision Making" (2015) 60:4 J Forensic Sciences 1111 [Dror, Context Management].

114 *R v Ali*, 2011 BCSC 1850 at para 28; *R v Parisien*, 2011 ONCJ 354 at para 13 [*Parisien*]; *R v Pelich*, 2012 ONSC 3224 at paras 18-21; *Market Surveillance Administrator, Re*, 2015 CarswellAlta 1400 paras 91, 111, [2015] AWLD 4488; *R v Tang*, 2015 ONCA 470 paras 6-7; *R v Dixon*, 2015 ONSC 8065 at paras 47-50; *R v Farnham*, 2016 SKCA 111 at paras 78, 85 [*Farnham*].

115 *Van Bree*, *supra* note 50 at para 116-118, *R v Tremblett*, 2012 NSPC 121 at paras 9, 29, 33; *Ontario v Advanced Construction*, *supra* note 78 at para 86; *BC Hydro supra* note 106 at paras 28-29; *R v Fabos*, 2015 ONSC 8013 at para 47.

To better control for contextual bias, and to resolve the inconsistency discussed above, courts should more critically consider an expert's exposure to contextual information when conducting their independence analysis. Several of the cases we reviewed may have benefited from such an exercise. For instance, in *R v Live Nation Canada*, the engineers who gave expert testimony were present at the accident and witnessed the deaths of numerous people.[116] In this case, and in several others like it,[117] the trial judge seemed to place significant weight on the expert's demeanor (e.g. whether the expert appeared an honest witness) and the expert's denials regarding their susceptibility to contextual factors. Given that experts may not be aware when they fall victim to contextual bias, relying on their demeanour or confidence in their own opinion is, in our view, misguided. This is similar to the case of the confident but mistaken eye witness; a phenomenon that has been widely discussed in both the psychological and legal literature.[118] We believe similar emphasis should be placed on the potential for contextual bias to sway the opinions of experts. In addition to screening out potentially inaccurate evidence, taking contextual bias more seriously at trial may encourage parties and investigators to keep such biasing information from the experts in the first place.

To conclude, while our analysis of the Canadian approach and the impact of *WBLI* has been generally pessimistic, it does seem to have had a salutary effect on the coherence of evidence law. As we discussed above, *WBLI* ended the debate about whether bias could be cause to exclude an expert and provided some clarity about how much bias was sufficient for exclusion (e.g., a reasonable apprehension is insufficient).[119] This clarity is useful in less obvious ways as well. Consider, for instance, *Matsalla v Rocky Mountain Dealerships Inc*, in which the court noted that while some Saskatchewan civil procedure rules established a duty of objectivity, such rules were not applicable in small claims court.[120] The lack of directly

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116 *R v Live Nation Canada*, 2016 ONCJ 22 at para 5.

117 *Farnham*, *supra* note 114 at para 78; *Parisien*, *supra* note 114 at para 1.

118 See Chin & Crozier, *supra* note 8 at 636

119 See the sources at *supra* note 50. Some pre-*WBLI* decisions did rely on a reasonable apprehension of bias, see *Van Bree*, *supra* note 50 at para 110: "The advantage of using a reasonable person standard is that the reasonable person assessing the appearance of bias must be informed of all the relevant circumstances, including the background factors that uphold the impartiality of the witness. As will be seen, I find this to be a factor tending to diminish appearances of bias of police officers.".

120 Matsalla v Rocky Mountain Dealerships Inc, 2017 SKQB 335 at para 25.

relevant legislation might have prompted a great deal of analysis as to why the *Small Claims Act Rules* and *Regulations* were not similarly drafted.[121] The court, however, quickly noted the precedent in *WBLI* and its explanation of the expert's duty. The matter was then easily decided. This economy and clarity are certainly beneficial, but perhaps it is now time to move on to certain subtler and thornier issues inherent in the biases of experts.

[121] The Small Claims Act, 1997, SS 1997, c S-50.11; RRS c S-50.11 Reg 1.

## Appendix A. Methodological Details

**Appendix A**. Selected details about our methodology. For a full accounting see the online supplementary materials: <https://osf.io/awy5v/> and preregistration: <https://osf.io/ed8f5/>.

**Determination of a decision's relevance for the database**

- No
    - the word bias, partial, independent, or advocate was used in a different context
    - the word bias, partial, independent, or advocate was used in the correct context but only to summarize the law
- Yes
    - the word bias, partial, independent, or advocate was used in the context of a challenge to the admissibility of an expert's evidence

**Operational definitions of impendence and partiality**

- Independence
    - Yes (1): Situations where the Court acknowledges that the expert has a relationship/connection with one of the parties or a demonstrated interest in the outcome of the case, that could potentially affect his or her ability to be impartial. Importantly, this includes situations where the Court ultimately concludes that the expert's relationship/connection with one of the parties would/did not affect their ability to be impartial. For example, in *R v Edison* (2015 NBBR 74), the defence argued that a police officer's expert opinion should not be admitted because police officers were biased in favour of the Crown. The Court acknowledged that there generally is a connection between police officers and the Crown counsel; however, the Court ruled that this connection does not affect the police officer's ability to be impartial.
    - Non-exhaustive list of examples:
        - The expert is employed by one of the parties or by a company closely connected to the case (*Ontario (Ministry of Labour) v Advanced*

*Construction Techniques Ltd*, 2015 CarswellOnt 6803 at para 55)
        - The expert is related to or friends with one of the parties in the case (*MacWilliams v Connors*, 2014 PESC 12 at para 33 and 34)
        - The expert has a demonstrated interest in the outcome of the case (*R v Tremblett*, 2012 NSPC 121 at para 29)
        - The expert is a police officer who was on the investigation team involved in the case (*R v Lee*, 2014 ONCJ 640 at para 13)
        - The expert worked closely with the investigation team or other individuals involved in the case (*Ontario (Ministry of Labour) v Advanced Construction Techniques Ltd*, 2015 CarswellOnt 6803 at para 52)
    - No (0): Situations where the Court does not identify any relationship/connection between the expert and either party that could potentially affect the expert's ability to be impartial.

- Partiality
    - Yes (1): Situations where the Court acknowledges that the expert's report/testimony potentially demonstrates that he or she has a bias towards one of the parties. Importantly, this includes situations where the Court ultimately concludes that the expert did not engage in partial behaviour in his or her testimony/report. For example, *in Conseil Scolaire Francophone de la Colmbie-Britaanique* (2014 BCSC 851 at paras 37, 51), the impartiality of an expert was questioned due to her evasiveness during cross-examination. Specifically, the expert often disputed with counsel the form of question she was asked. The court agreed that the expert was evasive, however attributed her evasiveness due to her carefulness with language. The court explained that the expert wanted to be precise with her words, which should not be seen as a demonstration of biased behaviour. The

behaviour of the expert in that case is an example of potentially partial/biased behaviour which the court ultimately concluded was not a demonstration of bias/partiality.

- Non-exhaustive list of examples:
  - Being argumentative/difficult with opposing counsel during cross-examination (*Redman v Kirder*, 2015 BCSC 178 at para 122)
  - Adopting the position of an advocate for one of the parties (*R v Carter,,* 2014 ABPC 291 at para 37) — the expert in the case emphasized that she took a favourable position to one of the parties and completely discounted evidence that opposed her position
  - Exclusively relying on evidence that supports the expert's viewpoint (*G (CM) v S (DW)*, 2015 ONSC 2201 at para 72)
  - Giving a testimony that resembles a legal argument to support one of the parties rather than on opinion to answer a factual question. (*P.M. Snelgrove General Contractors & Engineers Ltd. V Jensen Building Ltd.*, 2015 ONSC 585 at para 12)
- No (0): Situations where the Court does not identify any potential instances of biased/partial behaviour in the expert's testimony/report.

## Appendix B. Bias cases, pre- and post-*White Burgess Langille Inman v Abbott and Haliburton Co.*

**Appendix B**. A database of pre- and post-*WBLI* decisions including the case name, citation (neutral when possible), a description of the expert's area of expertise and whether the expert was admitted (0) or excluded (1). See the full database online: <https://osf.io/hqyv5/>. Post-*WBLI* cases are in greyscale.

| **Case Name** | **Citation** | **Expertise** | **Exclude?** |
|---|---|---|---|
| *Andersen v St. Jude Medical Inc.* | 2010 ONSC 5768 | Expert on cardiovascular pathology | 0 |
| *Bedford v Canada Expert 2 (Janice Raymond)* | 2010 ONSC 4264 | Expert in medical ethics | 0 |
| *Bedford v Canada Expert 3 (Richard Poulin)* | 2010 ONSC 4264 | Sociology professor with an expertise in prostitution | 0 |
| *Bedford v Canada: Expert 1 (Melissa Farley)* | 2010 ONSC 4264 | Counselling Psychologist | 0 |
| *Duff v Alberta* | 2010 ABPC 250 | Forensic Toxicologist | 0 |
| *Gutbir v University Health Network* | 2010 ONSC 6394 | Neonatologist | 1 |
| *Malenfant v Lavergne* | 2010 ONSC 2894 | Expert in substance addictions | 1 |
| *R v Lauzon* | 2010 CarswellOnt 10976 | Police Constable | 1 |
| *R v Sappleton* | 2010 ONSC 5704 | Police Detective | 0 |

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|---|---|---|---|
| *R v Zoraik: Constable Yeager* | 2010 BCPC 472 | Police Constable | 0 |
| *Warkentin v Riggs: Dr. D.G. Hunt* | 2010 BCSC 1706 | Expert Medical Legal Consultant | 1 |
| *Brandiferri v Wawanesa Mutual Insurance Co.* | 2011 ONSC 3200 | Licensed engineer and chemist | 0 |
| *Commercial Electronics Ltd. V Savics* | 2011 BCSC 162 | Expert in design and installation of residential integration systems | 0 |
| *Dean Construction Co v M.J. Dixon Construction Ltd: Chester Hodgins* | 2011 ONSC 4629 | Expert in delay analysis and costing of claims | 1 |
| *Dean Construction Co v M.J. Dixon Construction Ltd: Sean Keegan* | 2011 ONSC 4629 | Engineer | 1 |
| *Edmondson v Payer* | 2011 BCSC 118 | Family Physician | 0 |
| *Grigoroff v Wawanesa Mutual Insurance Co.* | 2011 ONSC 2279 | Psychiatrist | 0 |
| *N.I.W.A v Pacific Inland Resources* | 2011 BCHRT 294 | Specialist in Internal Medicine | 0 |
| *R v Ali* | 2011 BCSC 1850 | Police Detective | 0 |
| *R v K (L)* | 2011 ONSC 2562 | Psychologist | 1 |
| *R v McPherson* | 2011 ONSC 7717 | Law Professor | 0 |

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|---|---|---|---|
| *R v Myles* | 2011 CarswellOnt 10352 | Police Sergeant | 0 |
| *R v Parisien* | 2011 ONCJ 354 | Police Constable | 0 |
| *R v Van Bree* | 2011 ONSC 4273 | Police Detective | 1 |
| *R v Wilkinson* | 2011 SKQB 371 | Police Officer | 0 |
| *Ross River Dena Council v Canada* | 2011 YKSC 87 | Lawyer | 0 |
| *Steen Estate v Iran* | 2011 ONSC 6464 | Expert on Iranian Affairs | 0 |
| *Wakeley v Wakeley* | 2011 ONSC 5566 | Accountant | 0 |
| *Carmen Alfano Family Trust v Piersanti* | 2012 ONCA 297 | Accountant | 1 |
| *Continental Roofing Ltd. V J.J.'s Hospitality Ltd* | 2012 ONSC 1751 | Architect and Engineer | 0 |
| *Edmondson v Payer* | 2012 BCCA 114 | Family Physician | 0 |
| *First Nations Child and Family Caring Society of Canada v Attorney General of Canada* | 2012 CHRT 28 | Unspecified | 0 |
| *Gallant v Brake-Patten* | 2012 NLCA 23 | Neurologist | 0 |
| *Gould v Western Coal Corp* | 2012 ONSC 5184 | Accountant | 1 |

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|---|---|---|---|
| *Henderson v Risi* | 2012 ONSC 3459 | President of a company which undertakes business valuations and litigation accounting | 0 |
| *Kappell v Brown* | 2012 BCSC 113 | Lawyer | 1 |
| *Lees v Casorso* | 2012 NSSC 301 | Doctor | 0 |
| *Lockridge v Ontario* | 2012 ONSC 2316 | Doctor | 1 |
| *Lush v Connell* | 2012 BCCA 203 | Radiologist | 0 |
| *McDonald v Murray's Horticultural Services Ltd.: Mr. Ken Tobin* | 2012 NLTD(G) 127 | Structural Engineer | 0 |
| *Ottawa (City) v TKS Holdings Inc.* | 2012 ONSC 7633 | Engineer | 1 |
| *R v Aitken* | 2012 BCCA 134 | Podiatrist and Forensic Gait Analysist | 0 |
| *R v Alcantara* | 2012 ABQB 225 | Police Sergeant | 0 |
| *R v C(M): Expert 1 (Dr. Moore)* | 2012 ONSC 868 | Cognitive Psychologist | 0 |
| *R v C(M): Expert 1 (Dr. Wolfe)* | 2012 ONSC 868 | Expert on child abuse | 0 |
| *R v Gager* | 2012 ONSC 1472 | Street Gang Expert | 0 |
| *R v Gager* | 2012 ONSC 388 | Police Officer | 0 |
| *R v Pearce: Dr. Moore* | 2012 MBQB 22 | Psychologist | 1 |

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|---|---|---|---|
| *R v Pelich* | 2012 ONSC 3224 | Police Officer | 0 |
| *R v Phinney* | 2012 NSPC 68 | Police Constable | 1 |
| *R v Sarsfield* | 2012 ONSC 6154 | RCMP Corporal | 0 |
| *R v Shafia* | 2012 ONSC 1538 | Professor of Women and Gender Studies | 0 |
| *R v Shehaib* | 2012 ONCJ 144 | Police Officer | 1 |
| *R v Tremblett* | 2012 NSPC 121 | Police Constable | 1 |
| *R v Vu* | 2012 BCPC 46 | Police Constable | 0 |
| *R(J) v University of Calgary: Expert 1 (Malmo)* | 2012 ABQB 342 | Psychologist | 0 |
| *R(J) v University of Calgary: Expert 2 (Mayhew)* | 2012 ABQB 342 | Psychologist | 0 |
| *Blackmore v R* | 2013 TCC 263 | Expert on sociology of religion | 0 |
| *Brock Estate v Crowell: Jessie Gmeiner* | 2013 NSSC 259 | Actuary | 1 |
| *Brock Estate v Crowell: Mr. Nicholas Metivier* | 2013 NSSC 259 | Owner of an art gallery | 1 |
| *Brock Estate v Crowell: Ms. Elizabeth Nobles* | 2013 NSSC 259 | Fine art appraiser | 0 |

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|---|---|---|---|
| *Citizens Coalition of Greater Fort Erie, Re: Expert 1 (Dr. Gayler)* | 2013 CarswellOnt 7871 | Expert in land use and planning | 1 |
| *Citizens Coalition of Greater Fort Erie, Re: Expert 2 (Group of Experts called by Defendant)* | 2013 CarswellOnt 7871 | Professional Planners | 0 |
| *D.M. Drugs Ltd. V Bywater: Mr. Jim Roberts* | 2013 ONCA 356 | Expert in boiler design | 1 |
| *D.M. Drugs Ltd. V Bywater: Mr. Michael Learmonth* | 2013 ONCA 356 | Expert on fires | 1 |
| *Fielding v Fielding* | 2013 ONSC 1458 | Developmental Psychologist | 0 |
| *McEwing v Canada (Attorney General)* | 2013 FC 525 | Expert in research methodology and design and applied statistical analysis | 0 |
| *R v Chegini* | 2013 ONSC 1082 | Expert Translator | 0 |
| *R v Clark* | 2013 MBQB 130 | Police Officer | 0 |
| *R v Georgiev* | 2013 BCCA 431 | RCMP Officer | 0 |
| *R v Maple Lodge Farms* | 2013 ONCJ 535 | Veterinarian | 0 |
| *R v Williams* | 2013 ONSC 1076 | Police Officer | 0 |
| *Walsh v BDO Dunwoody LLP* | 2013 BCSC 1463 | Legal expert in tax law | 0 |

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|---|---|---|---|
| *Abbott v Abbott* | 2014 NLTD(F) 2 | Accountant | 0 |
| *Bourque-Coyle and Dieppe (City), Re* | 2014 CarswellNB 84 | Expert in urban street design, traffic accidents and road safety | 1 |
| *Bradley v Eastern Platinum Ltd.* | 2014 ONSC 4284 | Mining Expert | 0 |
| *Conseil Scolaire Francophone de la Colombie-Britannique v British Columbia* | 2014 BCSC 851 | Professor of Sociolinguists and Languages | 0 |
| *Decision No. 1748/131* | 2014 ONWSIAT 2593 | Doctor | 0 |
| *Decision No. 858/1212* | 2014 ONWSIAT 1105 | Doctor | 1 |
| *Kobilke v Jeffries* | 2014 ONSC 1786 | Psychiatrist | 1 |
| *Kroeplin v Director, Ministry of the Environment: Mr. Richard James* | 2014 CarswellOnt 5220 | Acoustical Engineer | 0 |
| *Kroeplin v Director, Ministry of the Environment: Mr. William Palmer* | 2014 CarswellOnt 5220 | Engineer with expertise in acoustics. | 0 |
| *MacWilliams v Connors* | 2014 PESC 12 | Doctor | 0 |
| *Maras v Seemore Entertainment* | 2014 BCSC 1109 | Psychiatrist | 1 |
| *Moore v Getahun: Dr. Ronald Taylor* | 2014 ONSC 237 | Orthopedic Surgeon | 0 |

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|---|---|---|---|
| *Moore v Getahun: Dr. Russel Tanzer* | 2014 ONSC 237 | Emergency Room Physician | 0 |
| *Ontario Professional Foresters Assn. v Robertson* | 2014 ONSC 4724 | Professional Forester | 1 |
| *Piccolo v Piccolo* | 2014 ONSC 5280 | Financial Advisor/Accountant | 1 |
| *R v Carter* | 2014 ABPC 291 | Forensic Alcohol Specialist | 0 |
| *R v Hersi* | 2014 ONSC 1258 | Investigator and advisor on peace and security issues in Africa | 0 |
| *R v Lee* | 2014 ONCJ 640 | Police Officer | 0 |
| *R v M(D)* | 2014 ONSC 1747 | Doctor with experience with child abuse victims | 0 |
| *R v Montgomery* | 2014 ONSC 2775 | Expert with regard to biology of lakes, fish habitat and how it is impacted | 0 |
| *R v Murray* | 2014 ABPC 112 | Expertise in wildlife law in the state of Alaska | 0 |
| *R v Natsis: Constable John Hewitt* | 2014 ONCJ 532 | Traffic Accident Reconstruction Expert | 0 |
| *R v Natsis: Constable Robert Kern* | 2014 ONCJ 532 | Traffic Accident Reconstruction Expert | 0 |
| *R v Natsis: Constable Shawn Kelly* | 2014 ONCJ 532 | Traffic Accident Reconstruction Expert | 0 |
| *R v Nguyen* | 2014 BCPC 95 | RCMP Sergeant | 0 |

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|---|---|---|---|
| *R v Pearce: Dr. Jordan Peterson* | 2014 MBCA 70 | Psychologist | 1 |
| *Blatherwick v Blatherwick* | 2015 ONSC 2606 | Business Valuator | 0 |
| *Bustos v Tardif* | 2015 ABQB 202 | Automobile Appraiser | 0 |
| *Dakota Ridge Builders Ltd v Niemela* | 2015 BCSC 581 | Lawyer | 1 |
| *Dustbane Products Ltd V Gifford Associates Insurance Brokers Inc.* | 2015 ONSC 1036 | Insurance Expert | 0 |
| *G. (C.M.) v S (D.W.): Dr. Jacinta Willems* | 2015 ONSC 2201 | Doctor of Naturpathic Medicine | 1 |
| *G. (C.M.) v S (D.W.): Dr. Nicole Lederman* | 2015 ONSC 2201 | Doctor of Chiropractic Medicine | 1 |
| *HLP Solution Inc. c. R.* | 2015 TCC 41 | Computer Science Research and Technology Advisor | 1 |
| *Moore v Getahun* | 2015 ONCA 55 | Orthopedic Surgeon | 0 |
| *Ontario (Ministry of Labour) v Advanced Construction Techniques Ltd* | 2015 CarswellOnt 6803 | Engineer | 1 |
| *P.M. Snelgrove General Contractors & Engineers Ltd. V Jensen Building Ltd.* | 2015 ONSC 585 | Expertise not specified in the motion | 1 |
| *Paur (Committee of) v Providence Health Care* | 2015 BCSC 1008 | Psychiatrist | 0 |

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|---|---|---|---|
| *R v Edison* | 2015 NBQB 74 | RCMP Sergeant | 0 |
| *R v J(N)* | 2015 ONSC 4347 | Forensic Kinesiologist | 1 |
| *Redmon v Krider* | 2015 BCSC 178 | Medical Doctor | 1 |
| *10565 Nfld. Inc. v Canada* | 2015 NLTD(G) 168 | Accountant | 0 |
| *1483489 Ontario Inc. v Air Liquide Canada Inc.* | 2015 ONSC 7343 | Chemical Engineer | 1 |
| *Anderson v Canada* | 2015 NLTD(G) 138 | The expert has worked for many years conducting historical research on Newfoundland and Labrador | 0 |
| *Anderson v Canada* | 2015 NLTD(G) 181 | Psychologist with experience in social work and family therapy | 0 |
| *Babstock v Atlantic Lottery Corp.* | 2015 NLTD(G) 116 | Research Associate on problem gambling | 0 |
| *BC Hydro & Power Authority and IBEW, Local 258 (Petersen Termination), Re* | 2015 CarswellBC 3847 | Police Constable | 1 |
| *Canadian Imperial Bank of Commerce v Deloitte & Touche* | 2015 ONSC 7695 | Accountant | 1 |
| *Eli Lilly Canada Inc. v Apotex Inc.* | 2015 FC 875 | Urologist | 0 |

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|---|---|---|---|
| *Keresturi v Keresturi* | 2015 ONSC 3565 | Unspecified | 1 |
| *Market Surveillance Administrator, Re: Dr. Jeffrey Church* | 2015 CarswellAlta 1400 | Expert in Economics | 0 |
| *Market Surveillance Administrator, Re: Dr. Matt Ayres* | 2015 CarswellAlta 1400 | Expert in Economics | 0 |
| *R v A. (T.)* | 2015 ONCJ 624 | Detective Constable | 0 |
| *R v Dixon* | 2015 ONSC 8065 | Police Constable | 0 |
| *R v Duffy* | 2015 ONCJ 693 | Forensic Accountant | 0 |
| *R v Elmadani* | 2015 NSPC 65 | Psychologist | 0 |
| *R v Esseghaier* | 2015 ONSC 5855 | Psychologist | 1 |
| *R v Fabos* | 2015 ONSC 8013 | Police Sergeant | 1 |
| *R v Tang* | 2015 ONCA 470 | Accountant | 0 |
| *R v Tesfai* | 2015 ONSC 7792 | Detective Sergeant | 0 |
| *Telus Communications Co. and TWU (Mendez), Re* | 2015 CarswellNat 7298 | Family Practitioner of the Grievor | 1 |
| *Wakeley v Wakeley* | 2015 ONSC 3561 | Financial Accountant | 0 |

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|---|---|---|---|
| *Wolney v Selkirk Vinyl Ltd.* | 2015 BCSC 1009 | Significant amount of construction background and experience | 0 |
| *X v Y* | 2015 ONSC 7681 | Senior Social Worker with a Masters in Social Work | 1 |
| *Allard v Canada: Corporal Shane Holmquist* | 2016 FC 236 | Police Corporal | 1 |
| *Allard v Canada: Len Garis* | 2016 FC 236 | Fire Chief | 0 |
| *Anderson v Pieters* | 2016 BCSC 889 | Family Physician | 1 |
| *Arctic Cat Inc. v Bombardier Recreational Productions Inc.* | 2016 FC 1047 | Mechanical Engineer | 0 |
| *Arslan v Sekerbank T.A.S.* | 2016 SKCA 77 | Turkish lawyer | 0 |
| *Baker Estate v Poucette* | 2016 ABQB 557 | Economist | 0 |
| *Bier v Continental Motors, Inc.* | 2016 BCSC 1393 | Lawyer | 0 |
| *Bordin v Iacobucci* | 2016 ONSC 1333 | Unspecified (but likely some sort of economist/financial advisor) | 0 |
| *British Columbia (Workers' Compensation Board) v Flanagan Enterprises (Nevada) Inc.* | 2016 BCSC 650 | Former Superintendent of Transport Canada's Aircraft Evaluation Group | 0 |

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|---|---|---|---|
| *Bruff-Murphy v Gunawardena* | 2016 ONSC 7 | Psychiatrist | 0 |
| *Bye v Newman* | 2016 BCSC 2671 | Accident Reconstruction Expert | 1 |
| *Christoforou and John Grant Haulage Ltd., Re* | 2016 CHRT 14 | Doctor | 0 |
| *Davies v Clarington (Municipality)* | 2016 ONSC 3900 | PhD in Engineering/oil and gas | 0 |
| *Davies v Clarington (Municipality)* | 2016 ONSC 6636 | Chartered Accountant | 1 |
| *Decision No. 1173/16* | 2016 ONWSIAT 1783 | Audiologist | 0 |
| *Dimitrijevic v Pavlovich* | 2016 BCSC 1529 | Doctor | 1 |
| *E (P.G) v C (H.R)* | 2016 BCSC 1316 | Psychologist | 0 |
| *Gordon v Canada* | 2016 ONCA 625 | Economist | 0 |
| *Jossy v Johnson* | 2016 BCSC 1023 | Psychiatrist | 0 |
| *Kitching v Devlin* | 2016 ABQB 212 | Lawyer | 0 |
| *L. (C.G.) v L. (D.K.)* | 2016 ABQB 71 | Accountant | 0 |
| *LBP Holdings Ltd. V Allied Nevada Gold Corp* | 2016 ONSC 6037 | Bankruptcy Specialist | 0 |
| *M(M.) v M(R.)* | 2016 ONSC 7003 | Certified Professional Accountant | 1 |

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|---|---|---|---|
| *Martin Marietta Materials Canada Ltd. V Beaver Marine Ltd.* | 2016 NSSC 225 | Engineer | 1 |
| *Providence Health Care v Dunkley* | 2016 BCSC 1383 | Professor with a focus on sign language | 0 |
| *R v Apetrea* | 2016 ABCA 395 | Forensic Video Analyst | 0 |
| *R v Colpitts* | 2016 NSSC 219 | Chartered Accountant | 0 |
| *R v D(D)* | 2016 ONSC 7249 | Psychologist | 1 |
| *R v Farnham* | 2016 SKCA 111 | Journeyman Electrician | 0 |
| *R v Fracassi* | 2016 ONSC 6120 | Neurologist | 0 |
| *R v Giles* | 2016 BCSC 294 | RCMP Constable | 1 |
| *R v Hood: Dr. Risk Kronfli* | 2016 NSPC 19 | Psychologist | 0 |
| *R v Hood: Dr. Stephen Hucker, and Dr. Lisa Ramshaw* (discussed by the judge together) | 2016 NSPC 19 | Psychologists | 0 |
| *R v Live Nation Canada Inc.* | 2016 ONCJ 223 | Civil Engineer | 0 |
| *R v Morrill* | 2016 ABQB 638 | Psychiatrist | 0 |
| *R v Piechotta* | 2016 BCPC 463 | Police Constable | 0 |

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|---|---|---|---|
| *R v Shafia* | 2016 ONCA 812 | Professor of Women and Gender Studies | 0 |
| *R v Smith-Wilson* | 2016 SKQB 33 | Forensic Video Analyst | 1 |
| *R v Snowdon* | 2016 NSSC 321 | Police Constable | 0 |
| *R v Soni* | 2016 ABCA 231 | Accident Reconstruction Expert (also a police officer) | 0 |
| *R v Sriskanda* | 2016 ONCJ 667 | Police Sergeant | 1 |
| *R v Vader* | 2016 CarswellAlta 1704 | Expert in Human Molecular Genetics | 1 |
| *Rioux and Nova Scotia (Department of Justice), RE* | 2016 CarswellNS 981 | Police Officer | 0 |
| *Rosati v Reggimenti* | 2016 ONSC 7013 | Certified Professional Accountant | 0 |
| *U. (L.A.) v U. (I.B.)* | 2016 ABQB 74 | Psychologist | 0 |
| *Untinen v Dykstra* | 2016 ONSC 4721 | Unspecified | 0 |
| *Uponor AB v Heatlink Group Inc.* | 2016 FC 320 | Engineer | 0 |
| *Virc v Blair* | 2016 ONSC 49 | Business Valuator | 1 |
| *Wise v Abbott Laboratories, Ltd.* | 2016 ONSC 7275 | Doctor | 0 |

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| *Wright v Detour Gold Corp.* | 2016 ONSC 6807 | Investment banker and director of a number of publicly-listed mining companies. | 0 |
| *XPG, A Partnership v Royal Bank of Canada* | 2016 ONSC 3508 | Former Employee of the plaintiff company | 0 |
| *AE v TE* | 2017 ABQB 449 | Psychologist | 0 |
| *Brookfield Residential (Alberta) LP v Imperial Oil Ltd.* | 2017 ABQB 218 | Geoenvironmental Engineer | 0 |
| *Bruff-Murphy v Gunawardena* | 2017 ONCA 502 | Psychiatrist | 1 |
| *Ciba Specialty Chemicals Water Treatments Limited v SNF Inc.* | 2017 FCA 225 | Unspecified | 0 |
| *Cole v Lau* | 2017 BCSC 2610 | Psychiatrist/Radiologist | 0 |
| *Hilton v Brink* | 2017 BCSC 1492 | Orthopedic Doctor | 0 |
| *Hodgson v Musqueam Indian Band* | 2017 FC 509 | Real Estate Appraisal Expert | 0 |
| *J.P. v British Columbia (Children and Family Development): Claire Reeves* | 2017 BCCA 308 | Doctor | 1 |
| *J.P. v British Columbia (Children and Family Development): Glen Woods* | 2017 BCCA 308 | Retired RCMP Officer | 0 |

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| *Kaul v The Queen* | 2017 TCC 55 | Licensed Art Appraiser | 0 |
| *Keresturi v Keresturi* | 2017 ONCA 162 | Expert Valuator | 1 |
| *Level One Construction Ltd. V Burnham* | 2017 CarswellBC 3727 | Journalism Professor | 0 |
| *Lewis v Lewis* | 2017 PECA 11 | Accountant | 0 |
| *Lichtman v R* | 2017 TCC 252 | Rabbi | 0 |
| *Luckett v Chahal* | 2017 BCSC 1031 | Medical Illustrations | 1 |
| *Matsalla v Rocky Mountain Dealerships inc.* | 2017 SKQB 335 | Journeyman Mechanic | 1 |
| *McKitty v Hayani* | 2017 ONSC 6321 | Medical Doctor | 1 |
| *Nerbas v Manitoba* | 2017 MBQB 206 | Infrastructure, Development, and Planning | 0 |
| *Noseworthy v Noseworthy* | 2017 ONSC 2752 | Chartered Professional Accountant | 0 |
| *R v Abbey* | 2017 ONCA 640 | Expert on gang culture | 0 |
| *R v Bookout* | 2017 SKQB 41 | Forensic Alcohol Specialist | 0 |
| *R v Dim* | 2017 NSCA 80 | Nurse/Sexual Assault Examiner | 0 |
| *R v Ennis-Taylor* | 2017 ONSC 5797 | Psychologist | 0 |

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| *R v Ford* | 2017 ABQB 542 | Psychologist | 0 |
| *R v France* | 2017 ONSC 2040 | Forensic Pathologist | 0 |
| *R v Garnier* | 2017 NSSC 259 | Psychologist | 0 |
| *R v Livingston* | 2017 ONCJ 645 | Retired Police Officer | 1 |
| *R v McManus* | 2017 ONCA 188 | Police Officer | 1 |
| *R v Reid* | 2017 ONSC 4082 | Police Detective | 0 |
| *Sivell v Sherghin* | 2017 ONSC 1368 | Urologist | 1 |
| *St. Clair Boating & Marina, a Division of 1537768 Ontario Ltd...* | 2017 ONSC 23 | Fire Investigator | 0 |
| *Stout v Bayer Inc.* | 2017 SKQB 329 | Attorney | 1 |
| *Turner v Dionne* | 2017 BCSC 1924 | Psychiatrist | 1 |
| *Virc v Blair* | 2017 ONCA 394 | Business Valuator | 1 |
| *Walter Energy Canada Holdings, Inc., Re* | 2017 BCSC 53 | Attorney | 0 |
| *Young v Insurance Corp. of British Columbia* | 2017 BCSC 2306 | Forensic Engineer | 0 |

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| *Fortress Real Developments Inc. v Franklin* | 2018 ONSC 296 | Unspecified | 1 |
| *Fraser, Re* | 2018 NSUARB 74 | Engineer | 0 |
| *McKinlay v Zachow: Dr. Ashwani Singh* | 2018 ABQB 365 | Medical Doctor | 1 |
| *Oberholtzer v Tocher* | 2018 BCSC 821 | Orthopedic Surgeon | 0 |
| *R v Natsis* | 2018 ONCA 425 | Traffic Reconstruction Expert | 0 |
| *West Moberly First Nations v British Columbia* | 2018 BCSC 730 | Expert on environmental matters | 1 |

# Persistence and Variability of DNA: Penile Washings and Intimate Bodily Examinations in Sex-Related Offences

JOHN W. BURCHILL*

## ABSTRACT

In 2008 the author conducted a five-year review of police case results, along with an academic and legal literature review surrounding the use of penile swabs obtained from male suspects in sexual assault investigations. This was the first review of its kind in Canada applying laboratory research to front line police practices. In this paper the author conducts a five-year follow-up of case results from 2010-2015 where both penile swabs were taken from the suspect and vaginal swabs were taken from the victim. This article provides an update to the original research, focusing not only on the current state of the law, but also on the value of collecting both penile swabs and vaginal swabs in the same case as evidence may be lost by collecting one but not the other. While some countries like Australia and South Africa have chosen to legislate the taking of penile or intimate samples incident to arrest, others such as Canada and the United States have relied on the common law approach to regulating the admissibility of such evidence. Nevertheless, the review shows that all four of these jurisdictions, as well as England and Wales, recognize the value of the evidence, they just differ on the process for collection and admissibility.

***Keywords:*** penile swab; penile washing; sexual assault; intimate search, bodily examination; forensic DNA analysis

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## I. INTRODUCTION

In 2008, the author conducted a five-year review of police case results along with an academic and legal literature review surrounding the use of penile swabs obtained from suspects in sexual assault cases in Winnipeg, Manitoba. The results were first published in *Police Practice & Research: An International Journal* on June 24, 2010 with iFirst.[1] A number of public presentations were subsequently done by the Winnipeg Police Sex Crimes Unit and Manitoba Public Prosecutions across Canada, outlining the results of the technique and procedures involved in collecting penile swabs from suspects by the Winnipeg Police.[2]

In 2017, a follow-up review of case results from 2010-2015 was conducted where both penile swabs were taken from the suspect and vaginal swabs were taken from the victim. In the author's original *Police Practice & Research* paper the focus was on the presence of the victim's DNA on the penile swab, rather than its persistence and variability in both quantity and quality.

In this review the author uniquely reviewed actual case results where both penile swabs were taken from the suspect and vaginal swabs were taken from the victim in the same case to assess the significance of collecting both for DNA analysis. In addition, the author reviewed current literature and jurisprudence in other common law countries to assess how or to what extent penile swabs may be used in the investigation of sexual assault offences. The question to answer was – are penile swabs from a suspect or vaginal swab from a victim the better source of DNA than the other in terms of presence and time in linking the suspect to the offence?

## II. WINNIPEG CASE REVIEW

In the review of fifty-two case results between 2010 and 2015, it was found that 81% of the penile swabs submitted for analysis yielded female

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1 John W Burchill, "Invasive Searches: Penile Washings, Bodily Examinations, and Other Investigative Considerations for Sex-related Offences" (2011) 12:1 Police Practice & Research at 35-49.

2 *Cf* Barry Pennell, Deborah Carlson & Wendy Friesen, "Invasive searches: penile washings, bodily examinations, and other investigative considerations for sex-related offences" (based on research article by John Burchill) (Presented at the Making a Difference Canada Conference, 18 April 2011) [unpublished]. Copies available on request from the author or Making a Difference Canada.

DNA profiles of varying quality, with 50% developing a full DNA profile of the victim. The time frame between offence, arrest, and penile swab for all cases ranged from 2.5 to 50 hours, with the mean being 10.75 hours. The time frame in which a full DNA profile of the victim was obtained from the penile swab ranged from 2.5 to 25 hours, with the mean being 9.75 hours.[3]

However, in only 35% of the same cases was the suspect's full DNA profile developed on the vaginal swabs taken from the victim. In half of the cases where the full DNA profile of the victim was located on the penile swab, no male DNA profile suitable for analysis was located on the victim's vaginal swab. Similarly, in 44% of the cases where the full DNA profile of the suspect was located on the vaginal swab, no female DNA suitable for analysis was located on the suspect's penile swab. In only 13% of the cases was the full DNA profile of both the victim and the suspect located on both the penile swab and the vaginal swab.

The time between the offence and the taking of the penile swab where no female DNA suitable for analysis was recovered, but DNA of the suspect was obtained from the vaginal swab, ranged from 7 to 21.5 hours, with the mean being 11.5 hours. The shortest period of time between the offence and the taking of the penile swab where female DNA was located, but of an insufficient quantity for analysis, was 4 hours.

These results are similar to a clinical study conducted by scientists at the GENA-Institute of DNA Analysis and the University of Stavanger in 2012 on the presence of female DNA on post-coital penile swabs in a controlled environment with 11 consenting couples.[4] Full female DNA profiles were recovered in 90% of the samples taken between 5 and 12 hours.[5] At the lowest, 67% of the full female profile was typed as an average of two swabs sampled at each time point. Samples collected from three couples at 20, 22, and 24 hours retrieved 100% of the female DNA profile from one couple, but only partial profiles of 37% and 30% from the other two couples.[6]

While female DNA was recovered on all post-coital penile swabs taken at 5 and 24 hour intervals, the quantity and quality was of diminishing value

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3 An additional 31 case results were also examined, however, for a variety of reasons either the penile swab from the suspect or the vaginal swab from the victim were not examined. In just under a half of those 31 cases no charges were laid.

4 Ragne Kristin B Farmen, Ingerborg Haukeli, Peter Ruoff & Elin S Frøyland, "Assessing the presence of female DNA on post-coital penile swabs: Relevance to the investigation of sexual assault" (2012) 9:7 J Forensic Leg Med 386-389.

5 *Ibid.*

6 *Ibid.*

for DNA profiling.[7] Nevertheless, the Farmen study confirms that skin cells sloughed off the inside of the vaginal walls can be reliably collected on a suspect's penis where recent penetration has occurred.[8] While a warrant or other court order may be obtained to carry out a penile swab on a suspected offender, considering the nature of the offences involved and the need to prevent perishable evidence under the control of the accused from being destroyed, officers searching incidental to a lawful arrest may still be justified, providing they have reasonable grounds and the seizure is done within both a reasonable time and manner (e.g. in private and by a person of the same sex).

From both a clinical and practical level these reviews confirm that penile swabs in conjunction with vaginal swabs will yield significant confirmatory evidence of contact between the victim and suspect in cases of recent sexual assault. However, they do not always co-exist. The DNA evidence is highly variable in both quantity and quality and may persist in one, but perish in the other. While a full DNA profile of the victim was found to exist for up to 25 hours in both reviews, the results also showed that a full DNA profile may not be recovered at all within a matter of hours. Due to this variability, whether from natural or environmental factors such as wiping, washing, body heat, urination, bacteria, or sweat, time may be of the essence in collecting the sample.

As the persistence or perishability of the victim's DNA on a penile swab has been the subject of several court decisions since 2008, the purpose of this supplement is to provide an update to the original paper first published in 2010 and any current academic or legal literature on the practice in Canada and elsewhere, including the United States, England and Australia.

## III. JURISPRUDENCE

### A. Canada

Prior to the completion of this review, on June 23, 2016 the Supreme Court of Canada upheld the warrantless seizure and DNA analysis of penile swabs taken in 2011 from a suspect incident to his arrest by the Edmonton Police in *R v Saeed*.[9]

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7 *Ibid.*

8 *Ibid.*

9 *R v Saeed,* 2016 SCC 24, aff'g 2014 ABCA 238 [*Saeed*].

In an 8 to1 majority the Supreme Court in *Saeed* found that while a penile swab constitutes a significant intrusion on the privacy interests of an accused, the police may nonetheless take a swab incident to arrest if they have reasonable grounds to believe that the search will reveal and preserve evidence of the offence for which the accused was arrested, and the swab is conducted in a reasonable manner (in this case by the accused at the direction of the police). Specifically the Court stated:

> Penile swabs performed incident to arrest enable the police to preserve important evidence. If this evidence is not promptly seized, it runs the risk of degrading or even worse, being destroyed by the accused... It can be crucial in the case of complainants who are unable to testify, such as children, adults with disabilities, or those who have died or suffered serious injuries as a result of the offence or otherwise.[10]

As an example, the Supreme Court cited *R v Laporte,*[11] a decision of the Manitoba Court of Appeal that was handed down less than two months earlier. In that decision the Court of Appeal also upheld the collection of a complainant's bodily fluids from a penile swab as important evidence. The author's *Police Practice & Research* paper on penile swabs[12] was highlighted as an example of the commentary available showing police authorities have a legitimate concern that, if not collected in a timely manner, the type of evidence available from penile swabs will disappear.

In addition, at paragraph 45 in *Saeed*, the Supreme Court added that "a penile swab is not designed to seize the accused's own [DNA] but rather, the complainant's," which is not part of the accused and does not reveal anything about him.[13] Accordingly, accused persons do not have a significant privacy interest in the complainant's DNA, any more than they have a significant privacy interest in drugs that have passed through their digestive system.

Subsequent to the decision in *Saeed*, on January 19, 2017 the Supreme Court released its decision in *R v Awer,*[14] another penile swab case, sending

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10 *Ibid* at para 59.

11 *R v Laporte*, 2012 MBQB 227, aff'd 2016 MBCA 36 [*Laporte*]. Another recent case applying *Laporte* and the admissibility of penile swabs is the decision of Justice Munroe in *R v Johnson*, 2016 ONSC 3947.

12 Burchill, *supra* note 1.

13 *Saeed supra* note 9 at para 45.

14 *R v Awer,* 2017 SCC 2, rev'g 2016 ABCA 128 [*Awer*]. Also see appeal factums filed in the Supreme Court online: Respondent's Factum: <www.scc-csc.ca/WebDocuments-DocumentsWeb/37021/FM020_Respondent_Her-Majesty-the-Queen.pdf>

it back for re-trial. However, the issue was not that the victim's DNA existed on the penis or the manner of search, rather it was the scrutiny the two DNA experts were subjected to by the trial judge.[15]

The defence expert, Dr. Libby advocated in favour of innocent explanations for the presence of the complainant's DNA on the appellant's penis: the complainant's DNA could have been "everywhere"; it could have made its way from person to person and thing to thing (such as a toilet, cans, towels, and countertops); the process is complicated and involves many factors. The accused testified that he did not have sexual contact with the complainant. He suggested that his entire, very large, penis entered a freshly-flushed toilet bowl and might have encountered the complainant's DNA therein while he either urinated (examination-in-chief) or defecated (cross-examination). Or, the DNA might have travelled from the complainant to the true culprit, and then possibly to other people and surfaces, before landing on his penis.[16]

The trial judge subjected the testimony of Dr. Libby to intense scrutiny and found that his evidence was speculative and without scientific foundation. However, the trial judge did not subject the Crown's expert, Steven Denison, to similar scrutiny. As a result, the Supreme Court found that:

> [I]n our respectful view, the materially different levels of scrutiny to which the evidence of the two experts was subjected — none for the Crown expert and intense for the defence expert — was unwarranted, and it tended to shift the burden of proof onto the appellant. In these circumstances, we feel obliged to quash the conviction and order a new trial.[17]

While the Supreme Court decision in *Awer* was very short, it was the acceptance of the evidence proffered by the Crown witness without scrutiny that raised the concern of at least one commentator:

> Denison, the Crown's expert in *Awer*, opined that the amount of DNA found on Awer indicated it was transferred through direct contact with a wet body fluid source because that was the case in previous observations he had made during his career. This opinion, which was central to the decision, fails the guidelines set forth in the NAS Report, the *Daubert* factors, and, more generally, many of

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[perma.cc/9F6K-K55F]; Appellant's Factum: <www.scc-csc.ca/WebDocuments-DocumentsWeb/37021/FM010_Appellant_Nihal-Awer.pdf> [perma.cc/677L-4L27]

15 *Ibid.*

16 *Ibid.*

17 *Ibid* at paras 6-7.

> science's best practices. In particular, Denison's methodology was apparently untested, likely biased, and of dubious precision.[18]

In the case of *Laporte*,[19] which went to trial in 2012, and involved two sexual assaults and two penile swabs taken in 2007 and 2008, Justice Schulman found that both searches contravened the accused's rights to be free from an unreasonable search for two reasons: First, because the prosecution had not proven that the common law power of search incident to arrest authorized such searches in these circumstances; and secondly, particularly for the 2008 seizure, the manner in which the search was conducted was unreasonable as the police had not afforded the accused the right to consult with legal counsel first. Consequently, Justice Schulman admitted the DNA evidence from the 2007 seizure as the police had not acted in bad faith or against established authority, but excluded the evidence from the 2008 seizure.

Upon further review in 2016 the Manitoba Court of Appeal found that the 2007 search was lawfully conducted incident to arrest and was in compliance with Laporte's constitutional rights:

> The collection of a complainant's bodily fluids from a penile swab of an accused person in a sexual assault investigation can provide important evidence. There is sufficient commentary in the case law and academic articles to say that the police authorities rightly have a legitimate concern that, if not collected in a timely manner, the type of evidence available from penile swabs will disappear...Also see John W. Burchill, "Invasive searches: penile washings, bodily examinations, and other investigative considerations for sex-related offences" (2011) 12:1 Police Practice & Research: An International Journal (24 June 2010). Therefore, the law-enforcement interests of penile swab searches are significant.[20]

As noted above, the decision in *Laporte* was subsequently considered by the Supreme Court of Canada decision in *Saeed* less than two months later. Affirming the decision of the Alberta Court of Appeal, in particular the

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18 Jason M Chin & Scott Dallen, "R v Awer and the Dangers of Science in Sheep's Clothing" (2016) 63; Crim LQ 527-554. Also available at SSRN online at: <ssrn.com/abstract=2815537> [perma.cc/Q695-6ZML].

19 *Laporte, supra* note 11.

20 *Laporte, supra* note 11 at para 49. See also *R v Cortes Rivera*, 2017 ABQB 275 at para 96-124, where Goss J found a s 8 *Charter* breach, not because of the type of search, rather because (i) there were too many officers present during the procedure, (ii) it was not conducted so as to ensure that the accused was not completely undressed at any one time, and (iii) a complete record was not created of the procedure . Nevertheless he found the breaches were at the low end of the spectrum and did not have a significant impact on the interests of the accused.

dicta of McDonald JA, the Supreme Court held that there had been no breach of the appellant's constitutional rights because the seizure was made reasonably and in exigent circumstances and was, accordingly, a reasonable search incident to arrest. As noted by McDonald JA in the Court of Appeal "it would be an affront to one's sense of justice for the police in this case to be required to stand idly by while highly relevant but time sensitive DNA evidence disappeared forever."[21]

While there was evidence at trial presented by Kenneth Hunter, an expert witness, that DNA of a complainant transferred through sexual intercourse could degrade in a matter of hours as a result of urination, bacteria, sweat, etc., Justices Bielby and Watson JJA, concluded that the evidence led by the Crown was too thin to support the seizure as being incident to the arrest based on exigent circumstances as the police officers themselves had not testified to such a concern – only that they were concerned with preserving evidence. However, they agreed the evidence should nonetheless be admitted.

In his testimony Kenneth Hunter referred to a paper published "in October," which showed that in a study of consenting adults DNA from penile swabs was shown to degrade after five hours in a clinical setting. Although DNA was also found in samples up to 24 hours, he opined that numerous factors in non-clinical settings from wiping, washing, urination, bacteria, sweat, etc. were too many and too varied to pinpoint an actual time frame. This opinion would be consistent with the findings in the review of Winnipeg Police case results.[22]

Although the title of the "October" paper was not cited, from a literature review it would appear the paper referred to by Kenneth Hunter was the one published by Farmen et al in the *Journal of Forensic and Legal Medicine*.[23] The conclusion of the authors in that paper, based on swabs taken from 11 consenting couples, was that a full female DNA profile could be recovered in the majority of cases between 5 and 12 hours in a clinical

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21 *Saeed, supra* note 9 at para 36 (ABCA).

22 In addition to these factors I would also add the capabilities and thresholds set by the testing laboratory for sample size. It is well known, for example, that the forensic laboratories in England and Wales will test a smaller amount of starting material, meaning that a profile can be obtained from only a few cells, compared to the RCMP Laboratory.

23 Farmen Haukeli, Ruoff, & Elin S Frøyland, *supra* note 4.

setting. However, the DNA evidence was highly variable in both quantity as well as quality and may have significantly degraded within 24 hours.

In more recent recommendations for the collection of forensic specimens from complainants and suspects, the Faculty of Forensic & Legal Medicine of the Royal College of Physicians has stated that the recovery of body fluids/DNA/other material from a penile swab (even if a condom was purported to have been used) is possible where intercourse has occurred within 3 days (72 hours). Recovery of body fluids/DNA/other material from vaginal swabs is possible where vaginal intercourse with or without anal intercourse has occurred within 7 days (168 hours); or 3 days (72 hours) where only anal intercourse has occurred (even if a condom is purported to have been used). However, the Faculty cautioned that these timescales are based on the maximum seen in published persistent data to date and the examining person must decide on a case-by-case basis, as exceptions are possible:

> Information from other sources will inform the decision regarding which samples are relevant. Officers submitting samples may have further information regarding the circumstances which will direct the forensic strategy and assist with decisions regarding the relevance and submission of items for forensic analysis.[24]

As most accused are not arrested immediately at the scene, and only after interviewing the victim and conducting some preliminary investigation, there will already be the passage of some time, possibly many hours, before the suspect is arrested and detained. Considering the shortest period of time between the offence and the taking of a penile swab where female DNA was located but insufficient for analysis in the Winnipeg cases was 4 hours, this already puts the police at a disadvantage in preserving the evidence using other procedures.

The impact of a penile swab on the accused's *Charter* protected interests is as profound as one can imagine. Indeed, in her review of the *Saeed* decision, Christine Mainville believes that the Supreme Court "failed to sufficiently recognize the acute personal privacy interest engaged in that area

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[24] UK, The Faculty of Forensic & Legal Medicine of the Royal College of Physicians, *Recommendations for the collection of forensic specimens from complainants and suspects* (Recommendations) produced by Dr. Margaret Stark and the Forensic Science Subcommittee (Faculty of Forensic & Legal Medicine, 2018), online: <fflm.ac.uk/publications/recommendations-for-the-collection-of-forensic-specimens-from-complainants-and-suspects-3/> [perma.cc/29TR-PTQ9].

of the body aptly referred to in common parlance as a person's 'private parts.'"[25]

However, when balancing the interests of the community in adjudicating the case on its facts, the Alberta Court of Appeal stated in *R v Arcand* that trial judges should also consider the impact of a major sexual assault on the victim and the sense of defilement, shame and embarrassment they must endure not only from the assault itself, but also from having swabs taken of their bodily orifices by others to collect evidence.[26]

## B. United States

The results in the United States have been mixed and to date there has been no appeal on the issue to the United States Supreme Court. Nevertheless, the results of DNA analysis from penile swabs have generally, but not always, been admitted at trial where exigent circumstances existed for the seizure.

For example, in 2010 the D.C. Court of Appeal affirmed the trial court's denial of a motion to suppress penile swab evidence in *Kaliku v United States*[27] by applying the exigent circumstances doctrine. The court held that because of the delicate nature of the DNA evidence in this case and the area in which it was located, it could easily have disappeared. Therefore, there was urgency to its collection, a time-sensitivity that justified the officer's reliance on exigent circumstances, rather than seeking a court order.

More recently, in *Jackson v State,*[28] the Georgia Court of Appeal reviewed the decision of an accused indicted for rape and aggravated sodomy. The accused was arrested shortly after the alleged rape and the police obtained a penile swab incident to arrest to preserve any latent DNA that might be on the surface of his penis. The police officer did not secure a warrant for the swab believing, based on his training as a sexual assault investigator, that

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25 Christine Mainville, "R v Saeed: Penile Privacy and Penal Policy" (2017), 81 SCLR (2d) 195 at para 3

26 *R v Arcand,* 2010 ABCA 363 at para 176-177.

27 *Kaliku v United States,* 994 A (2d) 765 (DC Cir 2010) [*Kaliku*].

28 *Jackson v State,* 784 SE (2d) 7 (Ga Ct App 2016) [*Jackson*]. Other recent appellate cases include *People v Fulton,* 141 Cal Rptr 3d 374 (Cal Ct 2012); and *State v Lee*, 967 NE (2d) 529 (Ind CA 2012).

any potential evidence was "fleeting or...could be compromised in a short amount of time."[29]

Both the trial court and the Court of Appeal concluded that exigent circumstances permitted the penile swab. Although no Georgia authority addressed the precise issue, the court adopted the principles in *Kaliku*. They did so as given the delicate and easily compromising nature of DNA evidence, "there was urgency to its collection which justified the officer's reliance on exigent circumstances, rather than seeking a court order."[30]

Penile swabs may also be obtained with consent. In 2015, the Maryland Court of Appeals in *Varriale v State*[31] admitted a DNA profile of the accused that was obtained from a consent penile swab in an unrelated rape investigation in 2012, to a 2008 burglary case where an unknown DNA profile had been developed. Although the DNA profile from the penile swab supported the conclusion that he did not commit the alleged rape, because Varriale had not put any conditions on what use could be made of his consent sample the police uploaded it to a local police DNA database and an automatic search revealed the match to the earlier crime. As a result of the lack of conditions on subsequent use, the Court admitted the evidence in the older case. The United States Supreme Court refused to hear a further appeal in 2016.[32]

The procedures for obtaining and analyzing penile swabs are laid out in many forensic collection guides for law enforcement in the United States, such as the use of Penile Swabbing Forensic Evidence Kits in the Physical Evidence Manual of the Oregon State Police, the report on Laboratory Analysis of Biological Evidence, and the Role of DNA in Sexual Assault Investigations.[33]

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29 *Jackson*, *supra* note 28 at para 6.

30 *Ibid* citing *Kaliku*, *supra* note 27 at 780.

31 *Varriale v State*, 444 Md 400, 119 A(3d) 824, (Md Ct App, 2015).

32 This should be clearly distinguished in Canada where any consent DNA sample provided by a suspect, including the results in electronic form, shall be destroyed without delay when it is determined it did not match the crime scene DNA it was being compared to (see s. 487.09(3) Criminal Code of Canada). However forensic laboratory personnel should not even be searching a penile swab for the accused's DNA profile, rather the sole purpose of the swab should be to locate the victim's DNA (see *R v Saeed*, *supra* note 9 at para 45).

33 Oregon, Operations Manager, Physical Evidence (Oregon State Police Forensic Services Division, September 2015) at 36-37. See also Sergeant Joanne Archambault et el, Laboratory Analysis of Biological Evidence and the Role of DNA in Sexual Assault

## C. Australia

### *1. Model Forensic Procedures Bill*

Unlike Canada and the United States where the admissibility of penile swab evidence is primarily argued on common law principles of search incident to arrest, most Australian states have adopted in whole or in part the *Model Forensic Procedures Bill 2000* (Model Bill) drafted by the Model Criminal Code Officers Committee.[34]

The draft Bill provided for: the power to request or require forensic procedures on suspects, convicted offenders and volunteers; a process for carrying out forensic procedures, including safeguards for those undergoing forensic procedures; rules in relation to evidence improperly obtained from forensic procedures; the regulation of DNA database systems; and a scheme for interstate jurisdiction.

While there is some variation between the different States, I will focus only on South Australia as an example of the processes and procedures involved in conducting intimate searches (i.e. penile swabs).

### *2. Criminal Law (Forensic Procedures) Act*

As a result of the Model Bill, the *Criminal Law (Forensic Procedures) Act* of South Australia was amended in 2002 allowing the police to apply for an interim order from a magistrate to conduct an "intimate forensic procedure,"[35] which was defined as involving the "exposure of, or contact with, the genital or anal area, the buttocks or, in the case of a female, the breasts."[36]

The application for an interim order could be granted if the magistrate was satisfied that the evidence (or the probative value of evidence) may be lost or destroyed unless the forensic procedure was carried out urgently; and there were reasonable grounds to believe that the grounds for making a final order would ultimately be established. However, the evidence obtained was

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Investigations, (module) (End Violence Against Women International, 2015). Penile swabbing is mentioned throughout.

34 Model Criminal Code Officers Committee, *Final Draft: Model Forensic Procedures Bill and the Proposed National DNA Database* (2000), Standing Committee of Attorneys-General, Canberra.

35 *Criminal Law (Forensic Procedures) Act 1998* (SA) 1998/8, as amended by *Summary Offences (Searches) Amendment Act 2000* No. 54 of 2000.

36 *Ibid.*

inadmissible against the person unless a final order was made confirming the interim order by another magistrate.

For an final order to be granted the court needed to be satisfied there were reasonable grounds to suspect that the respondent had committed a criminal offence; there were reasonable grounds to suspect that the forensic procedure could produce material of value to the investigation of the suspected offence; and the public interest in obtaining evidence tending to prove or disprove the respondent's guilt outweighed the public interest in ensuring that private individuals were protected from unwanted interference.

In 2007 a new *Criminal Law (Forensic Procedures) Act* was introduced in South Australia.[37] While similar, the substantive change was that a senior police officer, defined as a police officer of or above the rank of Inspector, could make an order authorizing the carrying out of a forensic procedure (s. 19). In effect the senior police officer assumed the duties of the interim issuing magistrate under the previous Act.[38]

Conducting a search pursuant to an order of a senior police officer is akin to a writ of assistance that existed in Canada until 1985. However, its use and application by the police as a tool to conduct warrantless searches and seizures was severely criticized by the Law Reform Commission of Canada in its 1983 report on *Writs of Assistance and Telewarrants*.[39] In effect, they lacked the neutrality and impartiality of an independent individual. As noted in the 1984 Supreme Court of Canada decision, *Hunter v Southam Inc*, "the person performing this function need not be a judge, but he must at a minimum be capable of acting judicially."[40]

Nevertheless, in addition to being satisfied that there are reasonable grounds to suspect that the accused has committed a serious offence and that there are reasonable grounds to suspect the forensic procedure could produce material of value to the investigation, the senior officer is also

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37 *Criminal Law (Forensic Procedures) Act 2007* (SA) *2007/58* [*2007 Forensic Procedures Act*].

38 See *R v Priestley*, [2012] SASC 119, for a decision involving a penile swab taken from an accused post 2007. There was no argument as to admissibility of the DNA evidence, just the inference to be drawn and whether it proved penetration had occurred. See paras 39 and 52.

39 Law Reform Commission of Canada, *Report 19: Writs of Assistance and Telewarrants*, Catalogue No J31-39/1983(Ottawa, Minister of Supplies and Services Canada, 1983). Also see the *Criminal Code of Canada*, RSC 1985, c 19, s 200, as it then applied to the repeal of Writs of Assistance by police.

40 *Hunter v Southam Inc.,* [1984] 2 SCR 145 at 163, 33 Alta LR (2d) 193.

required under s. 19 of the 2007 *Forensic Procedures Act* to weigh the public interest factors previously required by the confirming magistrate under the previous Act.

While the remainder of the procedures under ss. 21-27 remained similar (i.e. it must be carried out in private; by a qualified person; by a person of the same sex; a witness is allowed to be present; outlines when an audiovisual record must be made, etc), the 2007 Act also placed a time limit on the execution of the order.[41] Specifically, it may only remain in force for a period of 12 hours and cannot be extended or renewed.[42] Though, nothing in the legislation appears to prevent the making of another order.[43]

### *3. R v Jessop*

In *R v Jessop,* a 2015 trial decision involving the vaginal penetration of an 11-year old girl by her mother's boyfriend, the evidence consisted of samples taken from the accused during a forensic procedure conducted by the police within 13 hours of the offence.[44] The evidence included swabs from the accused's hands, fingernails and penis. The victim's DNA was found on both the accused's left hand and penis.

A physical examination of the victim did not locate any semen in her vagina, however, friction injuries to her erythema and hymen consistent with the forceful application and/or insertion of either fingers or a penis were observed. Based on the nature of the injuries it was determined that they had occurred within 12 hours of the examination.[45]

The accused argued the injuries were self-inflicted and that, considering the accused lived with the family, the victim's DNA on his hands and penis were from innocent contact. Specifically, the accused submitted that the DNA of the victim found on his penis could have been a secondary transfer

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41 *2007 Forensic Procedures Act*, *supra* note 37.

42 *Ibid.*

43 In *The Queen v CS* [2012] NTSC 94, the police took a penile swab from a sexual assault suspect 35 hours after being taken into custody. While s 137(2) of the *Police Administration Act* (NT) "permits a member of the police force, for a reasonable period, to continue to hold a person" for the purpose of obtaining evidence "in relation to an offence" that involves the person in custody, Justice Barr held that 35 hours was not reasonable (paras 33-34).

44 *R v Jessop,* [2015] SADC 168 at para 123 [*Jessop*].

45 *Ibid.*

by the accused having held his penis when using the toilet. The argument is not unlike that made by the defence in *R v Awer*.[46]

Considering the totality of the evidence, the trial judge convicted the accused, having no doubt that his fingers touched the complaint's genitals based on the recent bruising. However, whether he had used his penis in relation to touching her was not certain. It is possible, stated the judge, "that his hand came in contact with his penis after he touched the complainant and there was a transfer of DNA both onto his penis…and the accused must be given the benefit of this doubt."[47]

## D. South Africa

Like South Australia, South Africa has also recently codified procedures for taking intimate samples pursuant to section 36D of the *Criminal Law (Forensic Procedures) Amendment Act 2013*, so long as they are taken "(i) by a registered medical practitioner or registered nurse; and (ii) in accordance "with strict regard to decency and order."[48]

Unlike South Australia however, South Africa has an enshrined Bill of Rights in its Constitution to protect human dignity, bodily integrity, and privacy of the person.[49] However, the legislative scheme that has been enacted in both countries is similar to the common law powers of search incident to arrest in Canada, which also has a Charter of Rights to protect against unreasonable searches,[50] but with an additional level of oversight provided for by a police inspector not involved in the investigation.

While "strict regard to decency and order" is not defined in the South African legislation, the application and criteria for an order to conduct an intimate forensic procedure would likely be similar to the common law jurisprudence adopted in Canada in *R v Golden* [51] or the similarly legislated provisions in South Australia.

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46 *Awer, supra* note 14.

47 Jessop, *supra* note 4 at para 123.

48 *Criminal Procedure Act* (S Afr), No. 51 of 1977 as amended by the *Criminal Law (Forensic Procedures) Amendment Act* (S Afr), No. 37 of 2013, s 36D(7)(d) [emphasis added].

49 See Constitution of the Republic of South Africa, No. 108 of 1996, c 2, ss 10, 12(2)(b) & 14(a).

50 *Canadian Charter of Rights and Freedoms*, s 8, being Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 8 states "Everyone has the right to be secure against unreasonable search or seizure."

51 *R v Golden*, 2001 SCC 83.

## E. England and Wales

Pursuant to s. 53 of the *Police and Criminal Evidence Act* (PACE) all common law powers of constables to search a person incident to arrest were abolished in 1984. These powers were subsequently replaced by a complete legislative code of search powers promulgated pursuant to the Act.[52]

When PACE was originally enacted s. 62 stated that all searches for "intimate" samples could only be conducted by consent. Section 65 further defined intimate samples as blood, urine, pubic hair, dental impressions or physical examination of a bodily orifice. Non-intimate searches such as pulled head hair, fingernail scrapings and skin impressions could be done without the person's consent.[53]

However, a problem arose as to what a penile swab was. Was it a "physical examination of a bodily orifice" or was it more akin to that of a fingernail scraping or "skin impression"? As it did not fit squarely into either category a report into *Modernising Police Powers* recommended that PACE be amended to further define intimate searches so as to include penile swabs as an intimate sample.[54]

The Home Office recommendations were subsequently adopted and on July 1, 2005. Section 119 of the *Serious Organized Crime Act* came into force amending s. 65 of PACE so that an intimate search included "a swab taken from any part of a person's genitals (including pubic hair) or from a person's body orifice other than the mouth."[55] However, swabs taken from other parts of the body may still be obtained without the person's consent.

As such, penile swabs can only be done in England and Wales if the suspect consents. While this could result in the loss of significant probative evidence, under s. 62(10) of PACE a judge or jury may draw an adverse inference against anyone who refuses to provide a consent sample.

As there is no such adverse inference provision in the *Criminal Code of Canada* the police and/or prosecutors cannot rely on such a presumption in Canada. While similar adverse inference provisions can be found in

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52 *Police and Criminal Evidence Act 1984* (UK), 1984, c 60. [PACE]. Similar provisions exist pursuant to s. 62 of the *Police and Criminal Evidence (Northern Ireland) Order* 1989 (NI),SI 1989/1341. This criteria was adopted in Canada: *Golden*, *supra* note 51, and applied in *Saeed*, *supra* note 9 at para 78.

53 *Ibid.*

54 UK, Home Office, *Policing: Modernising Police Powers to Meet Community Needs* (Summary of Responses) (London: Home Office, 2004) at 22.

55 *Serious Organised Crime and Police Act* 2005 (U.K.), 2005, c 15.

family law statutes regarding issues such as parentage, [56] a similar provision in criminal law statutes would likely violate the principle regarding the presumption of innocence. For an in-depth discussion on this topic see the Supreme Court of Canada's 1994 decision in *R v Laba* [57] and John Webster's paper on "The Proper Approach to Detection and Justification of Section 11(d) Charter Violations Since Laba."[58]

In fact, in *F.(S.) v AG Canada*,[59] an early challenge to the DNA warrant legislation in Canada, the Ontario Superior Court held that drawing of an adverse inference for refusal to comply was considered unrealistic and would provide evidence of diminished reliability to that secured through comparative forensic testing. Citing the Scottish Law Commission, *Report on Evidence: Blood Group Tests, DNA Tests and Related Matters*, Justice Hill stated at paragraphs 115-118 that "evidence is preferable to inference as a basis for a criminal conviction."[60] Justice Hill also adopted the reasoning of the Law Review Commission of Canada Report 25, *Obtaining Forensic Evidence* that "the very allowance of an adverse inference may not be logically defensible in any case where the subject has failed or refused to submit to an investigative procedure of a particularly intrusive nature."[61]

Nevertheless, in *Saeed*, the Supreme Court of Canada distinguished the legislative regime in England and Wales as striking an inappropriate balance in the Canadian context, holding that the approach in England and Wales "effectively disregards the interests of victims of sexual assault...and all but ignores the public interest in bringing sexual offenders to justice."[62]

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56 *Cf Family Maintenance Act of Manitob*a, CCSM c F20, s 21(3) which states that the court may draw any inference it considers appropriate regarding parentage where a person refuses to submit to a blood test or other genetic test.

57 *R v Laba*, [1994] 3 SCR 965, 120 DLR (4th) 175

58 John Webster, "The Proper Approach to Detection and Justification of Section 11(d) Charter Violations Since Laba" (1995) 39 CR-ART 113.

59 *F(S) v Canada (AG)*, 182 DLR (4th) 336, 141 CCC (3d) 225, (Ont Gen Div), rev'd182 DLR (4th) 336, CRR (2d) 41.

60 *Ibid* at 115-118, citing Scotland, Scottish Law Commission, *Report on Evidence: Blood Group Tests, DNA Test and Related Matters* (Scot Law Com No 120) (Edinburgh: Her Majesty's Stationery Office, 1989).

61 Law Reform Commission of Canada, *Report 25: Obtaining Forensic Evidence*, Catalogue No J31-45/1985(Ottawa: Law Reform Commission of Canada, 1985).

62 *Saeed, supra* note 9 at para 61.

## IV. CONCLUSION

In the author's original *Police Practice and Research paper* the focus was more on the presence of female DNA on the penile swab, rather than its persistence and variability in both quantity and quality.

In the current review, from both a clinical and practical level penile swabs obtained in conjunction with vaginal swabs will yield significant confirmatory evidence of contact between the victim and suspect in cases of recent sexual assault. However, the DNA evidence is highly variable in both quantity and quality. While a full DNA profile of the victim may persist for up to 25 hours, due to natural or environmental factors such as wiping, washing, body heat, urination, bacteria, or sweat, it may be significantly degraded within a few hours that no suitable profile for analysis is developed. As such, time may be of the essence in collecting the sample regardless of the possibility female DNA suitable for analysis might survive for 25 hours in individual cases.

While some countries like Australia and South Africa have chosen to legislate the taking of penile or intimate samples incident to arrest, others such as Canada and the United States have relied on the common law approach to regulating the admissibly of such evidence. England and Wales, on the other hand, has made the evidence of such searches inadmissible without consent, but incorporated a reverse onus prevision where consent is refused. Nevertheless, all these jurisdictions recognize the value of the evidence, they just differ on the manner in which it is collected.

# Lost in Translation? The Difference Between the Hearsay Rule's Historical Rationale and Practical Application

CHRISTOPHER SEWRATTAN *

FROM THE PRACTITIONER'S DESK

## ABSTRACT

The article examines the differences between the hearsay rule's historical rationale and current application. The analysis occurs on two levels. The hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the doctrine itself. Practical considerations in the modern practice of criminal law are considered to determine if they create any differences. Section II explains in brief the hearsay rule's historical rationale. Section III considers the difference between the hearsay rule's historical rationale and the practical application of the exclusionary hearsay rule. The differences between the hearsay rule's historical rationale and practical application are described, and it is for the reader to determine whether each difference is positive or negative development. Positions are taken on instances where practical considerations in the modern practice of criminal law create a difference between the historical rationale and practical application of the hearsay rule. In such instances, there is neither a principled nor policy reason for the difference between the hearsay rule's historical rationale and its practical application.

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## I. INTRODUCTION

"Good my Lords, let my accuser come face to face, and be deposed,"[1] pleaded Sir Walter Raleigh. The year was 1603 and Raleigh was on trial for treason in England.[2] He was alleged to have conspired to kill King James I. The prosecution's chief witness was Lord Cobham, an alleged co-conspirator. Interrogated in the Tower of London, Cobham provided a written confession that implicated Raleigh.[3] Cobham recanted the confession before the trial. Cobham would recant again if he was brought to court and cross-examined.[4] The prosecution refused to produce Cobham as a witness though. Treason trials were prosecuted largely through hearsay. The rationale was plain and prejudiced: treason trials were high stakes, and allowing a witness to be cross-examined would make it easier for the accused person to secure an acquittal.[5] Raleigh was convicted on the strength of Cobham's hearsay. He was sentenced to death and beheaded.

The spectre of Raleigh's trial continues to haunt the hearsay rule's historical rationale. This article examines the differences between the hearsay rule's historical rationale and current application.[6] It is a conceptual exercise which occurs in bite sized steps. There are three aspects to the hearsay rule's historical rationale that were created by five factors. Section II discusses the hearsay rule's historical rationale, identifying its three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. Section II discusses the five factors that gave rise to the hearsay rule's tripartite rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. The five factors are important beyond their historical significance. They are used to measure the extent to which there is a difference between the hearsay rule's historical rationale and practical application.

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1 David Jardine, *Criminal Trials*, vol 1 (London: Charles Knight, 1832) at 427.

2 *Ibid* at 425-426.

3 *Ibid* at 422-423.

4 Gordon Cudmore, *The Mystery of Hearsay* (Toronto: Carswell, 2009) at 18.

5 *Ibid* at 19-20.

6 Throughout the article the terms current and practical application are used in interchangeably. The frame of discussion is how the hearsay rule is currently applied in practice.

Section III does the actual measuring. Section III considers the difference between the hearsay rule's historical rationale and the practical application of the exclusionary hearsay rule. There are two levels of examination in this section. First, the hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the modern hearsay doctrine. Second, practical considerations in the modern practice of criminal law are examined to identify differences.

The analysis in this article is mostly descriptive. The reader must determine whether differences between the historical rationale and practice application of the hearsay doctrine is positive or negative development. A rule of evidence can have multiple and different purposes over time. Mirjan Damaška reminds us that:

> a factor that provides a good justification for an evidentiary rule can – as part of the motivational syndrome for its acceptance – easily find a place in the causal story describing the rule's origin. But this is not always the case: persuasive reasons can be advanced in favour of a particular evidentiary doctrine or practice although it is also clear that these reasons played no part in its genesis.[7]

A position is taken on instances where practical considerations in the practice of criminal law create a difference between the historical rationale and practical application. In such instances, there is neither a principled nor policy reason for the difference between the hearsay rule's historical rationale and its practical application.

The article aids in understanding what the hearsay rule is, where it comes from, and where there exists incongruence between the rule's theoretical purpose and practical application. These lessons can guide the doctrine's development to help ensure that the hearsay rule's application is consistent with its theoretical purpose.

## II. The Hearsay Rule's Historical Rationale

The hearsay rule has three aspects to its historical rationale: inherent reliability, procedural reliability, and fairness in the adversarial process. Five

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7 *Ibid* at 3.

factors underlie this rationale. This section will canvass the literature's major theories about the hearsay rule's historical rationale. The section sets a base to appreciate how five factors influenced the hearsay rule's development, and how these five factors underlie the hearsay rule's historical rationale. Section III will use the five factors to measure the extent to which the hearsay rule's historical rationale differs from its practical application.

There are multiple rubrics at play. Here is how to keep track of them. There is one historical rationale to the hearsay rule. That rationale has three aspects. And those aspects were formed by five factors. This is all that matters for the purpose of tracking the differences between the hearsay rule's historical rationale and current application.

The paragraphs to follow will examine how the five factors influenced the hearsay rule's development. This is done by considering the major theories in the literature, of which there happen to be six.

## A. The Major Theories

First, professor John Wigmore believed that the historical rationale for the hearsay rule is to prevent lay jurors from overvaluing the reliability of hearsay evidence.[8] The locus of Wigmore's theory was that lay jurors will misevaluate testimony. Wigmore's theory is the most commonly accepted account in Canadian jurisprudence.

Wigmore did not explicitly articulate his theory of the hearsay rule's historical rationale. His theory is understood from the discussion of hearsay in his famous text, the *Treatise on the Anglo-American System of Evidence in Trials at Common Law*. According to Wigmore, unsworn hearsay statements were excluded from evidence by common law judges beginning in the 1670s.[9] By 1696 both sworn and unsworn hearsay statements were barred.[10] The equitable courts later adopted the common law bar against hearsay evidence. Although the equitable and common law courts sometimes used different triers of fact – the common law courts allowed for lay jurors and

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8 Frederick WJ Koch, Wigmore and Historical Aspects of the Hearsay Rule (PhD Thesis, Osgoode Hall, York University, 2004) [unpublished] at 89-90, citing John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada, vol 2 (Boston: Little, Brown, 1904) at 1685-1686, §1364.

9 *Ibid* at 89.

10 Wigmore, *supra* note 8 at §1364, cited in Koch, *supra* note 8 at 90.

the equitable courts only allowed professional judges – the equitable courts adopted the hearsay rule under the legal maxim that "equity follows the law."[11] The sole reason for the historical bar against hearsay evidence is the cross-examination of the declarant:[12]

> What is further noticeable is that in these utterances of the early 1700s the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination."[13]

The value of cross-examination is its ability to show lay jurors the potential sources of unreliability in testimony.[14] Lay jurors will be less inclined to overvalue testimonial evidence if the frailties of the testimony are brought to light under cross-examination. Wigmore's privileging of cross-examination in the rationale of the hearsay rule is unsurprising. He believed cross-examination to be "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[15]

Alongside the belief that cross-examination is the greatest engine for the truth, Wigmore strongly distrusted lay jurors' ability to properly evaluate testimonial assertions. Lay jurors were not believed to weigh hearsay evidence with the same competence as professional judges.[16] Cross-examination existed as a corrective measure against lay jurors' inability to properly assess testimony.

Under Wigmore's theory, the hearsay rule was not necessary when cross-examination was not required to show lay jurors potential sources of unreliability in testimony. Wigmore believed that the hearsay rule is generally not applicable when the trier of fact is a judge alone.[17] Unlike lay jurors, judges can properly assess testimonial evidence.

Second, the historical research of Professor John Langbein affected Wigmore's theory. A legal historian, Langbein's research agrees with

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11 Koch, *supra* note 8 at 242.
12 Wigmore, *supra* note 8 at 1688, §1364, cited in Koch, *supra* note 8.
13 *Ibid* [emphasis added].
14 Koch, *supra* note 8 at 90
15 Wigmore, *supra* note 8 at 27, §1367.
16 *Ibid.*
17 Koch, *supra* note 8 at 90-94.

Wigmore that most exclusionary rules of evidence, including the hearsay rule, were developed by judges to guard against the perceived tendency of lay jurors to overvalue testimonial evidence.[18] However, Langbein believed that the exclusionary rules relating to unsworn hearsay evidence developed later, in the 1700 and 1800s, as defence lawyers began to represent accused persons in felony trials.[19] Langbein's research saw the hearsay rule emerging at the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the rectitude of the jury's decision.[20]

Langbein has been understood by some scholars to disagree with Wigmore on the historical purpose of the hearsay rule.[21] This is a misreading of Langbein's research. Langbein and Wigmore agree that the historical purpose of the hearsay rule is to guard against the perceived tendency of lay jurors to overvalue testimonial evidence. Langbein and Wigmore disagree on the time period in which the rule emerged to achieve this purpose for unsworn hearsay evidence. Langbein, putting the emergence of the rule in the mid-1700s, sees the rule emerging at the intersection of the rise of the professional advocate, the judge's loss of influence over the jury, and the advent of evidence law as a control on the rectitude of the jury's decision.[22] Wigmore, putting the emergence of the rule much earlier in the 1600s, sees the rule only emerging as a control on the rectitude of the jury's decision.

Third, professor Richard Friedman suggests that the core of the hearsay rule is the right to confront the witness during their testimony.[23] This right applies in judge alone and jury trials and is unconcerned with perceived judicial attitudes about lay jurors.

Freidman provides a variety of examples from sixteenth to eighteenth century British common law. For instance, the jurisprudence surrounding

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18 John H Langbein, "The Criminal Trial Before the Lawyers" (1978) 45:2 U Chicago L Rev 263 at 306.

19 *Ibid* at 306-315. Langbein did not challenge Wigmore's description of sworn hearsay.

20 *Ibid.*

21 See e.g. criticism of some scholars in the literature levied in Lisa Dufraimont, "Evidence Law and the Jury" (2008) 53:2 McGill LJ 199 at 222.

22 Langbein, *supra* note 18 at 306-315.

23 Richard D Friedman, "No Link: The Jury and The Origins of the Confrontation Right and the Hearsay Rule" in John W Carins & Grant McLeod, eds. *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford: Hard Publishing, 2002) 93 at 93.

depositions crystalized during this time. Depositions were not allowed to be used at trial unless the adverse party had an opportunity to cross-examine the declarant.[24] Similarly, Magistrates under the reign of Queen Mary could take statements sworn from witnesses in felony cases for the express purpose of preserving their evidence before a trial. If the declarant was alive and able to travel to court, the statement could not be used at trial. The rationale was that the accused person could not be denied their right to confront the witness.[25] These sworn statements were eventually prohibited by the Courts of King's Bench and Common Pleas for misdemeanor cases as well. The Court specifically reasoned that "the defendant not being present when [the statements] were taken before the [examining authority, in this case the mayor], and so had lost the benefit of a cross-examination."[26]

Freidman readily admits that the right to confrontation was not cleanly applied in the time leading up to the eighteenth century. Some courts enforced the right sporadically. Still, the affirmation or denial of the right never depended on the jury's perceived ability to evaluate the hearsay evidence. The concern was always the procedural issue of whether the witness should give their testimony in open court, face to face with the adverse party.[27]

Fourth, professor Edmund Morgan posits that the hearsay rule is a product of a judicial desire to ensure that only reliable evidence is put to the trier of fact.[28] Morgan directly challenges Wigmore's suggestion that the hearsay rule's historical rationale is concerned with the evaluative competency of lay jurors.

Morgan's research reveals three rationales for the hearsay rule until the 1700s.[29] Hearsay is rejected because it is not information based on a witness' observations: it is information based on "what [the witness] is credulous

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24 *Ibid* at 95.

25 *Ibid* at 96.

26 *R v Paine*, 5 Mod. 163, 87 ER 584 at 585, cited in *ibid* at 96.

27 Freidman, *supra* note 23 at 98.

28 Edmund M Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62:2 Harv L Rev 177 at 182-183 [Morgan, "Hearsay Dangers"].

29 *Ibid*.

enough to believe."[30] A hearsay statement is not made under oath.[31] And the opposing party in litigation is unable to receive the benefit of cross-examining the hearsay declarant.[32]

Cross-examination is necessary for its ability to shed light the on potential sources of unreliability in testimonial evidence. Morgan identified four 'hearsay dangers' that exist whenever a witness testifies about an out of court statement. A court is unable to test the declarant's sincerity, use of language, memory, and perception of the statement in question.[33] Cross-examination allows the opposing party to test these potential sources of unreliability and make them plain to the trier of fact. This allows the trier to better weigh the testimonial evidence. Such insight into the reliability of testimony is lost when hearsay evidence is admitted.

Note that cross-examination is not necessary for its perceived ability to remedy an evaluative issue with lay jurors. Under Morgan's theory, the historical role of cross-examination in the hearsay rule is a product of the adversary system. Cross-examination is required to allow the opposing party an opportunity to expose sources of unreliability in testimony. This applies regardless of whether the trier of fact is a judge or jury.[34]

Morgan acknowledged a caveat to his research. His theory begins to show cracks in its application to the case law after the early 1700s. After the hearsay rule was formed in the 1600s, some decisions creating exceptions to the rule referenced perceived issues with the jury's competence. Morgan conceded that these hearsay exceptions were influenced by the jury's role as trier of fact.[35] He reconciles the discrepancy by recognizing that the hearsay doctrine is the product of conflicting considerations. Much of the doctrine, including the creation of the hearsay rule, is influenced by the reliability of hearsay evidence. Some of the exceptions to the rule, however, are influenced by concerns about the jury.[36]

Despite these caveats, Morgan's theory marked a paradigm shift in the literature. His suggestion that the hearsay rule stems from a concern for the reliability of testimonial evidence brought a new dimension to the debate

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30 *Ibid* at 183.

31 Edmund M Morgan, "The Jury and the Exclusionary Rules of Evidence" (1936) 4 U Chicago L Rev 247 at 253 [Morgan, "Jury and Exclusionary Rules"]

32 *Ibid.*

33 Morgan, "Hearsay Dangers", *supra* note 28.

34 Morgan, "Jury and Exclusionary Rules", *supra* note 31 at 255.

35 *Ibid.* at 255.

36 *Ibid* at 255-256.

about the historical rationale of the hearsay rule. Equally, his research is one of the most significant challenges to the jury control theory on which Wigmore premises his analysis.

Fifth, Professor H.L. Ho, taking a philosophical approach, considers fairness to be the lynchpin of the hearsay rule's historical rationale. For Ho, hearsay is based on two conceptions of fairness. First, the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified.[37] Under the adversarial system generally, the party producing a witness bears the risk that the witness will not be able to prove his or her anticipated evidence. Second, the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.[38]

Ho's theory is qualitatively different from most of the major theories in the literature. Ho is an evidence scholar who theorized about the philosophy of evidence. He created a philosophical theory and used historical cases to test it. Premised on philosophy and tested with case law, Ho's theory aims to explain the genesis of the hearsay rule, its exceptions, and, atypically, the route the doctrine should take as it develops in the future.

Sixth, one of the more contemporary theories of the hearsay rule's historical rationale is that of Professor Frederick Koch, a Canadian scholar. Koch believes that the hearsay rule is a merger of seven separate exclusionary evidence rules that formed between 1550 and 1750.[39] The seven rules formed for one or both of two reasons. The first reason is the judicial belief that certain kinds of hearsay evidence should be excluded because they are too unreliable.[40] The second reason is the epistemic need for two elements of testimonial evidence, cross-examination and demeanour evidence. [41]

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37 HL Ho, "A Theory of Hearsay" (1999) 19:3 Oxford J Leg Stud 403 at 403 [Ho, "Theory of Hearsay"].

38 *Ibid* at 410.

39 Frederick WJ Koch, "The Hearsay Rule's True Reason d'Être: It's Implications for the New Principled Approach to Admitting Hearsay Evidence" (2005) 37:2 Ottawa L Rev 249 at 253 [Koch, "Hearsay's Reason d'Être"].

40 *Ibid.*

41 *Ibid.*

Koch's theory is founded on a robust source of historical case law. He used the nominate case reports, reports in *Cobbett's State Trials*, early published works on evidence law, the *Old Bailey Session Papers*, and *Sir Dudley Ryder's Notes*.[42] Koch's research represents the most comprehensive examination of the hearsay rule's historical rationale.

These are the six major theories on the hearsay rule's historical rationale. They are presented to outline the prevailing views on the hearsay rule's historical rationale. Although not explicitly engaging with one another, the theories agree some on points and disagree on others. What is necessary is a reconciling of the theories to determine the precise historical rationale of the hearsay rule.

## B. The Hearsay Rule's Historical Rationale

Recent research shows that the six major theories about the hearsay rule's historical rationale are reconcilable as parts of a broader, more comprehensive rationale.[43] This rationale is premised on five factors which, analytically, underlie three rationales:

1. Inherent Reliability
    i. The hearsay dangers
    ii. No demeanour evidence

2. Procedural Reliability
    iii. The lack of opportunity to cross-examine the declarant
    iv. The evidence is unsworn

3. Fairness in the adversarial process
    v. Fairness in the adversarial process

The three rationales are not analytically distinct. They spill into each other, sharing similar concerns.

The first rationale, inherent reliability, is concerned with the accuracy of an untested hearsay statement. The inherent reliability rationale is derived from historical judicial concern with demeanour evidence and the

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42 Koch, "Hearsay's Reason d'Être", *supra* note 39 at 254.

43 Christopher Lloyd Sewrattan, *Lost in Translation? The Difference Between Hearsay Rule's Historical Rationale and Practical Application* (LLM Thesis, Osgoode Hall, York University, 2016) [unpublished].

hearsay dangers. The absence of demeanour evidence was concerning to judges because it prevented the trier of fact from assessing the sincerity of the hearsay declarant. It was more difficult to assess the accuracy of a declarant's statement without observing the witness' sincerity.[44] In addition, there was an epistemological concern that a witness testify *viva voce*.[45] The hearsay dangers are the inability to test the declarant's sincerity, use of language, memory, and perception of the statement in question.

The second rationale, procedural reliability, is closely related to the inherent reliability rationale. It too is concerned with the accuracy of the declarant's statement. However, whereas the inherent reliability rationale is concerned with the accuracy of the hearsay statement when it is initially uttered without testing, the procedural reliability rationale is concerned with the ability to test the statement, in court, through courtroom procedure. The rationale stems from judicial concern with the absence of two features of courtroom procedure: the oath and cross-examination of the declarant. Unlike the factors in the inherent reliability rationale, the oath and cross-examination do not influence the accuracy of a declarant's statement when it is initially uttered. Influence upon the accuracy of the statement is imparted only when the declarant testifies in court. The oath binds the declarant's conscience and cross-examination examines his or her motive and ability to recollect. It is in this manner that the oath and cross-examination increase the reliability of hearsay evidence through courtroom procedure.

The third rationale encompasses one factor, fairness to the opposing party in the adversarial process. The third rationale aligns with Professor Ho's fairness theory.

The spillage of the five historical factors between the three categories of rationales is not neat. Indeed, the factors touch upon all three rationales in varying degrees. The rationales are best conceived as aspects of a broader rationale of the hearsay rule.

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44 See eg Ho, "Theory of Hearsay", *supra* note 37.

45 Koch, "Hearsay's Reason d'Être", *supra* note 39 at 210-223

## III. THE EXCLUSIONARY HEARSAY RULE

Using the five factors that gave rise to the hearsay rule's historical rationale, this section identifies the nature and extent of the differences between the hearsay rule's historical rationale and practical application. The discussion centers on instances in which hearsay is admitted under the necessity and reliability principle.

Section A explains how the current hearsay rule is constituted and operates. The remaining sections examine differences between the hearsay rule's historical rationale and its current application. The analysis proceeds by reference to the five factors that gave rise to the hearsay rule. Each of the five factors exhibit problems in their practical application that affects their influence on the decision to admit hearsay evidence. This article explores those problems, and uses them as indicia of differences between the hearsay rule's historical rationale and current application. Since the five factors underlie the hearsay rule's historical rationale, a change in the factors will indicate a change in the application of the hearsay rule's historical rationale. For example, if it is found that there are instances in which demeanour evidence is less influential on the admission of hearsay than it was historically, this will suggest a change within the inherent and procedural reliability aspects of the hearsay rule's rationale.

The analysis is divided according to the five factors for analytical purposes. In practice, the factors are interrelated and affect the same underlying rationale. A difference found in the application of one factor will generally apply to other factors. For example, if demeanour evidence is found in some instances to be less influential than it was historically, the analysis of these instances will apply to the hearsay dangers and fairness in adversarial process.

In addition to tracking the differences between the hearsay rule's historical rationale and practical application, the causes of the differences will be identified and evaluated. In many instances, the differences prevent the hearsay rule from achieving its purpose. This part of the discussion occurs on two levels. The hearsay jurisprudence is examined to determine if differences between its historical rationale and practical application are created by the doctrine itself. Practical considerations in the modern practice of criminal law are considered to determine if they create any differences.

## A. The Current Hearsay Rule

Hearsay is an out-of-court statement adduced to prove the truth of its contents without a contemporaneous opportunity to cross-examine the declarant.[46] It is still unclear whether implied non-verbal conduct is captured by the hearsay rule.[47] The classic occasion on which hearsay is prohibited is the testimony by a witness of what a non-witness said. The hearsay rule also captures some out of court statements made by the very witness testifying in court. For example, prior inconsistent statements are considered hearsay when they are adduced for the truth of their contents.[48]

There are two features of the hearsay rule that limit its scope: the availability of the declarant as a witness and the use of the out of court statement to prove the truth of its contents.[49] Hearsay evidence is formally defined in Canadian law as an out of court statement by a person not called as a witness tendered in evidence to prove the truth of its contents.[50] Presumably what is meant by "not called as a witness" is the inability for contemporaneous cross-examination on the utterance. Otherwise, prior inconsistent statements would not be properly considered hearsay.

Hearsay jurisprudence stands at the end of a long road and at the start of another.[51] For over a century the hearsay rule was a blanket prohibition on hearsay evidence. Hearsay would be admitted into evidence if it fit within an ossified exception to the hearsay rule. Today, hearsay evidence must conform to the twin criteria of necessity and reliability in order to be admitted into evidence.[52] Necessity is the unavailability of the hearsay statement's content.[53] The necessity criterion serves a truth-seeking function. Rather than losing the evidence of an unavailable declarant, the

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46 *R v Khelawon,* 2006 SCC 57 at paras 56-58 [*Khelawon*];

47 *R v Baldree*, 2013 SCC 35 at paras 62-63 [*Baldree*].

48 *R v B(KG)*, [1993] 1 SCR 740, [1993] SCJ No 22 (CanLII) [*KGB*].

49 Alan W Bryant, Sidney N Lederman, & Michelle K Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada,* 4th ed. (Toronto: LexisNexis Canada, 2014) at 238.

50 *Baldree, supra* note 47 at para 1, Fish J.

51 S Casey Hill, David M Tanovich, & Louis P Strezos, *McWilliams' Canadian Criminal Evidence, Fifth Edition* (Toronto: Canada Law Book, 2012) at 7-5.

52 *Khelawon*, *supra* note 46 at paras 2-3.

53 *Ibid* at para 78.

law deems it necessary to admit the evidence as an exception to the hearsay rule.[54] If the declarant is deceased, ill, incompetent to testify, or otherwise unavailable, the content of their statement is trapped without the admission of hearsay. Hearsay evidence must be 'necessary' in this sense of being trapped in order to be admissible. Reliability is the ability to negate the likelihood that the declarant of a hearsay statement was mistaken or untruthful.[55] The reliability criterion is concerned with ensuring the integrity of the trial process.[56] Reliability is satisfied in two overlapping instances.[57] First, the circumstances in which the hearsay statement came about produced a statement so reliable that contemporaneous cross-examination of the declarant would add little to the trial process.[58] This is called procedural reliability. It examines whether there is a satisfactory basis to rationally evaluate the statement.[59] Second, the hearsay statement can be tested by means other than contemporaneous cross-examination.[60] This is called substantive reliability. It examines whether the circumstances "provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy."[61] The trier of law will allow a statement admission into evidence if there is a sufficient basis for the trier of fact to assess the statement's truth and accuracy. This is called the threshold reliability test.[62]

Necessity and reliability operate in tandem. A deficiency in one can be overcome by strength in the other.[63] However, even if a hearsay statement satisfies the necessity and reliability principle, it will be excluded from evidence if its probative value is outweighed by its prejudicial effect.[64]

The hearsay rule's rationale is tied to the justice system's value on *viva voce* testimony. The Supreme Court stated in *Khelawon*:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact,

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54 *Ibid.*

55 *R v Smith*, [1992] 2 SCR 915 at 933, 1992 CanLII 79 (SCC) [*Smith*].

56 *Ibid.*

57 *Khelawon*, supra note 46 at para 49.

58 *R v Bradshaw*, 2017 SCC 35 at para 40, Karakatsanis J.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Baldree*, supra note 47 at para 72, Fish J.

64 *Khelawon*, supra note 46 at para 3.

> and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.[65]

The three aspects of the hearsay rule's historical rationale are present in this statement. There is, of course, not always congruity between the way a rule is described and applied in practice. This section will discuss in detail the extent to which the hearsay rule's historical rationale differs from the way it is applied. For now, what is notable is that all aspects of the hearsay rule's rationale are present in the text of the jurisprudence.

This is perhaps surprising considering that Wigmore's theory of the hearsay rule's rationale is by far the most explicitly endorsed theory in the jurisprudence. The necessity and reliability principle are drawn directly from Wigmore's scholarship.[66] In *R v Smith*, Chief Justice Lamer (as he then was) stated that the principles underlying the exceptions to the hearsay rule also underlie the rule itself.[67] Lamer C.J.C. cited Wigmore for this statement. He then quoted Wigmore's description of the necessity and reliability criteria and his emphasis on the importance of cross-examination to test hearsay evidence.[68] It appears that Canadian jurisprudence has either misinterpreted Wigmore's theory or chosen to disregard aspects with which it does not agree. Wigmore was solely concerned that lay jurors could not properly evaluate hearsay; he regarded cross-examination as invaluable because it could remedy the evaluative incapacity of lay jurors. Canadian hearsay jurisprudence has adopted this concern, to be sure, but it is not the *sole* concern. The jurisprudence has adopted aspects of other theories as well, like Morgan's hearsay dangers and Koch's focus on demeanor evidence and the oath.[69] Although Wigmore's theory is by far the most referenced,

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65 *Ibid* at para 35.

66 *Smith, supra* note 55 at 929-934.

67 *Ibid* at 932.

68 *Ibid* at 929-930.

69 Koch's scholarship post-dates much of the hearsay revolution. The jurisprudence has not adopted aspects of his theory. It has adopted ideas shared by his theory.

the jurisprudence actually comprises a mash of different theories of the hearsay rule's historical rationale. This makes sense considering that the various theories describe aspects of the same rationale. The hearsay rule's historical rationale is a fusion of concerns relating to the reliability of hearsay and fairness in the adversarial process.

## B. The Hearsay Dangers

The hearsay dangers, as defined by Morgan, exist whenever a witness testifies about an out of court statement. The "danger" particular to hearsay evidence is the inability of a court to test the declarant's sincerity, use of language, memory, and perception of the statement in question.[70] Historically, cross-examination was deemed necessary to allow an opposing party the opportunity to test these potential sources of unreliability and expose them to the trier of fact.

The hearsay dangers are at the forefront of the hearsay rule's current application, as they were during the rule's development in the 1600s and 1700s. The Supreme Court identifies the inability to test the reliability of hearsay evidence as the "central concern" underlying the hearsay rule.[71] Testing the reliability of hearsay evidence is believed to enhance the accuracy of a court's decision and guard against unjust verdicts. According to the Supreme Court, testing reliability means testing the declarant's perception, memory, narration, and sincerity, as well as observing the declarant's demeanour.[72]

It has taken the case law some time to consistently identify the hearsay dangers. Beginning in 1993 in *R v K.G.B.*, the Supreme Court identified the hearsay dangers as the source of the hearsay rule's reliability concern. They were described differently than Morgan's formulation of the hearsay dangers:

> [The hearsay dangers are] the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent.[73]

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70 Morgan, "Hearsay Dangers", *supra* note 28.

71 *R v Starr*, 2000 SCC 40 at para 159 [*Starr*].

72 *Baldree*, *supra* note 47 at para 31; *Khelawon*, *supra* note 46 at paras 1-2.

73 *KGB*, *supra* note 48 at 764.

The Court would repeat this description of the hearsay dangers multiple times in the 1990s.[74] These factors underlie the hearsay rule's historical rationale. Inexplicably, the case law now recognizes the hearsay dangers in Morgan's formulation.[75] The factors identified as hearsay dangers previously are now labelled as their own terms.[76]

There are two overlapping methods to allay the concern posed by the hearsay dangers. One method is to show that the circumstances in which a hearsay statement came about safeguard against any real concern about the declarant's perception, memory, narration, and sincerity. The admission of a child's statement to her mother in *R v Khan* is a classic example.[77] In *Khan* a three-year-old girl was sexually assaulted by her doctor. Approximately 15 minutes later, she told her mother that the doctor "put his birdie in my mouth, shook it and peed in my mouth."[78] The child had a wet spot on her jogging suit that was determined to be a mixture of semen and saliva.[79] At trial, the child was held to be incompetent to testify.[80] Her statement to her mother was hearsay, and it did not fall under an exception to the hearsay rule. Nevertheless, the Supreme Court admitted the child's hearsay statement to her mother into evidence. The circumstances in which the statement was made satisfied the Court that the child's statement did not suffer from difficulties in perception, memory, narration, and sincerity.[81] The child made the statement shortly after the assault, eliminating concern that her memory was inaccurate. Being three years old, she had no motive to lie. Her statement was made naturally and without prompting, suggesting that her mother did not coax her into making the statement.[82] The content of her statement was about a subject outside the experience of a three-year-

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74 *R v Hawkins*, [1996] 3 SCR 1043 at para 60, 1996 CanLII 154 (SCC) [*Hawkins*]; *Khan*, *supra* note 66; *KGB*, *supra* note 48; *Smith*, *supra* note 55.

75 See e.g. *Baldree*, *supra* note 47 at para 31.

76 See e. g. *Baldree*, *supra* note 47.

77 *Khan*, *supra* note 66.

78 *Ibid* at 534.

79 *Ibid*.

80 *Ibid* at 534-535.

81 *Ibid* at 546-548.

82 *Ibid* at 548..

old, suggesting that the statement was not fabricated or remembered and narrated incorrectly. The statement was also corroborated by the semen stain on her clothing.[83]

Wigmore's scholarship is the basis for this method of allaying the concern posed by the hearsay dangers. When Wigmore wrote about the hearsay rule, most trials were judged by lay jurors. The terms 'trier of fact' and 'lay juror' could have been treated as synonymous during this time. Those circumstances do not exist in Canada today. Wigmore also believed that cross-examination was "beyond any doubt the greatest engine ever invented for the discovery of the truth."[84] A hearsay statement should be admitted into evidence if the declarant could not testify and the statement did not pose a risk of misevaluation in jurors in the absence of cross-examination. In such an instance cross-examination would be "superfluous."[85] The Supreme Court explicitly adopted Wigmore's scholarship on this issue in *R v Khelawon*:

> One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:
>
> > There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.[86]

In adopting Wigmore's scholarship in this manner the Court tied the admission of hearsay to the utility of cross-examination.[87] This causes some concern. Wigmore believed that the hearsay rule was created to guard against the evaluative capacity of lay jurors, and cross-examination was the best method to expose frailties in testimonial evidence to lay jurors. The

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83 *Ibid.*

84 Wigmore, supra note 8, vol 1 at 27, §1367.

85 *Ibid* at 1791, §1420 cited in Koch, *supra* note 8 at 92

86 *Khelawon, supra* note 46 at para 62.

87 Unlike Wigmore, however, the jurisprudence will not allow for an exception to the hearsay rule on the basis of a non-contemporaneous opportunity to cross-examine the declarant of a hearsay statement (*Starr*, supra note 71 at paras 58-60).

locus of Wigmore's concern was lay jurors' ability to evaluate the reliability of hearsay.

This can be contrasted with the concern of the hearsay dangers. The hearsay dangers are the ability to test potential flaws in a declarant's perception, memory, narration, and sincerity. They are distinct from the trier of fact's ability to evaluate hearsay evidence. The locus of concern is the ability to test hearsay evidence, and the concern applies to lay jurors and judges alike. To be sure, the Supreme Court is entitled to pick and choose from aspects of Wigmore's scholarship. However, Wigmore's scholarship on this issue is premised on lay jurors' ability to evaluate the reliability of hearsay. That premise is inapplicable and unsound. Inapplicable because the vast majority of trials in Canada today are conducted by judges alone.[88] It is usound because there is a lack of evidence suggesting that lay jurors are less adept than judges at evaluating hearsay. Indeed, the existing research almost suggests the opposite: when deciding a case, lay jurors are not less competent than judges.[89]

Another concern is that the hearsay dangers may not be allayed by cross-examination alone. To be clear, the need to allay the hearsay dangers stops when there is a sufficient basis for the trier of fact to assess the hearsay statement's truth and accuracy. This is the test for threshold reliability. In assessing the threshold reliability test, the hearsay dangers sometimes require additional safeguards, such as the oath or need to receive *viva voce* demeanour evidence. There is considerable overlap between Wigmore's concern and the concern posed by the hearsay dangers. It is often the case that both concerns are allayed by the circumstantial guarantees of reliability in the way a hearsay statement was made. There are occasions, however, when the hearsay dangers are not allayed simply because the circumstances in which a hearsay statement was made does not call for cross-examination. There may still be a need to test the declarant with an oath and *viva voce* demeanour evidence to expose potential flaws in the declarant's perception, memory, narration, and sincerity.

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88 Neil Vidmar, "The Canadian Criminal Jury: Searching For a Middle Ground" (1999) 62:2 Law & Contemp Probs 141 at 147.

89 See generally Neil Vidmar, "Foreword: Empirical Research and the Issue of Jury Competence" (1989) 52:4 Law & Contemp Probs 1 at 4.

*R v Sheriffe*[90] demonstrates this nicely. In that case the accused was convicted of first-degree murder after an expert witness testified about the accused person's alleged ties to gangs. The expert witness based his opinion on information received from confidential informants. The accused person argued on appeal that the basis of the expert witness' opinion was hearsay and ought to have been excluded from evidence. The Court of Appeal for Ontario held that the confidential informants' information was admissible under the hearsay rule.[91] Though hearsay, the information was necessary because the confidential informants could not be called as witnesses. The information was sufficiently reliable because the informants had a history of providing accurate and truthful information to the police.[92]

Clearly, the Court of Appeal was comfortable with the veracity of the informants' information. This was only part of the equation, though, and the Court should have looked further. More relevant was the expert's actual opinion – and how he derived that opinion from the information available to him. In this respect, the Court of Appeal ought to have treated demeanour evidence as critical. The informants were unlikely to be savory characters. They were confidential informants, with a history of speaking to the police, who chose to disclose gang ties about an accused murderer. These are not the type of people who look trustworthy in a courtroom, and they are not known for being careful with their words. The trier of fact, in this case a jury, should have been able to see the informants testify to determine whether the expert's opinion was credible in light of having based his opinion on their information. Even if the informants' information was in fact accurate, the jury should have been allowed to see if the informants were trying to be accurate. Do they look like they were under the influence of drugs or alcohol? Can you see them thinking about their answers before they speak? Are they being flippant? When the source of information is a confidential informant speaking about gang ties, these are all live issues. They all relate to reliability. And to resolve these issues you need to see the declarant's demeanour. Of course, since confidential informants could never testify in a court, the proper remedy would have been to prohibit the expert's evidence.

The hearsay dangers will not be allayed if the test adopted in the jurisprudence is applied too loosely. It is not difficult to imagine a situation

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90 *R v Sheriffe*, 2015 ONCA 880.

91 *Ibid* at para 120.

92 *Ibid* at para 92.

in which a loose application of the threshold reliability test is tempting. For example, consider a dark night in which a person is pushed under a bus and dies. No one sees the pusher, but a male witness is able to give a vague description of him. The statement is the strongest evidence pointing to the pusher committing the crime. The witness' statement is videotaped shortly after the push. When the witness gives the description of the pusher, he is high on heroin, has motive to lie, and specifically tells the police that he does not want to go to court. The witness' statement is not sworn and is both confirmed and contradicted by other evidence. Someone matching the witness' description of the pusher is arrested and charged. At trial, the witness claims to have no knowledge of the push or even giving the statement to the police. Meaningful cross-examination on his statement is meaningless now that his memory has failed him. Are the hearsay dangers of his statement allayed? Hardly. But this is evidence necessary to secure a conviction. This factual situation happened in *R v Groves*.[93] The application judge admitted the statement into evidence, reasoning that the statement's documentation on videotape and relative contemporaneity with the push provided sufficient reliability for admission.[94] The admission is too loose an application of the threshold reliability test. It is in line with the modern motivation to use the hearsay rule to effectively prosecute alleged offenders. Looking plainly at the hearsay dangers, the statement should never have been admitted. Although the witness' narration was preserved in the videotape, without meaningful cross-examination there was no light shed on his perception and memory of the push or the sincerity of his statement.

Returning to the methods of allaying the concern posed by the hearsay dangers, the second method is to show that there are adequate substitutes to test the truth and accuracy of the hearsay statement.[95] The classic example is when a statement is made at another court proceeding under oath and cross-examination. In *R v Hawkins*,[96] for example, the accused person's then-girlfriend testified against him at the preliminary inquiry. Her statement was given under oath and she was cross-examined by the accused person's

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93 *R v Groves*, 2011 BCSC 1935, aff'd 2013 BCCA 446.

94 *Ibid* at para 17.

95 *Khelawon, supra* note 46 at para 63.

96 *Hawkins*, *supra* note 74 at 1.

counsel.[97] She was recalled at the preliminary inquiry and, with explanation, recanted much of what she said.[98] The accused person married his girlfriend between the preliminary inquiry and the trial, rendering her incompetent to testify at trial as a Crown witness.[99] At the trial the Crown sought to admit the girlfriend's preliminary inquiry testimony under the principled exception to the hearsay rule. The Supreme Court held that statements given before a preliminary inquiry will generally allay the hearsay dangers because the statements are given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues.[100] In addition, the statements are recorded in a court certified transcript and the opposing party can observe the declarant's demeanour during cross-examination.[101] In short, there are ample substitutes to test the truth and accuracy of the declarant's statement.

To summarize, the hearsay dangers remain at the forefront of the hearsay rule's current application. While the jurisprudence has taken some time to correctly identify the hearsay dangers, the test for threshold reliability is premised on testing for them. The hearsay rule assumes that cross-examination will generally allay the hearsay dangers. The basis of the assumption is Wigmore's belief that lay jurors overvalue the reliability of hearsay. This causes some concerns. The hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely. In these situations, the concern with the hearsay dangers is less than it was under the hearsay rule's historical rationale.

## C. No Demeanour Evidence

The absence of demeanour evidence remains a core concept of the hearsay rule, as it was during the historical development of the rule. The influence of demeanour evidence on the admission of hearsay is substantial, though it is sometimes subsumed by the role of cross-examination. Though initially labeled a hearsay danger, demeanour evidence is characterized today as an independent factor in the test for threshold reliability.

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97 *Ibid.*

98 *Ibid* at para 14.

99 *Ibid* at para 1.

100 *Ibid* at para 76.

101 *Ibid* at para 77.

Under the case law, the inability to observe the demeanour of a hearsay statement's declarant impairs the trier of fact's ability to properly assess the statement. In *K.G.B.* the Supreme Court held:

> When the witness is on the stand, the trier can observe the witness's reaction to questions, hesitation, degree of commitment to the statement being made, etc. Most importantly, and subsuming all of these factors, the trier can assess the relationship between the interviewer and the witness to observe the extent to which the testimony of the witness is the product of the investigator's questioning. Such subtle observations and cues cannot be gleaned from a transcript, read in court in counsel's monotone, where the atmosphere of the exchange is entirely lost.[102]

*K.G.B.* addressed the issue of whether a videotaped statement can be admitted for the truth of its contents when the declarant recants its content at trial. Due to the specificity of the issue, the Court was acutely focused on the importance of demeanour evidence in its comments. Compared to the rest of the case law on the issue,[103] it is possible that the above passage is an inflated endorsement of demeanour evidence from the Supreme Court.

In general practice, demeanour evidence is an important consideration in the calculus to admit hearsay evidence. Consider *R v Baldree*. In that case the Supreme Court held inadmissible a drug purchase call made by an unknown caller because:

> [n]o effort was made to find and interview him, still less to call him as a witness - where the assertion imputed to him could have been evaluated by the trier of fact in the light of cross-examination and the benefit of observing his demeanour.[104]

The jurisprudence has gone so far as to outline potential methods of preserving demeanour evidence when taking a statement so that the statement can be admitted as an exception to the hearsay rule if the declarant becomes unavailable to testify. The statement can be video and audio recorded or, in exceptional cases, an independent third party can observe the making of the statement and testify about the declarant's demeanour.[105]

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102 *KGB, supra* note 48 at 792.

103 See especially *Starr*, supra note 71 at para 77.

104 *Baldree*, *supra* note 47 at para 73 [emphasis added].

105 *KGB*, *supra* note 48 at 794.

The case law has generally endorsed the value of demeanour evidence in relation to hearsay admissibility. The treatment of demeanour evidence generally, though, is far more conflicted. In *R v N.S.*, the Supreme Court addressed directly the value of demeanour evidence in court proceedings. The Court considered it an "axiom of appellate review" that deference be shown to the trier of fact on credibility issues because judges and juries have the "overwhelming advantage" of observing the witness' demeanour.[106] That strong endorsement of demeanour evidence was in 2012. Notwithstanding, appellate courts have in the same time period cautioned against strong reliance on demeanour evidence. In 2015 the Court of Appeal for Ontario cautioned trial judges "to bear in mind that, to the extent possible, they should try to decide cases that require assessing credibility without undue reliance on such fallible considerations as demeanour evidence."[107] Other appellate cautions abound.[108] It remains to be seen whether this trend of appellate skepticism will trickle its way into hearsay case law.

In terms of testing the reliability of a hearsay statement, the value of demeanour evidence is its ability to shed light on the declarant's sincerity. Observing the declarant allows the trier of fact to determine how certain or honest the declarant is attempting to be. Nonetheless, the jurisprudence has long held to Wigmore's belief that cross-examination is the best method for discovering the truth. As a result, the opportunity to cross-examine a hearsay statement's declarant is often deemed sufficient to satisfy sincerity concerns. Indeed, in *Hawkins* the preliminary inquiry testimony was admitted into evidence despite deep contradictions within the hearsay statement.[109] The absence of demeanour evidence was not fatal. The Supreme Court was fundamentally satisfied by the declarant being cross-examined at the preliminary inquiry.[110] In addition she provided her statement under oath and there was a court transcript of her testimony.[111]

Cross-examination and demeanour evidence will often shed the same light on a declarant's sincerity. The value of demeanour evidence is subsumed in cross-examination when a witness testifies in court and is contemporaneously cross-examined. This was the procedure in the 1600s

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106 *R v NS*, 2012 SCC 72 at para 25 [*NS*].

107 *R v Rhayel*, 2015 ONCA 377 at para 89 [*Rhayel*] [emphasis added].

108 See e.g. *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 at para 66.

109 *Hawkins*, *supra* note 74 at para 26.

110 *Ibid* at paras 78-79.

111 *Ibid* at para 89.

and 1700s when the hearsay rule was developed. The difficulty is that such intersection does not always occur anymore. Due to technological advancements, there are two types of cross-examination, contemporaneous and non-contemporaneous. In non-contemporaneous cross-examination, the declarant of a hearsay statement will be subjected to cross-examination by the opposing party before the hearing. If the cross-examination is not video recorded, the trier of fact at the hearing will be unable to observe the declarant's demeanour during the prior cross-examination. If the declarant's statement is admitted at the hearing under the hearsay rule, the trier of fact may only have a transcript of the cross-examination. The declarant's demeanour in giving the evidence will be lost. This is not an uncommon occurrence. It happens every time hearsay is admitted because a witness testified at a preliminary inquiry or non-videoed deposition and failed to attend the trial or hearing. On these occasions, the influence of demeanour evidence on the admission of hearsay is less than it was historically.

Non-contemporaneous cross-examination can also raise epistemic concerns. The ability to see a witness' face is deeply rooted in the criminal justice system.[112] A witness' demeanour can provide non-verbal insights that may uncover uncertainty or deception and assist at discovering the truth.[113] A cross-examiner may use this information to recalibrate questions, ask new questions, or refrain from asking questions on a particular topic. The process is fluid. As the witness testifies, they disclose information through their demeanour. The cross-examiner reacts with questions. The witness discloses new information with their answers. The process repeats itself until the cross-examination concludes. All the while the trier of fact observes the witness' answers, demeanour, and weighs accordingly. The information from this fluid interaction is absent if a written hearsay statement is admitted due to non-contemporaneous cross-examination. Again, this occurs every time a witness testifies at a preliminary inquiry or non-videoed

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[112] *NS*, *supra* note 106 at para 27. The Supreme Court made this ruling notwithstanding that that no expert evidence was put before the Court on the importance of seeing a witness's face to effective cross-examination and accurate assessment of a witness's credibility (para 17).

[113] *Ibid* at para 24.

deposition and does not attend the trial or hearing. The vibrancy of the witness' cross-examination is reduced to black words on white paper.

The helpfulness of demeanour evidence to the trier of fact is debatable. Courts regularly caution triers of fact to not overly rely on demeanour evidence in assessing a witness' sincerity.[114] The caution is backed by empirical research suggesting that triers of fact are fooled by a witness' purported sincerity.[115] However, there is another line of research suggesting that in certain contexts a witness' demeanour aids the assessment of sincerity.[116]

More important is the epistemic value of demeanour evidence. Demeanour evidence aids the cross-examiner by providing cues for cross-examination. And it allows the trier of fact to assess how a witness holds up over time through the process of cross-examination. This is something that is difficult to quantify with empirical research. The value of watching over a time a witness' demeanour chipped away during cross-examination cannot be understated.

Overall, demeanour evidence remains as important a factor in the hearsay rule as it was historically. It is a core concept of the hearsay rule for its ability to shed light on the declarant's sincerity. The value of demeanour evidence is sometimes subsumed by cross-examination. This generally does not diminish the ability of demeanour evidence to shed light on the declarant's sincerity. However, due to advancements in technology since the 1600-1700s, demeanour evidence can on occasion be lost when hearsay is admitted because the declarant received an opportunity for non-contemporaneous cross-examination.

## D. The Lack of Opportunity to Cross-Examine the Declarant

The lack of opportunity to cross-examine the declarant remains as influential a factor as when it became a late justification for the hearsay rule. It is complicated in practice by the disjunction between its theoretical role

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114 See e. g. *R v Levert* (2001), 150 O.A.C. 208 at paras 24-27; *R v Trotta* (2004), 191 OAC 322 at paras. 40-43

115 See generally Jeremy A Blumenthal, "A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72:4 Neb L Rev 1157.

116 Aldert Vrij et al, "Rapid Judgements in Assessing Verbal and Nonverbal Cues: Their Potential for Deception Researchers and Lie Detection" (2004) 18 Applied Cognitive Psychology 283; Max Minzner, "Detecting Lies Using Demeanor, Bias, and Context" (2008) 29 Cardozo L Rev 2557.

in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers.

With regard to its influence, cross-examination frames the principled exception to the hearsay rule. It is based on Wigmore's belief in it as the best method for ascertaining the truth in a trial. In *R v Smith*, the Supreme Court shaped the contours of the principled exception to the hearsay rule in the mold of Wigmore's high regard for cross-examination:

> It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it...

Of the criterion of necessity, Wigmore stated:

> Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative...[I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception.

And of the companion principle of reliability – the circumstantial guarantee of trustworthiness – the following:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.[117]

Of the two overlapping ways in which a hearsay statement can be deemed sufficiently reliable for admission, the ability to cross-examine the declarant is acutely important when reliance is placed on the latter, the use of adequate substitutes for contemporaneous cross-examination.[118] Non-contemporaneous cross-examination goes a long way to satisfying the

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117 *Smith*, *supra* note 55 at 929-930.

118 *Khelawon*, *supra* note 46 at paras 62-63.

reliability requirement.[119] When considering the admissibility of prior inconsistent statements for example, the ability to cross-examine the declarant is the most important factor supporting admissibility.[120] It was the controlling factor when the Supreme Court admitted prior inconsistent statements under the hearsay rule in *K.G.B.*[121] and *R v F.J.U.*[122]

Cross-examination is deemed necessary in the case law because of its ability to expose the hearsay dangers to the trier of fact.[123] Through questioning, an opposing party can test the declarant's sincerity, use of language, memory, and perception of the statement in question. The purpose for which cross-examination is deemed necessary is surprising in light of the Supreme Court's explicit adoption of Wigmore's scholarship to create the necessity and reliability principle. It is another instance of the Court selectively choosing from Wigmore's scholarship on the hearsay rule. Wigmore believed that, historically and currently, cross-examination of a hearsay statement's declarant is necessary to prevent lay jurors from overvaluing the statement.[124] Cross-examination is not necessary in situations where lay jurors are not the trier of fact or cross-examination would "add little security"[125] to the statement's accuracy. Despite claiming to adopt Wigmore's scholarship, the Supreme Court has averted Wigmore on these important tenets. The case law is steadfast that the hearsay rule is concerned with exposing the hearsay dangers, and the role of cross-examination is to test for them. Only Justice L'Heureux-Dubé has adopted Wigmore's view. Writing in dissent (not on this issue) in *R v Starr*, she stated:

> The rule against hearsay developed at the same time as the modern form of trial and is associated with a deep-seated distrust of the jury system. It is premised on a belief that the jury will erroneously assess the probative value of evidence and the retention of the rule reflects continued suspicions about jury deliberations. The rule against hearsay is "founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement."[126]

Based on this premise, L'Heureux-Dubé J. sought to loosen the hearsay rule to reflect the full competency of lay jurors. L'Heureux-Dubé sought a

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119 *R v Couture*, 2007 SCC 28 at para 92 [*Couture*].

120 *Ibid* at para 35.

121 *KGB*, *supra* note 48.

122 *R v U(FJ)*, [1995] 3 SCR 764, [1995] SCJ No 82 (QL).

123 *Khelawon*, supra note 46 at paras 61-64.

124 Koch, supra note 8 at 90-94.

125 Wigmore, supra note 8, vol 3 at 154, §1420.

126 *Starr*, supra note 71 at para 31, citing *Smith*, *supra* note 55 at 935 [citations omitted].

solution in search of a problem however. The hearsay rule's historical rationale was not developed out of a concern for the evaluative capacity of lay jurors. Cross-examination has always been deemed necessary to shed light on potential sources of unreliability in hearsay evidence.

There is congruence in the role cross-examination played under the hearsay rule's historical rationale and the role assigned to it in the current jurisprudence. According to the jurisprudence, the "central concern" of hearsay evidence is its reliability.[127] Reliability is conceptualized as the hearsay dangers; that is, concern with the declarant's perception, memory, narration, and sincerity.[128] The hearsay jurisprudence endorses methods of testing hearsay for the hearsay dangers, and of the methods cross-examination is privileged.

We just distinguished between the theoretical and practical role of cross-examination. The roles are not the same. The theoretical role of cross-examination is to test the veracity of the declarant's statement. For example, the Supreme Court views cross-examination as the "ultimate means of demonstrating truth and of testing veracity."[129] Without cross-examination, according to the Supreme Court, there may be "no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."[130] While the historical hearsay rule privileged cross-examination, there is no indication that it did so to such an extent. The jurisprudence is more in line with Wigmore's profound faith in cross-examination.

The practical role of cross-examination in criminal law is broader. In criminal practice, the goal of the cross-examining defence counsel is to raise a reasonable doubt on the evidence. Though not formally recognized, considerations other than the reliability of the evidence are employed in criminal practice to raise a reasonable doubt. There is tremendous overlap between the reliability of the evidence and raising a reasonable doubt; but the overlap is not perfect. The difference between the theoretical and practical roles of cross-exemption allow an accused person to cross-examine

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127 *Ibid* at para 159.

128 *Baldree*, supra note 47.

129 *R v Osolin*, [1993] 4 SCR 595 at 663, [1993] SCJ No 135 (QL) [*Osolin* cited to CanLII].

130 *R v Lyttle*, 2004 SCC 5 at para 1 [emphasis in original].

on considerations broader than reliability. When this occurs, cross-examination takes on epistemic and practical qualities that are beyond the scope of testing the reliability of the evidence. This method of cross-examination is not explicitly accepted in the hearsay jurisprudence. It is, however, accepted in practice by judges and counsel. Indeed, it is a regular occurrence.

In terms of epistemic qualities, a witness may have difficulty articulating their evidence to the court. The witness may suffer from crippling anxiety or be unfamiliar with courtroom procedure or unclear about what details they ought to include in their testimony. All of these difficulties are unrelated to the reliability of the witness' evidence. Nonetheless, a skilled cross-examiner is duty bound to expose these difficulties in cross-examination, if it is in his or her client's best interest, to convince the trier of fact to not rely on the witness' evidence. The cross-examination will have little to do with shedding light on the reliability of the witness' evidence and much to do with preventing the witness from articulating that evidence.

In terms of practical qualities, a witness may be quick to anger or have an otherwise unpleasant disposition. For example, they may be a gang member distrustful of the police, court process, and trier of fact. The accused person's lawyer may choose to cross-examine in a manner that brings out the witness' unfavourable personality, tying their distasteful character to the reliability of their evidence. Trials are a human process. The trier of fact may be unwilling to believe the witness' evidence despite whatever veracity it may possess.

Perhaps most poignant in terms of practical qualities is the occasion on which a witness' evidence is acutely tied to their credibility.[131] Granted, reliability is always implicated when a witness' credibility is questioned. Reliability becomes divorced from credibility when cross-examination focuses the trier of facts' attention on the witness' character to the exclusion of their evidence. Consider the common dynamic when a witness is the former co-accused of a defendant. Cross-examination can be used to paint the witness as needing to testify in a manner that secures the accused person's conviction in order to receive a lighter sentence. This may or may not be true. While in theory cross-examination must shed light on the truth, in practice the cross-examination is intended to tie the witness' evidence to their character so tightly that the trier of fact is unwilling to put any faith in

131 Cudmore, *supra* note 4 at 107-118.

the witness' evidence. This is not the same as testing the reliability of the evidence. Cross-examination may permissibly explore whether a witness has incentive to lie, but it cannot allow a truthful witness to be cast as a lair.

This occurs frequently. Take Edward Greenspan's cross-examination of David Radler in the *United States of America v Conrad M. Black and others*.[132] The cross-examination is examined by Gordon Cudmore in *The Mystery of Hearsay*.[133] Conrad Black was charged with multiple fraud-related offences. David Radler was Black's business partner. Radler signed a plea agreement with the prosecution and became the star prosecution witness against Black. The plea agreement turned on Radler testifying 'to the truth' against Black before Radler's trial. If Radler told the truth at Black's trial, he would receive a favourable sentence at his subsequent trial. Greenspan's cross-examination of Radler painted him as an opportunist who tells the truth in line with his interest: when Radler's interest changes, so too does his version of the truth:

> THE COURT: [Restating a question asked by defence counsel] "And I'm going to suggest to you, you know full well that if you come off your script, you know that the government will tell the judge that you're a liar, don't you?"
>
> WITNESS: I have no script, sir.
>
> DEFENCE: Is that your answer:
>
> WITNESS: That's my answer.
>
> DEFENCE: Okay. And so the key to your future in this courtroom, I put it to you, is [the prosecutor]. Do you appreciate that?
>
> WITNESS: Well, I'm getting a greater appreciation of it from you in any case.
>
> (Laughter)
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> DEFENCE: Maybe you should have hired me a long time ago. Now, the government wants to make absolutely sure that you say what they want because they added a clause to your agreement stating that

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132 *Black v United States*, 561 US 465 (2010).

133 Cudmore, *supra* note 4 at 107-118.

you will not be sentenced until you have testified in this trial. Isn't that right?

WITNESS: The clause is in there that I will not be sentenced until I testified, yes.

DEFENCE: So, there's a clause in that plea agreement, right?

WITNESS: Yes.

DEFENCE: And you signed the plea agreement on September 20th, 2005, that you will not be sentenced until the others have been prosecuted, correct? The fact is you haven't been sentenced yet, have you?

WITNESS: No, I haven't

DEFENCE: The fact is that you must perform here or lose your deal, correct?

....

WITNESS: I'm here to tell the truth, sir.

DEFENCE: I see. I see. And that's your answer to my question?

WITNESS: That's my answer, yes.

DEFENCE: Okay. You'll tell the truth even if it hurts [the prosecutor] and makes him angry at you, right? You're just going to tell the truth, correct?

WITNESS: I will answer your questions truthfully.

DEFENCE: If he thinks you're lying, you know you're in big trouble, don't you?

WITNESS: I now know, yes, certainly.[134]

Did Radler have to testify in a manner which convicted Black in order to receive his plea agreement with the prosecution? Would Radler's observations, unadulterated, produce testimony that achieved this result? We will never know. Greenspan's cross-examination focused so intensely on Radler's character that the truth of his evidence was obscured. The jury was encouraged to disregard the content of Radler's evidence because he was so deeply mired in an incentive to lie. The strategy worked too. Black was

134 *Ibid* at 116-117.

acquitted of all of the charges that relied upon Radler's testimony.[135] Surely this is not what the Supreme Court had in mind when it deemed cross-examination the "ultimate means of demonstrating truth and of testing veracity."[136]

This is not to say that the cross-examination strategy is improper or even undesirable. To the contrary, it can be proper. Criminal defense counsel in Ontario are duty bound to advance this strategy if it helps their client.[137] As part of the duty the practical role of cross-examination must be to raise a reasonable doubt. The role is laudable; the disjunction between it and the theoretical role of cross-examination is the problem. The hearsay jurisprudence assumes that an accused person's lawyer will cross-examine the declarant to expose reliability issues, but the lawyer may, and in many instances will, cross-examine more broadly, and emotionally, for the purpose of raising a reasonable doubt.

It is unclear whether the epistemic and practical qualities imbued in raising a reasonable doubt through cross-examination were present when the hearsay rule was developed in the 1600s and 1700s. Cross-examination was a relatively late justification for the hearsay rule's development, post-dating concerns with absence of an oath and demeanour evidence.[138] The same parties rule prohibited depositions taken in one proceeding from being used in another if the parties or issues were not the same in both. The rule was created in large part because of the lack of opportunity to cross-examine the declarant. Likewise, the joinder of issues rule prohibited the use of depositions that were not given at trial under the threat of perjury. It was eventually justified in the late 1600s in part because of the lack of opportunity to cross-examine the declarant of the disposition.[139] These two rules did not delineate between cross-examination for the purposes of testing reliability and raising a reasonable doubt.

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135 *Ibid* at 117.

136 *Osolin*, *supra* note 129 at 663, per Cory J.

137 Law Society of Ontario, *Complete Rules of Professional Conduct*, Toronto: LSO, 2019, ch 5.1-1 [*Rules*].

138 Koch, supra note 8 at 288-300.

139 Henry Bathurst, *The Theory of Evidence* (Dublin: Sarah Cotter, 1761) cited in Koch, *supra* note 8 at 236.

On the other hand, Richard Friedman's scholarship on the nexus between the modern hearsay rule and the right to confront the witness shows that by the mid-1600s accused persons in treason trials had the right to confront the sworn testimony of their accusers "face to face."[140] Confrontation in treason trials suggests a right to cross-examine for the purpose of raising a reasonable doubt. It is unlikely that the accused person was limited to shedding light on the accuser's sincerity, use of language, memory, and perception of the statement in question.

A third possibility is that the historical hearsay jurisprudence advanced a truth-seeking role for cross-examination and the lawyers of the day practiced beyond that role. This is what occurs today in varying degrees. The surviving historical records do not make clear how cross-examination was practiced in court.

If cross-examination was not practiced to raise a reasonable doubt – that is to say, the epistemic and practical qualities in raising a reasonable doubt were not present - there is a difference between the hearsay rule's historical rationale and current application. Contemporaneous cross-examination is deemed important in the historical and current hearsay jurisprudence because of its ability to shed light on the hearsay dangers. In practice, however, cross-examination is employed to fill a broader array of roles. This brings into question the importance of cross-examination in the hearsay jurisprudence. Its truth gathering function may be overstated; or it may be stated correctly and applied differently by defence lawyers.

## E. The Evidence is Unsworn

Like demeanour evidence, the absence of sworn evidence remains one of the core concepts of the hearsay rule. The role of sworn evidence has changed with the times. Gone is the suggestion that supernatural retribution will follow if a witness lies under oath.[141] The spectre of such punishment remains a consequence of the oath for some witnesses, but it is no longer part of the oath's philosophical significance. Rather, like the solemn affirmation, the oath's significance is its impression upon the witness of the moral obligation to tell the truth.[142] The oath and solemn affirmation are court procedures that augment the reliability of testimonial

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140 Friedman, *supra* note 23 at 97.

141 *KGB*, supra note 48 at 788.

142 *Ibid.*

evidence. They are employed to aid the trier of fact in arriving at the correct decision.

In practice the oath and affirmation operate in tandem with criminal law. A witness who describes one version of events to the police and another version at trial is liable for prosecution for a number of offences. Under the *Criminal Code,* the witness could be found guilty for obstruction of justice (s. 139), public mischief (s. 140), or fabricating evidence (s. 137). In addition, if a witness provides contradictory statements, both of which are under oath or solemn affirmation, the witness could be further prosecuted for perjury (s. 131). Together, the threat of state punishment and the moral suasion of the oath or solemn affirmation increase a witness' inclination to tell the truth at trial - or at least be cautious with their words.[143] Between the two, the threat of state punishment is a far greater influence on the truthfulness of a witness' statement than the moral obligation to tell the truth.

So important is sworn evidence to the hearsay rule that it is almost a necessary requirement for the admission of prior inconsistent statements. In *K.G.B.* the Supreme Court held that the oath and solemn affirmation augment the reliability of a statement to such an extent that, all things being equal, their absence in a prior inconsistent statement strongly suggests inadmissibility.[144] Among other considerations, requiring a prior inconsistent statement to be sworn at its utterance prevents the trier of fact from accepting unsworn testimony over sworn testimony.[145] It also prevents the trier from potentially convicting the accused person solely on unsworn testimony.[146] Currently statements taken for the purpose of preserving their words and veracity ought to be made under oath or solemn affirmation and follow an explicit warning of criminal prosecution for lying.[147]

Sworn evidence is not a mandatory requirement for the admission of hearsay. The need is acute for prior inconsistent statements. The overriding concern for the admission of hearsay evidence is always necessity and

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143 *Ibid* at 788-789.
144 *Ibid* at 789-790.
145 *Ibid* at 789-791.
146 *Ibid* at 791.
147 *Ibid.*

reliability. The absence of an oath or solemn affirmation for any hearsay statement can be overcome by the circumstances in which the statement was made and other means of testing it. Indeed, even for prior inconsistent statements, alternative measures for impressing the importance of telling the truth upon the witness can substitute for the oath or solemn affirmation.[148]

In all, then, the oath remains an important concept of the hearsay rule. Its influence upon a witness has shifted with the times, focusing today on the threat of state punishment. As a court procedure intended to augment the reliability of testimonial evidence, the oath serves to aid the trier of fact in arriving at the correct decision.

## F. Fairness in the Adversarial Process

The admission of hearsay evidence occasions two types of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence.[149] These two types of unfairness primarily comprise the factor 'fairness in the adversarial process.'

Fairness in the adversarial process is one of three aspects of the hearsay rule's historical rationale and remains a factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness inherent in admitting hearsay evidence. However, the test's influence is affected by changes in litigation procedure. Indeed, modern litigation procedure in preliminary inquiries has created a third type of prejudice for people accused of serious criminal offences.

We begin with the first type of unfairness: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified. It is not guaranteed that the declarant would have uttered the hearsay statement if he or she knew that they were subject to an oath or affirmation, cross-examination, and observation by the adverse party, judge, and, potentially, lay jurors. In determining the admissibility of hearsay evidence, courts are concerned with whether the hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact "a

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148 *Ibid* at 792.

149 Ho "Theory of Hearsay", *supra* note 37 at 410.

satisfactory basis for evaluating the truth of the statement."[150] This is the test for threshold reliability, and it is supposed to minimize unfairness in the adversarial process by screening out hearsay statements that are devoid of a basis for testing its truth or accuracy. The test is concerned with the basis for evaluating the statement's truth, not the actual truth of the statement. The actual truth of the statement is left for the trier of fact to determine. Hence if a declarant testifies at a preliminary inquiry that she saw "the accused and an alien kill the victim with a spaceship," and the declarant cannot be found at trial, her hearsay statement would likely be admitted into evidence under the hearsay rule. The declarant would have made the statement under oath or solemn affirmation, been visible to the adverse party when making the statement, and would have been cross-examined. Although the truth of the statement is clearly false, the basis to determine its falsity is clear.

While this may make sense in isolation, in modern criminal trials it can exacerbate unfairness. There are sub-proceedings in criminal trials where evidence is not weighed. The sub-proceedings include preliminary inquiries and directed verdict applications. In these sub-proceedings, a hearsay statement admitted into evidence is taken at its highest. This creates a tension. The hearsay rule assumes that hearsay evidence will be appropriately weighed by the trier of fact, including the possibility that it will be disregarded. In a preliminary inquiry or directed verdict application, admitted hearsay is never disregarded. It is assumed to be true. Significantly, if a hearsay statement is not admitted into evidence in a preliminary inquiry or directed verdict application, its omission has the potential to end the prosecution. The tension between the different assumptions of weight in the hearsay rule and the sub-proceedings did not exist during the hearsay rule's creation and is still not accounted for in the current hearsay jurisprudence.

Take preliminary inquiries. Evidence is presented by the prosecution to show that there is evidence upon which a jury acting reasonably could convict the accused person.[151] One purpose of the preliminary inquiry is to

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150 *Baldree*, supra note 47 at para 83, citing *Hawkins*, supra note 74 at para 75.

151 *United States of America v Shephard*, [1977] 2 SCR 1067, [1977] SCJ No 106 (QL).

screen out charges for which the prosecution does not have any evidence that could result in a conviction. The evidence is not weighed by the preliminary inquiry judge. Every inference in the evidence is taken at its highest to afford the opportunity to commit the accused person to trial, where he or she can be judged in full by a trier of fact.[152] These conditions can set up a perfect storm of unfairness, one which is not uncommon in Canadian courtrooms. A hypothetical illustrates the point: A completely fanciful and untrue hearsay statement is tendered at a preliminary inquiry. The declarant does not attend and the statement meets the test for threshold reliability. The hearsay statement will be admitted into evidence and deemed true. Assume that the hearsay statement is the lynchpin for the prosecution, giving it enough evidence to commit the accused person to trial. There is a great deal of unfairness here. The prosecution is permitted to tender a statement that the court assumes would have been proven by the declarant if he or she testified – and, worse, the statement is deemed to be true. The unfairness cascades onto other unfairness. The accused person is unable to discover the hearsay statement through cross-examination. The statement, despite being fanciful and untrue, commits the accused person to trial. Typically, that trial is four to six months away. If the accused person is detained in custody, they must remain detained for that time. By contrast, if the statement had been weighed for the untruth that it is, the accused person would have been discharged at the preliminary inquiry. Their ordeal with the criminal justice system would have been at an end, barring the exceptional use of a preferred indictment.[153]

The second type of unfairness in 'fairness in the adversarial process' is the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice.[154] This unfairness can manifest in directed verdict applications at trial. An accused person can apply for a directed verdict of acquittal at the end of the prosecution's case. The test is the same as at a preliminary inquiry: is there evidence upon which a jury acting reasonably could convict the accused person?[155] Every inference available on the evidence is taken at its highest in the prosecution's favour. A successful directed verdict application has strategic implications for the accused person. If the application is granted,

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152 *R v Arcuri*, 2001 SCC 54 [*Arcuri*].

153 *Criminal Code*, RSC 1985. c C-46, s 577 [*Criminal Code*].

154 Ho, "Theory of Hearsay", *supra* note 37 at 410.

155 *Arcuri*, *supra* note 152 at para 26.

the accused person is acquitted by the judge. They do not have to call evidence in their defence to defeat the charge. If the directed verdict application is denied, the accused person is in the same position they were in before the application was made. They may need to call evidence in their defence.

Apply the previously discussed hypothetical into the context of a directed verdict application. A completely fanciful and untrue hearsay statement is admitted during the prosecution's case at trial. The statement is the lynchpin of the charge surviving the directed verdict application. An application to direct a verdict of acquittal is made by the accused person. The hearsay jurisprudence assumes that the hearsay statement will be weighed by the trier of fact as untrue. However, in the directed verdict application the statement is deemed to be true. As a result, the directed verdict application is denied. In order to remove the prejudice created by the untrue hearsay statement, the accused person will have to call evidence in their defence, or gamble that the trier of fact will weigh the statement as untrue.

A dissonance between the hearsay jurisprudence and criminal litigation procedure can create a third type of unfairness that did not exist during the hearsay rule's development. There exists in preliminary inquiries procedures not accounted for in the hearsay jurisprudence. These procedures change the purpose for which cross-examination is conducted. The effect is unfairness to the cross-examining party.

A witness' testimony before a preliminary inquiry will generally be admitted as hearsay evidence if the witness is unavailable to testify at trial. The fact that the witness' statement was made under oath or solemn affirmation and subject to contemporaneous cross-examination by the adverse party on the same issues will be sufficient to satisfy the test for threshold reliability.[156] Driving admissibility is the adverse party's ability to cross-examine the declarant. In almost all instances, the cross-examining party in a preliminary inquiry is the accused person. Litigation procedure may cause the accused person's litigation strategy to change between the preliminary inquiry and trial. The cross-examination conducted at the

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156 *Hawkins*, supra note 74 at para 76.

preliminary inquiry will serve a purpose different than cross-examination at trial. However, if the declarant does not attend the trial, the accused person will be unable to implement the new cross-examination strategy. Instead, the accused person will be stuck with the cross-examination from the preliminary inquiry.

A change in cross-examination strategy can occur for a variety of reasons. One reason is that the accused person faces a number of charges at the preliminary inquiry and reasonably believes that they can be discharged on the weaker charges through cross-examination. The accused person may choose to cross-examine the declarant extensively on the subject of the weaker charges in the hope of obtaining a discharge. The witness' evidence on the other charges will be left unchallenged, saving the surprise of cross-examination on these issues for the trial. The tactic is a strategic one. It assumes, fairly, that the witness will be available for cross-examination at trial. If the witness' evidence is admitted at trial under the hearsay rule, however, the accused person is unable to implement the second half of their strategy. The hearsay jurisprudence assumes, unfairly, that the witness has been fully cross-examined.

Cross-examination strategy between a preliminary inquiry and trial can also change when the preliminary inquiry is held for jointly charged accused persons. The prosecution's witnesses will almost always be cross-examined on the assumption that none of the accused persons will plead guilty and testify against their former co-accused at trial. It is not uncommon though for this very thing to happen between the preliminary inquiry and trial. One cannot anticipate it, but it is a real risk. The change is a tactical decision initiated by the prosecution and accepted by the pleading accused person. If one of the accused parties pleads guilty and testifies against his or her former co-accuseds at trial, there may need to be recalibration for the cross-examination of *other* witnesses from the preliminary inquiry.

A common example makes this clearer. Imagine that two men are charged with shooting at a police officer. The prosecution is not sure which of the two men is the culprit, so both are prosecuted. At the preliminary inquiry an eyewitness testifies that she saw a man a gun, but she is not sure who it was. The cross-examination strategy of the accused parties at the preliminary inquiry will be to challenge the eyewitness' ability to identify the shooter.

This all changes if one of the accused parties pleads guilty in exchange for testifying against the other. The remaining accused person would want

to cross-examine the eyewitness to suggest that the (former) co-accused was the shooter. The cross-examination would fit into a new defence theory that the co-accused shot at a police officer and is now testifying to deflect blame and secure a lower sentence. The strategy is similar to Edward Greenspan's cross-examination of David Radler in *United States of America v Conrad M. Black and others*.[157] The strategy comes crashing down, though, if the eyewitness does not attend at the trial. Her evidence would likely be admitted into evidence under s. 715 of the *Criminal Code* or the hearsay rule. The law assumes that the accused person had the opportunity to cross-examine the eyewitness at the preliminary inquiry. In reality, that opportunity is hollowed by the former co-accused's guilty plea and anticipated testimony.

The same dynamic can occur when multiple accused persons are tried together at a preliminary inquiry and severed in prosecution before the trial. The accused persons will share a preliminary inquiry but not share a trial. Often, the prosecution decides to sever the accused parties before the trial so that they can be compelled to testify against one another at each other's respective trials. The anticipated testimony of the severed accused party can change each defendant's cross-examination strategy of the witnesses from the preliminary inquiry. The example of the 'police shooter' is applicable to this situation, as is the resulting unfairness. If a witness from the preliminary inquiry cannot be found at the time of trial, the accused person will be unable to initiate his or her new cross-examination strategy. Instead, the hearsay jurisprudence will deem the accused person to have applied their strategy at the preliminary inquiry. The hearsay evidence will be admitted despite a hollow cross-examination of the declarant at the preliminary inquiry.

The unfairness created by preliminary inquiry procedure is not generated by the hearsay rule in all instances. Under section 715(1) of the *Criminal Code*, preliminary inquiry testimony will generally be admitted into evidence at trial if the declarant refuses to be sworn or to give evidence, is dead, insane, so ill as to be unable to travel or testify, or is absent from

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[157] Cudmore, *supra* note 4 at 107.

Canada.[158] The hearsay rule allows for the admission of preliminary inquiry testimony not captured by s. 715(1).[159] This occurs quite frequently in practice. It is not uncommon for a witness to not show up to the trial. Without contact with the witness, the prosecution cannot prove that the conditions precedent of s. 715(1) are met. It falls to the hearsay rule to determine whether the testimony can be admitted into evidence.

Section 715(1) of the *Criminal Code* is a statutory exception to the hearsay rule. However, it does not consider the necessity and reliability principle to determine admissibility. Hearsay evidence falling within s. 715(1) is automatically admitted into evidence. In this respect, it is an exception to the hearsay rule that operates differently than the common law exceptions. The admissibility of hearsay falling within s. 715(1) is rarely challenged, and it is not successfully challenged for the types of prejudice discussed in this section. Admissibility under s. 715(1) can be challenged by asserting that the hearsay's probative value does not outweigh its prejudicial effect. Even more rare, s. 715(1) can be constitutionally challenged for operating in a manner that renders the trial unfair. Under a constitutional challenge, the trier of law would likely determine admissibility with reference to the necessity and reliability principle.

In summary, fairness in the adversarial process remains an underlying factor in the current application of the hearsay rule. The test for threshold reliability aims to attenuate the two types of unfairness in admitting hearsay evidence: the unfairness to the adverse party in assuming that the declarant would have proven his or her hearsay statement if he or she testified; and the disadvantage to the adverse party by the production of hearsay evidence without giving that party the chance to remove the prejudice caused by that evidence. However, the test fails to recognize litigation procedures that exacerbate the two types of unfairness. A third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

## IV. CONCLUSION

The hearsay rule has come a long way since Sir Walter Raleigh was convicted and sentenced to death on the strength of hearsay evidence. An exclusionary evidence rule has formed with a historical rationale that has

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158 *Criminal Code*, *supra* note 153, s 715(1).

159 *R v Saleh*, 2013 ONCA 742 at para 76 [*Saleh*].

three aspects: concern with the inherent reliability of hearsay evidence, concern with procedural reliability in admitting the evidence, and fairness in the adversarial process. There are five factors that gave rise to the hearsay rule and underlie this rationale: the hearsay dangers, demeanour evidence, the lack of opportunity to cross-examine the declarant, the evidence is unsworn, and fairness in the adversarial process. These five factors still hold influence on the application of the hearsay rule and its exceptions.

Using the five factors as indicia of difference between the hearsay rule's historical rationale and current practical application, it is clear that there are a number of differences. The hearsay dangers may not be allayed by cross-examination alone or when the threshold reliability test is applied too loosely. In these situations, the concern with the hearsay dangers is less than it is under the hearsay rule's historical rationale. The value of demeanour evidence is sometimes subsumed by cross-examination. The testimonial oath or affirmation's influence upon a witness has shifted with the times, focusing today on the threat of state punishment. The opportunity to cross-examine the declarant is complicated in practice by the disjunction between its theoretical role in hearsay jurisprudence and its application in criminal hearings. Due to this disjunction, the truth gathering function of cross-examination may be overstated; or it may be stated correctly and practiced differently by criminal defence lawyers. The test for threshold reliability fails to recognize litigation procedures that augment unfairness in the adversarial process. Moreover, a third type of unfairness exists due to criminal litigation procedures that change the strategy of cross-examination for accused parties.

As early as the trial of Sir Walter Raleigh in 1603, criminal cases have been won and lost on the application of the hearsay rule. The doctrine is complex and not instinctual. The analysis in this article is important for lawyers, evidence scholars, or anyone who testifies in a courtroom. It aids in understanding what the hearsay rule is, where it comes from, and where there exists incongruence between the rule's theoretical purpose and practical application. These lessons can guide the doctrine's development to help ensure that the hearsay rule's application is consistent with its theoretical purpose.

# Threading the Needle: Structural Reform & Canada's Intelligence-to-Evidence Dilemma

CRAIG FORCESE*

FEATURED ARTICLE

## ABSTRACT

This article canvasses the "intelligence-to-evidence" dilemma in Canadian anti-terrorism. It reviews the concept of "evidence", "intelligence" and "intelligence-to-evidence" (I2E). It examines Canadian rules around disclosure to the defence: the *Stinchcombe* and *O'Connor* standards and the related issues of *Garofoli* challenges. With a focus on Canadian Security Intelligence Service (CSIS)/police relations, the article discusses the consequences of an unwieldy I2E system, using the device of a hypothetical terrorism investigation. It concludes disclosure risk for CSIS in an anti-terrorism investigation can be managed, in a manner that threads the needle

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between fair trials, legitimate confidentiality concerns and public safety. The paper proposes both administrative and legislative changes accomplishing these objectives.

***Keywords***: intelligence; evidence; criminal law; national security; terrorism; police; CSIS

## I. INTRODUCTION

Canada struggles with terrorism investigations. Not least, the Canadian Security and Intelligence Service (CSIS) and police struggle to coordinate and collaborate. Consider this passage from *Ahmad*, a 2009 terrorism prosecution: "CSIS was aware of the location of the terrorist training camp...This information was not provided to the RCMP, who had to uncover that information by their own means. Sometimes CSIS was aware that the RCMP were following the wrong person, or that they had surveillance on a house when the target of the surveillance was not inside, but [CSIS] did not intervene."[1]

Reasonable observers might assume that CSIS's failure to inform the police was a one-off mistake, or at worst a remnant of the cultural divide that bungled the 1985 Air India bombing investigation. It was not – it exists by design. This design responds to the "intelligence to evidence" (I2E) dilemma, and specifically the risk that sensitive CSIS targets, sources, means and methods might be disclosed to the defence (and public) in a prosecution, should CSIS share its intelligence with the police.

Both inside and outside government, observers now acknowledge the institutional distance created by I2E is a problem, and must be solved. I2E was described by the current CSIS director as one of the most pressing challenges for CSIS,[2] and a former commissioner of the RCMP worried that terrorism investigations are not well coordinated at the structural level to manage public safety risks.[3] But solutions are not easy. Like many issues in

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1 *R v Ahmad*, 2009 CanLII 84776 (Ont Sup Ct J) at para 43, [2009] OJ No 6153 [*Ahmad*].

2 David Vigneault, "Ep 36: An INTREPID Podsight: CSIS Director David Vigneault" (11 May 2018) at 00h:29m:40s, online (podcast): *A Podcast called INTREPID* <www.intrepidpodcast.com/podcast/2018/5/11/t7a66ktq1pwmscgk9hinevyhu3slcn> [perma.cc/G8F4-EUAJ].

3 Bob Paulson, "EP 41: An INTREPID Podsight: Bob Paulson, former Commissioner of the Royal Canadian Mounted Police" (15 June 2018) at 00h:18m:35s, online (podcast): *A Podcast called INTREPID* <www.intrepidpodcast.com/podcast/2018/6/15/ep-40-an-

national security law, the I2E problem stems from real dilemmas. Solving the issue requires navigating a narrow strait between Odysseus's feared monsters, Scylla and Charybdis. And weaving this path bumps up against stiff currents produced by legal uncertainty, agency culture, cross-agency coordination and simple institutional inertia, all reinforcing each other. In the result, Canada's response to I2E dilemmas have so far been minimalist.

Like others,[4] I do not believe this is a satisfactory strategy. In the past, I have described I2E as the single biggest shortcoming in Canadian anti-terrorism law and policy,[5] and compared it to the tail that wags Canada's domestic anti-terrorism dog. It drives a siloing between police and CSIS, and silos are anathema in a dynamic security environment. The most obvious disaster stemming from siloing would be a terrorist outrage that (whether state actors admit it or not) could have been averted by more seamless intelligence-to-evidence solutions.

Less tragic – but still concerning – outcomes are criminal cases never brought because police and prosecutor right-hands are unable to act on intelligence produced by the CSIS left-hand. A related, sub-optimal outcome would be CSIS unilateralism: confronted with no solution to the I2E conundrum, CSIS responds to a threat with its new threat reduction powers,[6] even where such disruptions simply kick security dangers down the road through episodic disruptions that risk (as is notorious with disruptions) unforeseen knock-on consequences. All these outcomes would degrade security.

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intrepid-podsight-bob-paulson-former-commissioner-of-the-royal-canadian-mounted-police> [perma.cc/GUK8-LMP6].

4 Intelligence-to-evidence was a central concern of the 2010 Air India Bombing commission of inquiry report. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Final Report*, vol 1 (Ottawa: Public Works and Government Services Canada, 2010), online (pdf): <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/volume1.pdf.> [Air India Inquiry Vol 1]; See also Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence,* vol 4 of the Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (Ottawa: Supply and Services, 2010).

5 See e.g. Craig Forcese, "Staying Left of Bang: Reforming Canada's Approach to Anti-terrorism Investigations" (2017) 64 Crim LQ 487.

6 Canadian Security Intelligence Service Act, RSC, 1985, c C-23, s 12.1 [CSIS Act] ("If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.").

But these consequences would also undermine civil liberties. People are killed or injured in an avertable terror attack, precipitating knee-jerk responses that may do nothing to solve real problems but do fetter liberties. Threat reductions, done under secret warrant and possibly in violation of the law otherwise applicable to CSIS, fuel concerns about overreach, especially when done in the fog of uncertainty, and risk reputational fallout when they go wrong.

In writing this paper, I therefore share the view of others that anti-terrorism must always leave prosecutions on the table. Prosecutions, despite their imperfections, remain the clearest, most transparent and fairest means of responding to a security threat.[7] They signal that the liberal democratic state will respond with the tools of justice, not subterfuge. Following a fair, measured process, convictions denounce and stigmatize in a way nothing else can, a considerable virtue in an area of competing narratives. It is true other tools may be more appropriate than prosecutions in some circumstances. But that is a decision that should be driven by security imperatives, not artificial institutional fetters. Prosecutions should not fall from the toolbox because Canada has feet of clay on intelligence-to-evidence.

So how do we solve I2E? This article argues the first stage in resolving this conundrum is to understand it, and to tease its component pieces apart. Reducing the fog of uncertainty in this area requires a hard look at what the law is, and what it requires. To what degree are intelligence-to-evidence dilemmas the product of unalterable legal impediments? Are there steps that might plausibly be taken without violence to constitutional standards, and if so what path best navigates between the horns of the dilemma?

This article is organized into five sections. The first parts review the concept of "evidence," "intelligence" and "intelligence-to-evidence." Here, I point to the legal context in which I2E arises in Canada. Specifically, I examine Canadian rules around disclosure to the defence: the *Stinchcombe* and *O'Connor* standards and the related issue of *Garofoli* challenges. With a focus on CSIS/police relations, I then discuss the consequences of an unwieldy I2E system, using a hypothetical terrorism investigation of Bob the Bomb-Builder and his confederates. I conclude the disclosure risk for CSIS in an anti-terrorism investigation can be managed, in a manner that threads the needle between fair trials, legitimate confidentiality concerns and public

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7 On this point, see Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015) at chapter 9.

safety. I propose a three-legged approach to achieving this goal. To invoke another analogy, solving intelligence-to-evidence requires "moneyball": it requires incremental changes in several different areas that cumulatively culminate in regular base hits, rather than infrequent home-runs punctuated with numerous strike-outs.

I end this introduction with a disclaimer: As they consider this article, readers should be conscious of its inevitable shortcomings, especially in its assessment of current government practices. I have spent considerable time talking about this issue with lawyers and security practitioners in government. But I am an academic lawyer who has never worked in that government. Given how little on this subject is part of the public record, I know only what I have been able to extract from use of the access to information law, and from what people have been prepared to tell me. That means that my analysis is likely a close study of the tip of the iceberg.

## II. Defining "Evidence"

In my experience, different individuals and agencies debating "intelligence-to-evidence" (or I2E) mean different things by the expression. This uncertainty in diagnosing the problem makes it difficult to imagine solutions. This article begins, therefore, with definitions of "evidence," "intelligence" and "intelligence-to-evidence."

Neither "evidence" nor "intelligence" mean, simply, information. Both evidence and intelligence are purposive concepts; that is, they comprise information marshalled for specific ends. They are, therefore, subsets of information. But the subsets differ, because the purposes that define them also differ.

"Evidence" is the easier, and narrower expression, because it is tied strictly to the legal system and thus confined to the smaller box. Evidence is information, the truth of which determines facts that matter in deciding a legal adjudication. Put another way, evidence is data used by a trier of fact (a judge, adjudicator or jury) to resolve factual controversies.[8] It is information that is relevant because it tends, as a matter of logic or experience, to prove a fact that matters (is material) in the case. "Materiality"

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[8] In the discussion on materiality and relevance that follows, I draw on the concepts and structure of David M Paciocco & Lee Stuesser, *The Law of Evidence* 7th ed (Toronto: Irwin Law, 2015) at chapter 2.

and "relevance" constitute, therefore, the dual litmus test for deciding when information is "evidence."

## A. Materiality and Relevance

A material fact is a fact that a party is trying to prove because it affects the outcome in a case. Alice's eye-witness testimony that she saw Bob build a bomb is evidence of a material fact in a case in which Bob is charged with bomb-making. Alice's eye-witness testimony that Bob enjoys watching *Saturday Night Fever* is information, but it is not evidence because it does not relate to a material fact, at least not without additional context.

Evidence may also have a more "secondary" materiality, because it matters in assessing the quality of the evidence of a directly material fact. For example, if Alice's roommate Sally testifies that Alice is a compulsive liar, Sally's evidence does not have a direct connection to the fact of whether Bob built a bomb. It does, however, create doubt about the reliability and credibility of Alice's testimony, and therefore is connected to the question of whether Alice truly did see Bob build a bomb. It has, therefore, a more indirect materiality.

"Relevance" is closely associated with the concept of materiality. While materiality determines which facts matter (e.g., that Bob built a bomb vs. his misplaced fondness for *Saturday Night Fever*), relevancy is concerned with whether the evidence actually assists in proving the existence (or not) of a fact material to the case. Or put another way, "[r]elevance can be defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[9] Sometimes, evidence that contributes to proving a fact is also called "probative". Alice's eye-witness testimony "I saw Bob build a bomb" is relevant, because logic and experience suggest that seeing Bob in the act contributes to the probability that Bob did build a bomb (that is, the testimony is probative). Likewise, Sally's direct experience with Alice as a compulsive liar is relevant (and probative), because it diminishes the probability that Alice's evidence proves Bob built a bomb.

In comparison, information concerning Bob's collection of vinyl records is not relevant, as it does not assist (is not probative) in determining the probability of a material fact (i.e., whether Bob built a bomb). This

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9 *R v P (R)*, (1990) 58 CCC (3d) 334 (Ont H Ct J) at para 9, [1990] OJ No 3418.

irrelevant information is, effectively, "non-evidence" as it does not assist in resolving a factual controversy material to the case.[10] That is, it does not assist in deciding whether a fact that affects the outcome of a case is true or not.

It is not always easy to decide whether evidence is "relevant" to a "material" fact (that is, whether it affects the probability of the existence of a material fact). Relevance is contextual and will vary according to the facts at issue in the case, and what position the parties take on those facts. Evidence that one assumes will be relevant may prove irrelevant. In our hypothetical, any evidence that assists in resolving the fact of whether Bob built a bomb is obviously relevant to a material fact. And so, sales receipts showing that Bob acquired an unusual amount of fertilizer are relevant. But it may not be necessary for the prosecutor to prove the purchase of fertilizer if Bob admits to the purchase. And so, the sales receipts are no longer relevant to a material fact in dispute. The relevance of evidence may also depend on its immediate context. If Bob was playing the terrorist villain on the TV show *24* and Alice only "saw Bob build a bomb" in Episode 14, Alice's evidence suddenly becomes irrelevant.

On the other hand, it is also the case that things that one assumes irrelevant may turn out to be relevant. For instance, Sally's evidence of Alice's relationship with honesty only becomes relevant when Alice's testimony on Bob's conduct is used as evidence for Bob's conduct. In other words, relevance "may become apparent only when other evidence is adduced, and even then, it may depend on a chain of inferences."[11]

For reasons discussed further below, "relevance" is a key consideration in the I2E dilemma. The key take-away here, however, is that "relevant" does not mean every piece of information that might be in the possession of an investigative agency.

## B. Other Admissibility Considerations

While the starting point is that all relevant evidence should be available to the trier of fact "in a search for truth,"[12] other (essentially policy) considerations may limit this access, and therefore determine what

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10 Paciocco & Stuesser, *supra* note 8 at 4. See also *Mitchell v Canada (MNR)*, 2001 SCC 33 at para 30 (to be admissible, "the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case.").

11 Paciocco & Stuesser, *supra* note 8 at 32.

12 *R v Jarvis,* 2002 SCC 73 at para 68.

information is "evidence." These include legal "privileges" – such as solicitor-client privilege – and the public interest immunities found in section 38 of the *Canada Evidence Act*, discussed further below. These exclusions deny triers of fact access to certain types of information, to preserve other societal interests.

Other rules of evidence restrict the use to which some (even relevant) information may be put, based on suppositions about the reliability of that information. For instance, where it applies, the "hearsay" rule privileges statements made in-court, over those made out-of-court. Because trial fairness is (presumptively) imperiled if a speaker's information cannot be challenged in court, an out-of-court statement made by a person (who cannot be questioned in court) cannot generally be used to prove the truth of what it asserts. The CSIS intelligence office (IO) may assert "the informant told me she saw Bob building a bomb." But unless the informant is produced to testify in court, the IO's statement cannot generally be used to prove that Bob was building a bomb (although the IO could certainly use that tip to justify an investigation into Bob's activities).

To avoid rigid legal formalism, there are, however, exceptions even to this hearsay rule. Most notably, the formal hearsay rule gives way where the statement is reasonably necessary to prove a fact, and it satisfies a qualitative judgment concerning its reliability.[13] This reliability is assessed with "indicia" suggesting the statement is inherently trustworthy, or where its trustworthiness can be tested. Assume, for example, the IO's informant was the night-watchman on his appointed rounds. The latter found Bob building a bomb and then contacted the authorities. He was carefully and thoroughly questioned by the IO in a recorded conservation. The evidence produced in this manner would likely be more trustworthy than if the informant was a trespasser who reported seeing Bob building the bomb only when subsequently questioned by the IO, and now has since disappeared. Of course, a party wishing to rely on hearsay evidence would need to prove the indicia of reliability, increasing the scope of information that now is relevant to the case.

"Opinion evidence" is another sort of information treated with suspicion by the rules of evidence. An opinion is an "inference from observed fact."[14] If Alice says "I saw Bob build a bomb," the obvious

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13 See discussion in Paciocco & Stuesser, *supra* note 8 at 114.

14 *Ibid* at 195 (The discussion of opinion evidence is drawn from *ibid* Chapter 6, unless otherwise noted).

rejoinder is: "How, Alice, did you know it was a bomb?" Put another way, on what basis did Alice draw her inference that the thing Bob was working on was a bomb? But if Alice says "I saw Bob dismantling and adding components to a pressure cooker," this is a statement of fact (assuming Alice knows what a pressure cooker looks like), and Alice is not offering an opinion of her own. The implications of Bob's conduct are then left to the trier of fact, bolstered by whatever other evidence is offered concerning Bob's objectives (that is, bomb-making). (And in keeping with the discussion of relevance, Bob's employment as a repair person in a kitchen appliance shop now becomes more than information. It is admissible evidence because relevant to a newly material fact.)

The starting point is that facts are admissible, and opinions are not. There are, however, exceptions. Where they are in a better position to do so than the trier of fact, non-expert witnesses ("lay" witnesses) are permitted to offer opinions of a sort that people of ordinary experience can make and where recourse to an opinion is the most effective way of communicating the underlying facts. For example, Alice reporting "the person I saw was Bob" is, strictly speaking, voicing an opinion. But it would ask too much of Alice to expect her to instead testify about the physiographic features of the man's face. (Of course, if Bob contests that it was he that Alice saw, this is a question now at issue, and the basis for Alice's opinion becomes more important).

Expert evidence is also sometimes admissible, in circumstances where the expert offers an opinion on a matter on which people of ordinary background would be unlikely to form a correct judgment without aid. It might be necessary, for example, to use a properly-qualified expert to determine, definitively, whether Bob was building a bomb, as opposed to a souped-up pressure cooker. But even so, not every expert opinion has the same weight. The expert who examined Bob's contraption is in a very different position than the expert who based their opinion on a second-hand description of a device they have never seen.

If there is doubt about the factual foundation of an expert's opinion, that too reduces its evidentiary weight. For example, if the expert opines that Bob had the technical ability to make a bomb, it would matter whether this opinion stems from Yves's out-of-court statements that he and Bob attended the Acme bomb-making camp and Bob was the best in the class. The expert opinion is built on a fact that is itself the product of hearsay. This means that the trier of fact may be obliged to give the opinion no

weight because it has no factual foundation in the laws of evidence. And even if the expert's opinion survives because there are other, provable facts upon which it is based, the expert's opinion cannot be offered as proof that Bob did attend the Acme bomb-making camp.

## III. DEFINING "INTELLIGENCE"

If evidence is information that is legally cognizable under the rules of evidence, what is "intelligence"? Definitions here are more difficult because there is no consensus understanding of the term. "Intelligence" may mean different things to different agencies, because their mandates may drive what it is they collect. CSIS, for example, mainly collects "security intelligence"; that is, intelligence relating to "threats to the security of Canada" as that expression is defined in the CSIS Act.[15] But, under different circumstances, it may also collect "foreign intelligence": "information or intelligence relating to the capabilities, intentions or activities" or foreigners or foreign states or entities.[16] A similar concept is found in the *Communications Security Establishment Act* (currently part of Bill C-59): "foreign intelligence means information or intelligence about the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group, as they relate to international affairs, defence or security."[17] Of course, this definition does not actually define "intelligence" (and strangely, juxtaposes it with "information"). Nor does it provide precision on what "relating" to international affairs, defence or security (all themselves ambiguous concepts) means.

At a collection level, "intelligence" is also often divided into different "intelligence disciplines,"[18] according to the source of the information. For instance, intelligence collected from human sources is "human intelligence," or HUMINT, while intelligence collected through interception of electronic communications is "signals intelligence," or SIGINT. There are still other ways intelligence could be divided, by source. Intelligence could be the product of direct observation (a CSIS employee

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15 CSIS Act, *supra* note 6, ss 2, 12.

16 *Ibid*, s 16.

17 *Communications Security Establishment Act*, s 2, being Part III of Bill C-59, *An Act respecting national security matters*, 1st Sess, 42nd Parl, 2017 (first reading 20 June 2017).

18 Robert Clark, "Perspectives on Intelligence Collection," (2013) 20:2 J US Intelligence Studies 47.

sees Bob buy a pressure cooker at Walmart) or of intrusive surveillance (CSIS searches Bob's house, and bomb-making equipment is found). Intelligence could come from an informant who has, almost certainly, been offered anonymity and protection against the disclosure of his or her identity (CSIS confidential informant Alice hears Bob say "I am building a bomb"). It may also be shared intelligence, received from a foreign partner and likely "caveated" in a manner that limits its subsequent use by the recipient agency (The CIA tells CSIS that it believes Bob is building a bomb, which CSIS may use for investigative purposes but must not share). And it may also be packaged as processed analytical intelligence, compiling intelligence from any of the sources above (CSIS prepares an intelligence assessment from all the sources above, concluding Bob is building a bomb).

Still, at best, these sorts of classifications compartmentalize "intelligence" without defining it. And so, I shall also employ a generic understanding of intelligence:

> Intelligence is the umbrella term referring to the range of activities – from planning and information collection to the analysis and dissemination – conducted in secret and aimed at maintaining or enhancing relative security by providing forewarning of threats or potential threats in a manner that allows for the timely implementation of a preventive policy or strategy, including, where desirable, covert activities.[19]

Under this reasoning, intelligence is all the information that contributes to these objectives. Intelligence is information collected, analyzed, assessed, shared and assigned a value directed at some intelligence objective. Intelligence will, therefore, have its own concept of materiality and relevance – it cannot serve its purposes without focusing on information that assists in proving the existence (or not) of facts that contribute to the objectives of intelligence.

But because the breadth of these objectives is expansive, and not tied to a choreographed legal proceeding, the standards of relevance and materiality are almost certainly more relaxed for intelligence than for evidence. Intelligence is designed to serve a predictive function tied to an ill-defined understanding of "security." This means the potential paths by which a given piece of information may prove relevant to a material fact are more plentiful than they are in a legal proceeding built around shared (or at least resolvable) understandings of the limited key issues in dispute.

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[19] Peter Gill & Mark Phythian, *Intelligence in an Insecure World* (Cambridge: Polity Press, 2012) at 19.

As with evidence, intelligence practices may include their own heuristics – that is, shortcuts and protocols that, based on experience, maximize the chance of accuracy. Intelligence assessments will worry about the provenance, reliability and credibility of information. For example, an intelligence agency might regard as less reliable information from a single source that cannot be validated with other information. These practices may narrow the band of information processed as intelligence, by enabling more careful ingestion and evaluation of information. Understandings between agencies may also limit how intelligence is used. For example, "caveats" on intelligence shared between agencies may purport to limit how given intelligence in then used by the recipient service. And law itself may superimpose limitations for policy reasons on what information can be considered intelligence. For example, Canadian government policy limits the use to which information shared by foreign intelligence service may be put, where it is believed to be the product of mistreatment.[20]

But intelligence is not burdened to the same degree with the strict rules of admissibility that are part of the law of evidence. A hearsay exclusion would be nonsense to an intelligence practitioner, although that same analyst would still be worried about the credibility of the source.

Put another way, intelligence and evidence inhabit different worlds, and the broader, more diffuse concept of "intelligence" can sit poorly with the stricter, more technical concept of "evidence." As the Ontario Court of Appeal noted, discussing intelligence supplied by foreign services:

> [t]he source of the evidence is unknown. The circumstances in which the evidence was gathered are unknown. Often, the intelligence evidence itself is unknown because, for national security reasons, the named person is denied access to it. In the appellant's words, the intelligence information is "unsourced, uncircumstanced, and unknown."[21]

This decision concerned evidence supplied by France in a Canadian extradition proceeding. Despite these shortcomings, the Court of Appeal declined to rule intelligence inherently inadmissible. Rather, admissibility depended on whether the use of the intelligence would deny the "person's fundamental right to make answer and defence and have the benefit of a

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20 See e.g. *Ministerial Direction to the Canadian Security Intelligence Service: Avoiding Complicity in Mistreatment by Foreign Entities* (25 September 2017), online: <www.publicsafety.gc.ca/cnt/trnsprnc/ns-trnsprnc/mnstrl-drctn-csis-scrs-en.aspx> [perma.cc/7U9P-52SK] [Ministerial Direction].

21 *France v Diab*, 2014 ONCA 374 at para 205.

fair trial."[22] In sum, the worlds of intelligence and evidence overlap, but not always in predictable manners.

## IV. Defining "Intelligence-to-Evidence"

We reach, therefore, the question of "intelligence-to-evidence." Again, definitions matter, and here I offer my own. Intelligence-to-evidence is the inelegant phrase we use to describe several discrete types of issues. The first – at issue in the *Ahmad* matter noted in the introduction – is the movement of intelligence procured by intelligence services to support law enforcement, typically the police. I will call this the actionable-intelligence issue. An example would be CSIS supplying RCMP with the intelligence that Bob is building a bomb.

Ample actionable-intelligence is an ingredient of successful security – a point made in the 1985 Air India bombing inquiry,[23] by the 9/11 commission[24] and affirmed in the UK context by David Anderson's study of security services' performance in relation to the 2017 terror attacks in that country.[25]

In theory, police or other enforcement agencies could act on actionable-intelligence without worrying about how it dovetails with the concept of evidence. In practice, however, law enforcement agencies depend on legal proceeding. To perform their mission, they are not free to discard the conventions of evidence, at least not without running the risk of their conduct then being invalidated in one form or another. Likewise, intelligence agencies must contemplate how police – in their more legalized environment – will be obliged to use – and especially, disclose – the information intelligence services provide. The distance between intelligence and evidence matters, therefore, in considering even actionable-intelligence.

For this reason, actionable-intelligence sharing cannot be delinked from a second, closely-related component of I2E: something that I shall call the

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22 *Ibid* at para 209.

23 See Air India Inquiry Vol 1, *supra* note 4; Roach, *supra* note 4.

24 National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (New York: Norton, 2004) at 417.

25 David Anderson, *Attacks in London and Manchester March-June 2017, Independent Assessment of MI5 and Police Internal Reviews* (December 2017), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664682/Attacks_in_London_and_Manchester_Open_Report.pdf> [perma.cc/9UM5-S84R].

evidentiary-intelligence issue. Evidentiary-intelligence has two aspects. This first I will call the evidentiary-intelligence sword. The second, much better-canvassed issue in Canada is the evidentiary-intelligence shield problem.

The evidentiary-intelligence sword issue involves the use of intelligence in legal proceedings, to justify state action. For example, the prosecutor may wish to use intelligence provided by CSIS to RCMP to prove that Bob was planning to build a bomb. At issue, here, is the use of intelligence as evidence in a legal proceeding, either to justify police conduct or prevail in a legal dispute. Here, authorities must worry about the quality of the information, measured against the standards of evidence.

In comparison, the evidentiary-intelligence shield is about protecting intelligence from disclosure as part of a legal proceeding. For example, the government seeks to protect CSIS intelligence about Bob from disclosure to the defence, in a prosecution of Bob for building a bomb. As I argue below, while actionable-intelligence comes first in time, its scope will inevitably depend on an assessment of evidentiary-intelligence issues, especially shields. This preoccupation with evidentiary-intelligence is especially acute in the criminal law context. CSIS is determined that its "crown jewels"[26] – its targets, means, methods and sources – not be revealed in open court, dragged into a proceeding by Canada's broad criminal disclosure rules.[27]

The latter concern is a product of the Supreme Court's 1991 decision, *Stinchcombe*.[28]

## A. "First Party" Disclosure Under *Stinchcombe*

In *Stinchcombe*, the Supreme Court found a general duty on the Crown to disclose all relevant information to the defence in a criminal case. The "Crown" is, in practice, prosecutors and the police, so-called "first parties" to the case. The Crown must disclose upon request from the defence,

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26 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Final Report*, vol 3 (The Relationship Between Intelligence and Evidence) (Ottawa: Public Works and Government Services Canada, 2010) at 195, online (pdf): <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume3/volume3.pdf>.

27 The standard, CSIS "boilerplate" description of information CSIS will protect is set out in *Huang v Canada (Attorney-General)*, 2017 FC 662 at para 23, aff'd 2018 FCA 109 [*Huang*].

28 *R v Stinchcombe*, [1991] 3 SCR 326, [1991] SCJ No 83.

without judicial intervention.[29] When prosecutors determine whether to disclose (or not) information in the possession of the Crown, nothing turns on admissibility, or whether the information is exculpatory or inculpatory, or whether the Crown intends to use the information as evidence or not, or whether it find the information credible or not: the disclosure threshold is "relevance."[30] The Crown has a disclosure obligation "whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" [31] – that is, "in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence."[32] For instance, if the night-watchman who discovered Bob building a bomb called the police, the information stemming from the police interview with the night-watchman would be relevant to the material question of "was Bob building a bomb."

*Stinchcombe* prescribes a low threshold, and where it is resisted, the Crown bears the burden of justification. But there are limits to *Stinchcombe*. The implicit expectation in *Stinchcombe* is that Crown and police have information for criminal law purposes, and therefore their information holdings are likely relevant and that they comprise the case against the accused.[33] But this may not always be true, and *Stinchcombe* does not obliged disclosure of <u>every</u> possible piece of information in the police/Crown's possession relating to the case. The Crown and police have no obligation to disclose information that is "clearly irrelevant." As the Supreme Court has said, "[t]here is no constitutional right to adduce irrelevant or immaterial evidence."[34] The aperture of relevance – its scope – depends on what is charged, and any reasonable possible defences to these charges.[35] It is not

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29 *R v Gubbins*, 2018 SCC 44 at para 19 [*Gubbins*].

30 *R v Illes*, 2008 SCC 57 at para 63.

31 *R v Dixon*, [1998] 1 SCR 244 at para 21, [1998] SCJ No 17.

32 *R v Egger*, [1993] 2 SCR 451 at para 20, [1993] SCJ No 66.

33 *R v McNeil*, 2009 SCC 3 at para 20 [*McNeil*].

34 *R v Pires*; *R v Lising*, 2005 SCC 66 at para 3.

35 *R v Taillefer; R v Duguay*, 2003 SCC 70 at para 59. For instance, relevance is levered open where entrapment is a plausible defence. In *Nuttall*, the defence argued entrapment, after the police commenced a criminal investigation into the accused without reasonable suspicion of criminal activity and then induced criminal conduct. The court concluded the shared CSIS information that initiated the police investigation was relevant to this defence, and subject to *Stinchcombe*. *R v Nuttall*, 2015 BCSC 1125 [*Nuttall*].

relevant, for example, that the night-watchman was an Afghanistan veteran and that he had coffee during the interview with the police. There is no reasonable likelihood this information affects the probability that Bob built a bomb. (On the other hand, if the police knew that Bob used to beat up the night-watchman in high school, this is relevant to the question of whether the night-watchman might be lying, a matter that clearly affects the likelihood of whether the night-watchman saw Bob build a bomb.)

Nor does the Crown have an obligation to disclose so-called "background information" or "operational records" not specific to any particular investigation. Such information includes, for example, the maintenance records concerning a piece of technology used in an investigation.[36]

## B. "Third Party" Disclosure Under *O'Connor*

The *Stinchcombe* disclosure obligation is on the Crown. It does not extend directly to the information holdings of other government agencies – so-called "third parties." And so CSIS has been treated as a "third party," at least so long as its investigation is not so interwoven with that of the police that courts regard the two as conflated and organized with the purpose of charging and prosecution.[37] This does not mean that a government third party (in this case, CSIS) has no disclosure obligations. Moreover, the Crown does have an obligation to make reasonable inquiries of third-party state agencies that may be in possession of relevant information.[38] But the third-party disclosure standard is different from *Stinchcombe*. Instead, it is governed by the *O'Connor* approach.[39] The *O'Connor* approach does set a higher threshold on disclosure to the defence than does *Stinchcombe*: one of "likely relevance"[40] (rather than "not clearly irrelevant"). This *O'Connor* threshold is "significant, but not onerous,"[41] and excludes "fishing

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36 *Gubbins*, *supra* note 29.

37 See e.g. *R v Ahmad*, *supra* note 1.

38 *McNeil*, *supra* note 33 at para 13.

39 *R v O'Connor*, [1995] 4 SCR 411, [1995] SCJ No 98 [*O'Connor*]. See e.g. *Nuttall*, *supra* note 35 for recent applications of this test to CSIS.

40 *O'Connor*, *supra* note 39 at para 22. For a recent case applying *O'Connor* to CSIS, see *R v Peshdary*, 2017 ONSC 1225.

41 *Gubbins*, *supra* note 29 at para 26; *O'Connor*, *supra* note 39 at paras 24, 32. See also *Gubbins*, *supra* note 29 at para 27 ("Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation").

expeditions" for "irrelevant evidence."[42] But *O'Connor* differs most dramatically from *Stinchcombe* in creating a judicial gate-keeper to disclosure: Under *O'Connor*, the defence must persuade a court to order disclosure.

In a first step under the *O'Connor* process, the accused must persuade a trial judge that "there is a reasonable possibility that the information is logically probative [that is, tending to prove] to an issue at trial or the competence of a witness to testify."[43] Or, put another way, the defendant must show that the information is relevant to a material issue at trial. Issues at trial include not only "material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also 'evidence relating to the credibility of witnesses and to the reliability of other evidence in the case.'"[44]

For example: If the night-watchman is the Crown's witness in Bob's prosecution, the defence will likely want to know what the night-watchman might have said to CSIS, as part of CSIS's separate investigation into the bomb plot. The defence will need to persuade the trial court that there is a reasonable possibility that these CSIS interview notes constitute information logically probative (that is, they tend to prove) the merits of the night-watchman's testimony. There is a good chance of success on this point.

And if the defence succeeds, then the judge will order production of the information for the judge's own review. In this second stage, the judge weighs the different considerations favouring disclosure or non-disclosure to the accused. The caselaw does not propose a closed list of considerations guiding this assessment. In keeping with *O'Connor*'s specific facts, courts have emphasized fair trial considerations versus personal privacy interests in, especially, medical or psychiatric records. And so, if the CSIS interview included a psychiatric assessment of the night-watchman, the court would need to weigh the fair trial virtues of disclosing this assessment against the privacy interests of the night-watchman. But it seems unlikely that a simple interview between the informant and a CSIS officer would raise acute

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42 *McNeil*, *supra* note 33 at para 28.

43 *O'Connor, supra* note 39 at para 22.

44 *McNeil*, *supra* note 33 at para 33. There are caveats on this point. For one thing, the lower court caselaw suggests that a court may be attentive to redundancy, and decline to review documents containing information already in the hands of the defence. See e.g. *R v Nicholson*, 2016 BCSC 1831 at para 33; *R v Batte*, (2000) OR (3d) 321, 2000 CanLII 5751 (Ont CA) at para 75.

privacy interests of this nature. And what other considerations would go into this disclosure/nondisclosure balancing in a CSIS case are not prescribed: there is no legislative guidance here, as there has been in other contexts.[45] For reasons discussed below, I doubt the second prong of the *O'Connor* test could ever be very protective of CSIS secrets, whether legislated or not.

At any rate, the caselaw on CSIS secrets on the *O'Connor* approach is not especially helpful. Most of what can be usefully extracted from it concerns the first prong of the *O'Connor* test. For instance, in a case where the defence sought the entire CSIS investigatory information holding, the court noted that CSIS's mandate "is significantly different than that of the RCMP" and where the case is built entirely on information collected by the police, the defence fails "to show the likely relevance of the CSIS investigation as a whole to the issues" at trial.[46] That is, the aperture of relevance does not reach an entire CSIS investigation, just because it too was investigating the same target.

On the other hand, where the issue at trial is an entrapment defence, and at issue is whether a person was a CSIS source being directed by CSIS, production may be ordered, even at risk of impairing source identity.[47] And so, if Bob's claim is that he was entrapped into working on the bomb by the state, the court may order disclosure of information on the CSIS IO's conduct, even at risk of revealing Alice's identity as the IO's confidential informant. (And this development would likely spark a CSIS supplemental blocking effort, under the privileges discussed below.)

## C. Wiretaps and Disclosure

Different disclosure issues arise where a prosecution is supported by the fruits of a wiretap (or possibly, other forms of search warrant). Except in exigent circumstances, a police wiretap is authorized by a form of warrant, issued after a closed-door (*in camera*) judicial proceeding in which only the government side appears (*ex parte*). Police applications must be supported by evidence. Most notably, they must include an affidavit in which police affiants spells out the facts for their "reasonable grounds to believe" that interception of specified people's communications may assist in the

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45 See *Criminal Code*, RSC, 1985, c C-46, s 278.1ff, relating to third-party records containing the personal information of a complainant or witness [*Criminal Code*].

46 *R v Peshdary*, 2018 ONSC 1358 at para 43 [*Peshdary, ONSC*].

47 *R v Nuttall*, 2016 BCSC 154 at paras 9-11.

investigation of an offence.[48] The rules of evidence for such warrant affidavits are relaxed: they may include hearsay.[49]

Because the constitutionality of a wiretap depends on it meeting the strict requirements in the *Criminal Code*,[50] a defendant later prosecuted because of evidence stemming from the wiretap may wish to challenge the admissibility of that evidence by showing that the warrant was unlawfully issued (or used). This is done in what is known as a *Garofoli* challenge.[51] Here, the later judge retrospectively reviews the validity of the warrant issued by the earlier, authorizing judge.

The material issues in a *Garofoli* matter are, only, whether the record before the original, warrant-authorizing judge satisfied the statutory preconditions for the warrant, and whether that record accurately reflected what the affiant knew or ought to have known. And if the record does not meet this standard, the question then is: were the errors egregious enough to affect the issuance of the warrant.[52] The reviewing judge will invalidate the warrant where, upon review of the material before the authorizing judge, the reviewing judge believes there was "no basis upon which the authorizing judge could be satisfied that the preconditions for the granting of the authorization existed."[53]

To conduct this probe, the reviewing judge and the parties must obviously have access to the materials originally before the authorizing judge. For a police warrant, the information undergirding a warrant may already be part of the police investigative file, already disclosable to the

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48 *Criminal Code*, *supra* note 45, s 185(1). Sometimes called "reasonable and probable grounds" in the constitutional caselaw, "reasonable grounds to believe" is much lower than the criminal trial standard of "beyond a reasonable doubt." Instead, it is defined as a "credibly-based probability" or "reasonable probability." *R v Debot*, [1989] 2 SCR 1140, [1989] SCJ No 118.

49 See *Eccles v Bourque*, [1975] 2 SCR 739 at 746 ("That this information was hearsay does not exclude it from establishing probable cause," in an arrest context); *R v Morris*, 1998 NSCA 229, (1999), 134 CCC (3d) 539 at 549 (NS CA) ("Hearsay statements of an informant can provide reasonable and probable grounds to justify a search."); *R v Philpott*, 2002 CanLII 25164 (Ont Sup Ct J) at para 40, 56 WCB (2d) 163 ("The [warrant] issuing court may consider hearsay evidence obtained by the affiant from other officers or informants.").

50 See discussion on this point in *Huang*, *supra* note 27 at para 14.

51 *R v Garofoli*, [1990] 2 SCR 1421, [1990] SCJ No 115.

52 See *World Bank Group v Wallace*, 2016 SCC 15 at para 120 [*Wallace*].

53 *R v Pires*; *R v Lising*, *supra* note 34 at para. 7.

defence under *Stinchcombe*'s broad relevance test. Here, the *Garofoli* challenge does not broaden the aperture of disclosure.

But if not all the supporting information related to the warrant has been disclosed as relevant to the trial under *Stinchcombe*, then it is potentially disclosable under this new challenge, because it has introduced new, material issues. In a *Garofoli* challenge, the affidavit supporting the warrant authorization and the documents before the authorizing judge are presumptively disclosable.[54] But beyond that, there are limits: relevance applied in a *Garofoli* context does not authorize a fishing expedition through documents never before the affiant whose affidavit supported the warrant application, in part because the courts have been sensitive about revealing confidential sources.[55] And so, for documents further afield than the affidavit and the documents it relied on, it is for the accused to "establish some basis for believing that there is a reasonable possibility that disclosure will be of assistance on the application" to challenge the warrant.[56] This is not easy to do. Applying this standard, lower courts have found instances where some police information – for example, notes kept by the handler of a confidential informant – are irrelevant both for the trial and for testing a search warrant.[57]

Warrant disclosure issues become even more complicated where at issue is a CSIS warrant. CSIS can collect intelligence through wiretaps under its own, separate CSIS Act warrant procedures, involving authorizations by the Federal Court. Here, the warrant application is supported by a CSIS affidavit asserting the facts believed, on reasonable grounds, to show why the warrant would enable CSIS to investigate a threat to the security of Canada.[58] Sometimes CSIS will then find things that are important for the police to know. That is, sometimes CSIS discovers actionable-intelligence. In a functioning intelligence-to-evidence system, CSIS will share this actionable-intelligence in an advisory letter; that is, a letter from CSIS to the RCMP containing intelligence and permitting its use in legal

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54 *Wallace*, *supra* note 52 at para 134.

55 *Ibid* at para 129ff.

56 *R v Ahmed*, 2012 ONSC 4893 at paras 30-31, an approach cited without objection in *Wallace*, *supra* note 52 at para 131.

57 See e.g. *R v Ali*, 2013 ONSC 2629, cited without objection in *Wallace*, *supra* note 52 at para 131.

58 *CSIS Act*, *supra* note 6, s 21.

proceedings.[59] And the CSIS information then finds its way into the police investigative, one that may culminate in charges and a prosecution.

In consequence, CSIS may worry that the contents of its wiretap intercept (or other search), used to further an RCMP investigation, might later attract *Garofoli*-style scrutiny of CSIS's own Federal Court authorization and the basis for it.[60] Since that CSIS warrant may be built on confidential source information, foreign origin intelligence and signals intelligence, it would not wish too close an inquiry in open-court into the evidence undergirding the Federal Court warrant.

The likelihood of a CSIS warrant *Garofoli* challenge is greatest should the information collected by CSIS be presented in evidence as partial proof of crimes charged.[61] If the CSIS warrant was invalid, then the information flowing from it would be excluded from the trial. And therefore, defence lawyers would have a direct incentive to test the CSIS warrant. But the more likely scenario is this: the shared CSIS intelligence is one of the pieces of evidence police used to obtain their own wiretap. This police wiretap then produces evidence used in the trial.

Put another way, the CSIS warrant is two steps removed from the evidence used in the trial. Even so, CSIS's warranted intercept activity must stand up in the criminal court, where it is the foundation of a criminal investigation. This is true even if the information shared by CSIS in an advisory letter is not used as direct evidence of a crime in trial, but simply as evidence by police supporting the reasonable grounds to believe required to obtain a *Criminal Code* search warrant or authorization. If the defence lawyer can knock over the CSIS warrant, and information collected by the CSIS warrant was the basis for the police warrant, the dominos fall.

Again, the scope of relevance in this two-steps-removed *Garafoli* context would be tied to the narrow purpose of challenging the warrant. But to add to the complexity, CSIS is likely a "third party," not the Crown. And where

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59 An "advisory letter" "contains information that may be used by the RCMP to obtain search warrants, authorizations for electronic surveillance or otherwise used in court. In the case of Advisory letters CSIS requires the opportunity to review any applications for judicial authorizations prior to filing." CSIS-RCMP Framework for Cooperation, One Vision 2.0 (10 November 2015) at 2, posted at *Secret Law Gazette*, online: <secretlaw.omeka.net/items/show/21> [perma.cc/9XHZ-KEBD] [One Vision 2.0].

60 For an example, see Peshdary v Canada (Attorney General), 2018 FC 850 [Peshdary, FC]; Peshdary v Canada (Attorney General), 2018 FC 911.

61 This is indeed happening in the Huang prosecution. See discussion in Huang, supra note 27 at para 9.

CSIS has *O'Connor* third-party status, disclosure of information relevant to this purpose will follow the *O'Connor* two-step process: first, the defence will need to show the "likely relevance" of the documents being sought; second, if they do so, the documents are reviewed *in camera* and *ex parte* by the judge.[62]

In practice, application of this test has meant that (at least redacted) copies of the CSIS affidavit supporting the CSIS warrant will be disclosed, along with any supporting material actually before the warrant-authorizing judge.[63] Courts may also oblige disclosure of draft warrant applications.[64] There is also the possibility the CSIS affiant may be cross-examined, but only with leave of the court and confined to the question of whether the affiant knew or ought to have known about errors or omissions in the warrant application.[65] It is unlikely source materials undergirding the warrant documents must also be disclosed – where CSIS is a third party under the *O'Connor* rule, lower courts have required the defence to show that "there is a factual basis for believing that the material sought will produce evidence tending to discredit a material pre-condition in the CSIS Act authorization."[66]

## D. Privilege and Immunities

It is also important to note that neither *Stinchcombe* nor *O'Connor* annul privileges in the law of evidence, including police informer identity

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62 R v Jaser, 2014 ONSC 6052. See also Canada (Attorney-General) v Huang, 2018 FCA 109 at para 19 [Huang FCA].

63 *Jaser*, *supra* note 62 at para 18 (observing that the "CSIS Affidavit on which the Federal Court authorization depends easily meets the first stage O'Connor/McNeil test of 'likely relevance'"); *R v Alizadeh*, 2013 ONSC 5417. The test is whether the documents will be of probative value on the issues in the application – that is, the validity of the warrant. More specifically: "would the justice have had reason to be concerned about issuing the warrant had he or she been made aware of the other facts". *R v Peshdary*, 2018 ONSC 2487 at para 9ff.

64 *R v Peshdary, ONSC*, *supra* note 46.

65 *R v Pires*; *R v Lising*, *supra* note 34 at para 40ff. See also *World Bank*, *supra* note 52 at para 121ff.

66 *Peshdary, ONSC*, *supra* note 46 at para 20. See also *Peshdary, FC*, *supra* note 60.

privilege[67] and the new CSIS informer privilege.[68] Moreover, disclosure obligations are subject to a national security public interest immunity codified in s. 38 of the *Canada Evidence Act*. Section 38 is a form of evidentiary intelligence shield, allowing the government to block disclosure of sensitive information.

Under s. 38, specially designated Federal Court judges decide whether the information in question is relevant to the underlying proceeding. Where the disclosure dispute is tied to a *Criminal Code* trial, "relevance" in a criminal context is the *Stinchcombe* test.[69] But still, relevance depends on the context. For instance, relevance will be narrower when the issue is the validity of a warrant in a *Garofoli* proceeding than if the issue is evidence in the criminal trial itself.[70] Moreover, CSIS warrants tied to a broad threat investigation may include information unrelated to the intercept of a specific target's telephone call. This extraneous information may not be relevant to that person's subsequent *Garofoli* challenge.[71]

Then, if the information is relevant, the judge decides whether the material, if disclosed to the accused, would harm national security, national defence, or international relations. If it would, the judge then balances this injury against the public interest in disclosure. If the security interest exceeds the public interest (often, but not exclusively, in the form of the defendant's right to make full answer and defence),[72] the judge will protect the information from disclosure or may order the information disclosed only in redacted or summarized form.

Even if the Federal Court orders information disclosed, the government has, essentially, an absolute ability to stop disclosure under s. 38, using what is known as an "Attorney-General's certificate." This certificate allows the government to short-circuit a court disclosure order. Section 38.13 of the Act empowers the Attorney General (AG) to personally issue a certificate "in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in

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67 *R v Leipert*, [1997] 1 SCR 281 at para 21, [1997] SCJ No 14. That privilege has an outer limit. It does not apply to identity information that goes to the very question of innocence or guilt: where there is "a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused".

68 CSIS Act, *supra* note 6, s 18.1

69 *Huang* FCA, *supra* note 62 at para 23.

70 *Ibid* at para 14.

71 *Huang*, *supra* note 27 at paras 50, 59.

72 *Ibid* at paras 50-52.

subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security."

Issuance of the certificate has the effect of barring any subsequent disclosure of the information in a proceeding for ten years (and for a further period if the certificate is renewed at the end of that ten years). In other words, the certificate may reverse an order from the Federal Court authorizing disclosure under s. 38, subject to a very narrow and limited appeal before a single judge of the Federal Court of Appeal.

The AG Certificate is an emergency rip-cord. As Justice Canada counsel Don Piragoff told the Senate when the provision was enacted:

> The provision is a last resort for the Attorney General to ensure that information critical to national security is not disclosed in judicial proceedings to which the Canada Evidence Act applies or through other government processes. ...The certificate issued by the Attorney General...would be the ultimate guarantee that information such as sources of information and names of informers would not be made public.[73]

Based on conversations with government officials, I believe the AG certificate has never been used since the creation of this power in 2001.

Protecting information using s. 38 comes with a cost. For one thing, the s. 38 process can be unwieldy. The disclosure decisions made by the Federal Court are generally made before the terrorism trial starts, and the process can be long and fraught. Moreover, the prosecution cannot use the information shielded under s. 38. That is, information shielded cannot be used as a sword in a prosecution.

Even more dramatically: if the Federal Court (or Attorney-General certificate) denies disclosure of information on security grounds that is important to the defence, there will doubts about the fairness of the trial. This may scuttle trials. A trial judge accepts whatever non-disclosure decision the Federal Court makes. But the trial judge also must make a difficult decision on whether to halt the prosecution because the Federal Court's non-disclosure order has made the trial unfair. And he or she might need to do so without even knowing the specifics of the secret information.[74]

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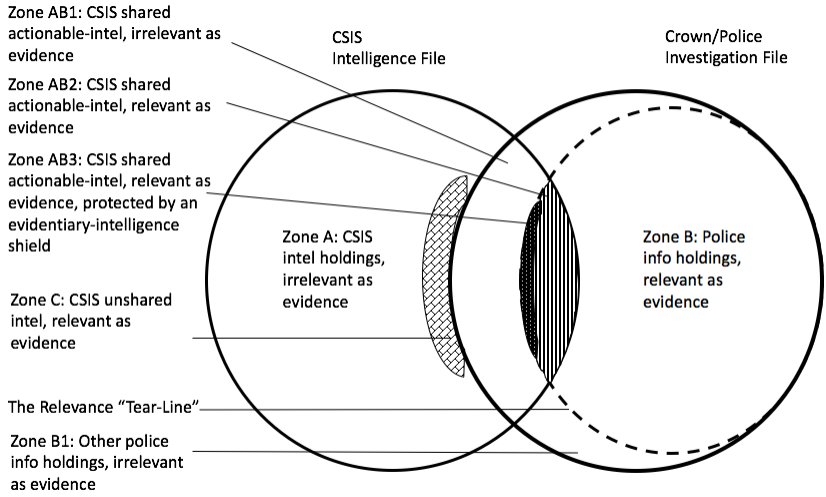
73 Senate, Special Senate Committee on the Subject Matter of Bill C-36, *Issue 1 - Evidence*, 37-1, (22 October 2001), online: <sencanada.ca/en/Content/Sen/committee/371/sm36/01evb-e> [perma.cc/5H6M-27KM].

74 In *R v Ahmad*, 2011 SCC 6 [*Ahmad* SCC], the Supreme Court recognized that the two-court s. 38 system could "cause delays and pose serious challenges to the fair and expeditious trial of an accused, especially when the trial is by jury" (para 76) but decided

## E. Consequences

The net result of all these evidentiary-intelligence issues is a taxing and incredibly uncertain system that greatly complicates actionable-intelligence sharing as CSIS and the police engage in an arcane choreography to minimize disclosure of sensitive CSIS intelligence. In figure 1, I present a pictorial image of how different information categories overlap in a police and intelligence investigation.

**Figure 1:** Possible Intelligence-to-Evidence Zones




The rules of evidence overlap with these zones in the manner portrayed in table 1.

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that it was constitutional because the trial judge could always stop a trial, should the Federal Court's non-disclosure order make it impossible for the accused to have a fair trial. The Court stressed that "the trial judge may have no choice but to enter a stay." *Ibid* at para 34. Some participants in the case argued that this approach "puts the Attorney General and the trial courts in the dilemma of playing *constitutional chicken*" (para 34). For its part, the Court expressed the hope that a sensible application of s. 38 would avoid such a result, perhaps using the intermediary of a security-cleared special advocate as a link between Federal and trial courts.

**Table 1:** Topology of I2E

| Zone | Initial Disclosure Standard | Evidentiary-Intelligence Shield (Public Interest Immunities) |
|---|---|---|
| A | Not disclosable under any standard, because irrelevant. | N/A |
| B | Disclosable under *Stinchcombe*, because relevant and in possession of police investigators. | Source identity information may be protected under police source identity privilege. Other public interest privileges in the *Canada Evidence Act*, could apply, including s. 38, requiring a proceeding in the Federal Court. |
| B1 | Not disclosable under any standard, because irrelevant. | N/A |
| AB1 | Not disclosable under any standard, because irrelevant. | N/A |
| AB2 | Disclosable under *Stinchcombe*, because relevant and in possession of police investigators. | N/A (the chart assumes that the information over which CSIS claims privilege is in AB3.) |
| AB3 | Disclosable under *Stinchcombe*, because relevant and in possession of police investigators. | In this zone, protected under, e.g. CSIS source identity protections or under *Canada Evidence Act* s. 38 (the national security imperative outweighs the public interest as assessed by the Federal Court, or the Attorney General issues a certificate denying disclosure after a Federal Court disclosure order.) |

| | | |
|---|---|---|
| C | Disclosable under *O'Connor*, if CSIS has third-party status: the defendant must show the likely relevance of this information, and the trial court must then review and weigh the disclosure interest against the non-disclosure interest. | Should the court order disclosure, the Crown could still seek to protect this information under privileges, such as those listed above under AB3. |

It may not always be clear at the outset of a case into which zone information falls. Moreover, the core structural problem with this complicated architecture is this: I2E dilemmas limit the size of the AB zones – that is, the zones in which CSIS shares actionable-intelligence. CSIS will fear that its shared intelligence will fall on the *Stinchcombe* disclosure side of the "relevance tear-line," into zone AB2. It may find the tear-line boundary between irrelevant (AB1) and relevant information (AB2) difficult to predict in advance. CSIS may subsequently protect some of the information in AB2 through the *Canada Evidence Act*, s. 38, creating zone AB3. This evidentiary-intelligence shield risks scuttling a prosecution, if AB3 information is necessary for a fair trial (or to secure a conviction). And so, police themselves may be wary of building a case on shared CSIS zone AB information that the government would then seek to protect under s. 38 (that is, it will end up being AB3 information). Moreover, since the outcome of the s. 38 process cannot be predicted in advance, CSIS may err on the side of under-disclosure to the police, creating zone C. This may be a pyrrhic victory. It would deprive police of potentially important actionable-intelligence. At the same time, it would not shield CSIS completely from disclosure risk: the information will still be subject to *O'Connor* disclosure procedures, and that in turn may spark recourse to s. 38.[75]

The possible consequences of this suboptimal information management approach can be summarized as follows:

- Public Safety Risk: Siloed information holdings may not be pieced together to identify security risks. And information acquired for intelligence purposes by CSIS may not be shared seamlessly with

[75] See e.g. Canada (Attorney General) v Peshdary, 2018 FC 369.

police, legally empowered to act physically to diminish public safety risks.

- Investigative Inefficiency: Services may conduct duplicative investigations, expending scarce resources to chase the same target. This will make investigations more expensive, especially where these parallel investigations persist simply to avoid I2E dilemmas. And the obvious opportunity cost is investigations that are not mounted for lack of resources.

- Investigative Timing and Latent Threats: I2E struggles may make it impossible to respond to latent threats. For instance, a CSIS investigation may produce evidence of a crime. But if the I2E strategy does not permit the use of that evidence to secure a conviction, prosecution of that crime will depend on evidence separately collected by police. If, however, the target discontinues their conduct prior to the commencement of the police investigation (perhaps aware of the CSIS interest), there is no evidence allowing a prosecution. The target escapes the criminal net, unless police are prepared to continue their investigation indefinitely in the hope the target will reengage (raising the resource issue anew). The matter may instead return to CSIS, risking a recurrence of the difficult I2E handover to RCMP should the target re-engage in criminal threat activities. Variations of this problem arise where the target's conduct took place overseas, and information on it stems from intelligence sources that cannot be used in court (for instance, foreign terrorist fighters returning from Iraq or Syria).

- De Facto Criminal Immunity: Absent very careful coordination, I2E struggles may "poison-pill" downstream prosecutions. For instance, a CSIS threat reduction measure undertaken without sufficient attentiveness to its impact on the evidentiary record, or how it might be treated in a prospective prosecution, may make it impossible to prosecute. The record may be muddled with CSIS activity, disclosure of which would be prejudicial. Or the threat reduction measure is of a sort that would be regarded as an abuse of process (for instance, entrapment), and thus make a conviction

> impossible. Alternatively, defence counsel aware of I2E dilemmas may press for disclosure as a form of "graymail"; that is, forcing government to withdraw charges or risk disclosure of sensitive intelligence. In these circumstances, the target would enjoy *de facto* immunity from criminal process.

To explore how some of these outcomes might culminate in disastrous outcomes, I examine how Bob the Bomb-Builder first came to CSIS's attention.

## V. The Plot

### A. Genesis

It turns out Bob has a long history and a past tied to tragic events. Some time ago, he became a CSIS subject of investigation because of intelligence supplied by Jordan. The Jordanians shared metadata with CSIS suggesting Bob had been in regular communication with another Canadian believed to be in Syria, and associated with Hezbollah (a listed terrorist entity under Canada's *Criminal Code*) as a bomb-maker.

CSIS used this intelligence to start a security intelligence investigation into Bob. The Jordanian intelligence has regularly proven reliable and was deemed credible enough in its details to meet a legal threshold – "reasonable grounds to suspect" a threat to the security of Canada.[76] (If CSIS came to a different conclusion, it would have no jurisdiction to investigate – it should not even run a Google search on Bob.) Because there is not yet any legal proceeding, CSIS does not need to justify this decision in a proceeding governed by the rules of evidence.[77]

It is true that under ministerial directions that govern its conduct, CSIS must be wary of using information from a foreign partner that is likely to have been procured by maltreatment. Since this intelligence was metadata from a foreign wiretap, and not from a human source (who might have been maltreated), CSIS regards it as unlikely that the Jordanians obtained the information through mistreatment. At any rate, CSIS is not absolutely

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76 CSIS Act, supra note 6, s 12. For a definition of how "reasonable grounds to suspect" is defined in law, see the text accompanying note 82.

77 It is possible that its expert review body – at the time of this writing, the Security Intelligence Review Committee – might subsequently review this investigation. But in conducting its review, SIRC would not hold CSIS to rules of evidence.

barred from using information stemming from mistreatment. Such information could not be used in a "judicial, administrative or other proceeding,"[78] even if CSIS wanted to. But initiating an investigation is not a "proceeding." Moreover, it does not itself create risk of further mistreatment or deprive anyone of their rights. And so CSIS could comply with ministerial direction and still rely on the Jordanian information.

As part of its investigation, Bob is tailed in Canada by a covert CSIS surveillance team. During this surveillance, Bob meets with another man, later identified as Yves. Yves is a foreign national and his precise involvement with Bob is unclear. At their meeting in a public café, a CSIS intelligence officer acting as part of the surveillance team hears Yves tell Bob about a meeting Yves is organizing for "those who believe like we do." This is all the information the officer overhears, although there is more to the conversation.

This is new intelligence. And again, it can be used to further an intelligence investigation without any concern about the rules of evidence.

## B. A First Stab with CSIS's Evidentiary Sword?

CSIS would, of course, wish to know more about Bob, Yves, and their planned meeting. One way to do that might be to intercept their electronic communications, or search their premises. To make the step to intrusive surveillance or the searching of premises, CSIS would need to commence a legal proceeding. Under the *Charter of Rights and Freedoms*, Part VI of the *Criminal Code* and the CSIS Act, a wiretap of Bob and Yves's electronic communications requires a warrant.[79] Likewise, a search of premises in which either has a reasonable expectation of privacy – for instance, their homes – also requires a warrant.

CSIS investigators might, however, worry whether they would receive a warrant at this point of the investigation. A warrant requires using

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78 See Ministerial Direction, *supra* note 20. This duplicates an existing legal requirement. Whether in raw or processed form, it is not possible to use as evidence in any proceeding over which Parliament has jurisdiction "any statement obtained as a result" of torture criminalized in s. 269.1 of the Criminal Code. Criminal Code, s 269.1(4). Such use would also violate the *Charter*, and would be the quintessential example of conduct violating fair trial rights (as well as Canada's international human rights obligations).

79 Intercept of private communication is protected under section 8 of the *Charter*. *R v Duarte*, [1990] 1 SCR 30 at paras 18-19, [1990] SCJ No 2. The authorization process for intercept for the police is found in *Criminal Code*, *supra* note 45, Part VI and for CSIS, in CSIS Act, *supra* note 6, s 21.

intelligence as evidence (that is, information that is probative of material legal issues), because it involves a proceeding in front of the Federal Court. This is a modest proceeding – it is done in secret, with only the government side represented. And the rules of evidence are relaxed. As with Criminal Code warrants, CSIS warrant applications may include hearsay, including intelligence-based allegations.[80] That means the Jordanian intelligence – clearly hearsay – would be admissible. So too, the CSIS officer's observations are direct evidence. Both sources constitute evidence of material facts used to decide whether a legal test in met. In this case, that test is whether there are "reasonable grounds to believe" the existence of a threat to the security of Canada, something that includes terrorism.

But at this point in the investigation, CSIS would be unwise to seek a warrant. While "reasonable grounds to believe" is a low threshold,[81] the evidence available to CSIS to meet even this threshold is weak. The Jordanian intelligence shows, at best, calls between Bob and a Canadian, who is believed (on bases that might be difficult to defend before an inquisitive judge without further details from the Jordanians) to be affiliated with Hezbollah as a bomb-maker.

And the CSIS officer's observations about a prospective meeting between the like-minded could be construed both innocently and less innocently. For example, it could involve a gathering of the small subset of people who enjoy *Saturday Night Fever*. And since the officer heard only a snippet, and not the full context, it could even be argued that what he or she heard is irrelevant under the law of evidence: it is so decontextualized it cannot be used one way or another to prove anything material to the proceeding. Relevance is always a standard in any legal proceeding. And the observed snippet of conversation is no more likely, as a matter of logic, to point to a threat to the security of Canada than is the fact that the two men spoke in low tones while drinking their white chocolate mochas.

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80 For instance, the CSIS affidavit sworn as Federal Court file CSIS 15-12 (sworn in relation to Raed Jasser) specifies at para 6: "The information in this affidavit has been conveyed to me by employees of the Service who are, or were, involved in the Service's investigation of international Islamist terrorism and through a review of relevant records maintained by the Service. The information was obtained through various sources including government agencies, open information, as well as [redacted] associated with international Islamist terrorism." (The affidavit is supported by exhibits, fully redacted.) Likewise, the affidavit PPSC Number 1-12-073 (concerned Raed Jaser) relies on information conveyed in, e.g. letters from the FBI.

81 For a definition of this concept, see the text accompanying note 48.

Because a Federal Court judge would almost certainly toss a warrant application, CSIS continues its non-intrusive intelligence investigation. Days later, the CSIS surveillance units trail Bob and Yves to a residence in suburban Ottawa. They see another person, not known to CSIS, also enter the home.

## C. Where are the Police?

So far, CSIS has not notified the RCMP. While the investigation of terrorism offences is within the RCMP's remit, there is precisely nothing at this point to suggest criminal conduct.

One response to this observation is: So what? An anti-terror intelligence investigation may come to naught, but if there is enough information to start such an investigation, the expectation must be that it could lead, in the fullness of time, to criminal charges. Canada's anti-terrorism laws are broad, and it does not take much to trip the line of criminal conduct. In these circumstances, while it may make sense to have CSIS lead such an investigation, it also makes sense to have RCMP in the wings, and fully apprised.

That is not likely to happen in my hypothetical, because Canada has not adopted a blended security intelligence/police approach to anti-terrorism. Part of the reason for this is institutional: two agencies with different mandates, approaches and histories. But the factor that holds these agencies apart is Canada's disclosure regime in criminal proceedings. CSIS is determined that its sources and methods not be revealed in open court, dragged into a proceeding by the *Stinchcombe* rule. A conflated CSIS/police investigation would mean CSIS was no longer a "third party." It would instead by fully subject to the *Stinchcombe* "not clearly relevant" disclosure standard, extended to the entire CSIS investigation. And so, in practice, police and CSIS maintain a carefully choreographed distance.

## D. The Forger

The RCMP is, however, busy investigating (other) possible criminal activity. One of its targets of investigation is Trent. Trent came to the RCMP's attention while it was investigating drug trafficking by organized crime. Trent is suspected of forging Canadian passports (a crime) for use by organized crime syndicates. This suspicion does not, however, reach the level of reasonable and probable grounds for the RCMP to arrest Trent, let alone constitute enough for prosecutors to secure a conviction. Nor does

the RCMP have the "reasonable grounds to believe" required for a search warrant or wiretap.

It does, however, have enough evidence to meet the lower, "reasonable grounds to suspect" standard that can be used to obtain a transmission data tracking device for Trent's car.[82] With a tracking order in place, the RCMP follows Trent to a suburban Ottawa home. There, it also observes two other people – both unknown to the RCMP – enter the house.

## E. The Signals Intelligence

Meanwhile, while collecting foreign intelligence on Hezbollah, the Communications Security Establishment (CSE) intercepts a mobile call between a Hezbollah field commander in Lebanon and Canadian Person (CP) A. In that call, the field commander suggests a "big, loud party in Canada that their government will never forget," and tells CP A "to gather the friends to begin the planning" and asks for a "new supply of papers."

CSE may not direct its intelligence activities at Canadians or persons in Canada,[83] but it does retain incidentally collected information of this sort that, as would be the case here, engages national security concerns. It also shares that intelligence with its domestic partners, initially in a manner that redacts information that would identify a Canadian (a process of "minimization"). These redactions can, however, be lifted administratively.[84] I assume intelligence of the sort implicating CP A would be shared with CSIS, and deminimized. CSIS then discovers that the identifying information in the CSE intercept matches that of Yves.

That means CSIS now has both Jordanian and CSE intelligence suggesting something is afoot in Canada. The CSE intelligence ties Yves to an ominous sounding Hezbollah-orchestrated "party" in Canada and a

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82 *Criminal Code*, *supra* note 45, s 492.1 ("reasonable grounds to suspect that an offence has been or will be committed" ). A lower standard than "believe on reasonable grounds," "suspects on reasonable grounds" is a suspicion based on objectively articulable grounds that may be lower in quantity or content than the requirement of reasonable belief, but must be more than a subjective hunch. *R v Kang-Brown*, 2008 SCC 18. Or put another way, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime." *R v Chehil*, 2013 SCC 49 at para 27

83 *National Defence Act*, RSC, 1985, c N-5, s 273.64.

84 For a discussion of aspects of this process, see Commissioner of the CSE, *Annual Report 2013-2014* at 43, online (pdf): <www.ocsec-bccst.gc.ca/a37/ann-rpt-2013-2014_e.pdf> [perma.cc/4NH9-L7G8].

planning process for it. The Jordanian intelligence includes metadata of a call between a Hezbollah affiliate and Bob. Bob and Yves, in the meantime, did discuss a gathering at their café meeting, and one later took place in suburban Ottawa.

The dots connect in this hypothetical in a manner that simplifies life and this article includes only the "signal" and none of the "noise" that would make piecing together puzzles difficult. But in this scenario, CSIS should now be preoccupied with sharing some information with the RCMP. In principle, the Jordanian-origin metadata and the CSE intercept could be "evidence" in a criminal proceeding. However, to use it would raise I2E concerns about secondary materiality. For example, if the CSE intercept were used to help prove a terror plot, facts concerning the circumstances of this intercept and how it was conducted might become material. What sort of technology was used, for example, to trace the call to CP A, and how can one be sure that CP A was the person on the call? The CSE will not willingly part with the sensitive information needed to satisfy this line of inquiry.

But still, we have enough that hints at a possible terrorist plot or other criminality, and in the interests of both public safety and "de-confliction" between the CSIS right-hand and RCMP left-hand, the RCMP should be told something. In practice, in this case, they would likely be given a hint, in the form of a so-called "disclosure letter." This will be just enough information to allow the RCMP to start its own investigation,[85] but not so much to tie CSIS into a joint investigation that might sweep its full intelligence investigation directly into the *Stinchcombe* regime.

That means that enough is shared to allow RCMP and CSIS to realize that they had been working on different aspects of the same matter: they had both surveilled the gathering at the suburban house in Ottawa. And both the RCMP and CSIS can link Trent (the suspected passport forger), Bob and Yves (the suspected Hezbollah sleepers). And so, the RCMP and CSIS now begin a deconfliction process to manage what becomes two, parallel investigations into the same suspected plot: the police criminal investigation (now called Operation PARTY) and the continuing CSIS security intelligence investigation. In doing so, they follow the inter-agency framework designed to supervise – without fusing – this segregated

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[85] A disclosure letter "contains information designed to provide an investigative lead that the RCMP may use to initiate its own investigation. The information in the disclosure letter is not to be used as evidence by the RCMP without prior consultation with CSIS." One Vision 2.0, *supra* note 59.

investigative system: One Vision (now in its second version as "One Vision 2.0").[86]

Fortified with all this new information, CSIS is closer to the "reasonable grounds to believe" standard required for a CSIS Act wiretap warrant. Of course, to obtain this warrant, it would need to use the Jordanian and CSE information, a prospect that neither source would embrace with relish. But we shall assume that caveats are relaxed, carefully crafted affidavits are prepared, and the Federal Court authorizes a CSIS wiretap warrant on both Yves and Bob.

## F. The Wiretapped Call

Very soon after, CSIS intercepts a call between Bob, Trent and Yves. In it, the three men talk about "making new false passports for the brothers in Syria" and discussing "joining Hezbollah fighters in Syria." This is direct evidence of crimes. It would be admissible as relevant evidence of a material fact in prosecutions for terrorism travel[87] and passport fraud.[88] It is information that the RCMP might reasonably wish to have as a form of actionable-intelligence in a police investigation.

Does CSIS share this intelligence, this time in what is known as an advisory letter containing these investigative fruits? The answer should be "yes." But CSIS may worry that the contents of its wiretap intercept, used to further an RCMP investigation, may then attract scrutiny of its own Federal Court warrant and the basis for it. And since that CSIS warrant is built on foreign origin intelligence and signals intelligence, it would not wish too close an inquiry in open-court into the evidence buttressing the Federal Court wiretap authorization. And things are not that urgent yet. There is no intelligence suggesting that Yves and Bob are an imminent risk to public safety, although they seem to have malevolent designs.

Still, without the supplemental CSIS information, the RCMP is not likely to have enough evidence so far to obtain its own search and wiretap warrants. Its investigation is stuck, in consequence, with other, less invasive investigative techniques. That would mean that the agency with the most forceful capacity to disrupt a threat – the police – is partially in the dark about the development of that plot.

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86 *Ibid.*

87 *Criminal Code*, *supra* note 45, s 83.181.

88 *Ibid*, s 57.

It is not certain to me that CSIS would share the content of its intercept with the police – under the One Vision 2.0 framework, that choice rests with it.[89] There is no legal obligation to disclose this information,[90] and CSIS may decide that the public safety imperative is not grave enough to risk *Stinchcombe* disclosure of shared information. But, nevertheless, I shall assume CSIS provides police with an advisory letter that contains the substance of the intercept: namely, that Trent, Bob and Yves are plotting joining Hezbollah in Syria and providing false passports to its members. This, along with information from the RCMP's original investigation of Trent, is packaged into a separate police affidavit that then is used to obtain a police wiretap authorization.

## G. Reaching for Tools

CSIS does have other legal tools. Under Canadian law, passport revocations and listing on Passenger Protect (the no-fly list) can be done administratively, using classified evidence that can then be preserved from disclosure to the interested party or the public in any subsequent appeal. Likewise, Yves is a foreign national, and immigration removal proceedings (under the "security certificate" regime or otherwise) can be conducted behind closed doors, using classified information. Here, intelligence can be used as an evidentiary-intelligence sword, because it is shielded from open disclosure.[91]

This is not to say that CSIS information will go untested in the event these matters end up before an adjudicator. That adjudicator will require evidence in any appeal or removal proceeding. The rules of evidence are not as strict here as they would be in a criminal proceeding. For instance, hearsay may be used in immigration security certificate proceedings, if the Federal Court judge regards it as "reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence."[92]

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89 One Vision 2.0, *supra* note 59 at 5.

90 CSIS does have the discretion to disclose under CSIS Act, *supra* note 6, s 19(2).

91 See, respectively, *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42 at ss 5-6; *Secure Air Travel Act*, SC 2015, c 20, s 11 at s 16; *Immigration and Refugee Protection Act*, SC 2001, c 27, Division 9 [IRPA].

92 IRPA, *supra* note 91, s 83(1)(h). *Almrei (Re)*, 2009 FC 3 at para 53 (This section "permits the reception of hearsay evidence such as that which may be provided by a confidential informant or a foreign intelligence service."). See also *Harkat*, 2014 SCC 37 at para 75.

Still, hearsay may diminish the weight given to this intelligence, and raise questions about procedural fairness.[93] And it is likely specially-cleared independent lawyers (known as "special advocates" or *amici curiae*) will be tasked by the adjudicator to probe aspects of the government's case. In the immigration security certificate context, CSIS has used information acquired through confidential sources, communicated through the proxy of an intelligence officer. The government has no obligation to produce the source. However, the Federal Court has affirmed it (and special advocates) must nevertheless be able "to effectively test the credibility and reliability of that information…To conform to the law, CSIS and the Ministers must give the Court all of the information necessary to test the credibility of the source and not just the information that a witness, trained as an intelligence officer, considers operationally necessary."[94]

But even if CSIS is comfortable with this degree of limited disclosure (and it may not be), these security certificate, no-fly or passport revocation processes would alert the targets of investigation to the existence of that investigation, something that would be prejudicial to further unraveling this conspiracy. In our hypothetical, CSIS decides it is better to keep the investigation covert, to determine its full extent.

## H. The Plane Ticket

CSIS investigators determine Trent has now booked a plane ticket to Turkey, a common gateway to Syria. CSIS could somehow use its "threat reduction" powers to delay and possibly stop Trent's travels – although it is difficult to see how it could do so indefinitely, without exposing the investigation. It could place Trent on the no-fly list and revoke his Canadian

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93 See e.g. *Harkat*, 2014 SCC 37 at paras 76, 235 (suggesting judges are able under the security certificate process to "exclude not only evidence that he or she finds, after a searching review, to be unreliable, but also evidence whose probative value is outweighed by its prejudicial effect against the named person."); *Mahjoub (Re)*, 2013 FC 1097 at para 130ff. (concluding that hearsay evidence may be admissible in security certificates, but must be tested for reliability and appropriateness); *Zundel (Re)*, 2004 CF 1308 at para 25 (indicating in a security certificate context that "hearsay evidence is given less weight").

94 *Harkat (Re)*, 2009 FC 1050 at para 48. See also *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 88 ("The Minister has no obligation to produce CSIS human sources as witnesses, although the failure to do so may weaken the probative value of his evidence") and para 90 (noting that "the designated judge's weighing of the relevant [source] evidence took into account the fact that it was hearsay").

passport, but again that would expose its covert investigation. Alternatively, it could notify the Turks, but at the risk that the Turks would then detain an arriving Trent and mistreat him. Where this risk is substantial enough and cannot be mitigated, CSIS is barred by ministerial direction from sharing this intelligence with its Turkish partners.

In these circumstances, especially since there is no reason to believe that Trent-the-suspected-passport-forger poses an imminent public safety risk, the best thing may be to let Trent conduct his trip, subject to whatever continuing surveillance CSIS (likely with CSE's assistance)[95] can mount.

The police, who independently learn of Trent's plans from their new wiretap on him, come to a similar conclusion: if they were to arrest Trent, they would have little evidence of why he was travelling to Syria that did not come from the original CSIS intercept. Moreover, Bob and Yves would be alerted, and the prospect of obtaining more evidence on those plotters would evaporate.

## I. The Confidential Source

Meanwhile, a fourth individual, Alice, contacts local police in Ottawa, expressing worry that "a couple of her friends are going down the wrong path." She provides enough details that the police believe that this may be a terrorism matter, and they pass Alice on to the RCMP (likely operating through Ottawa's Integrated National Security Enforcement Team). It turns out that Alice is Bob's roommate, and she is worried that Bob wants to build a bomb.

The RCMP quickly tie this new information into Operation PARTY, and they pass on the new information to CSIS. The police might be tempted to now arrest Bob, but the information that could be used as evidence tying Bob and Yves and Trent to a bombing plot orchestrated by Hezbollah is still weak, especially if the intelligence sources cannot be used.

Both the RCMP and CSIS think, therefore, it would be wise to manage Alice as a confidential informant. The police would like to do so, as part of building a criminal case. But if CSIS is not willing or able to share the full-fruits of its own investigation with the RCMP, the police may find it difficult to run Alice as an informant without risk to Alice, or to the two parallel investigations. This is especially true if CSIS hopes to cultivate Alice as a long-term source, possibly implicated in other investigations. I am not sure

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95 CSE may provide technical assistance to CSIS under its so-called "Mandate C". *National Defence Act*, *supra* note 83, s 274.64(1)(c).

what would happen in this case, but will assume that Alice becomes a CSIS confidential informant.

## J. The Emergency

Days later, Alice contacts her CSIS handler and reports her belief that Bob and Yves are planning to drive a rented truck into a music festival in Ottawa on Thursday, in protest of the Canadian Armed Forces presence in Syria.

There is now an imminent public safety risk, and the plot has clearly moved to a conspiracy cognizable as terrorism criminal offences. But proving this would depend on Alice's cooperation, and she tells CSIS she will not testify in court. Meanwhile, Bob and Yves have gone "dark" – there is no electronic communication, or that communication is fully encrypted (a commonplace reality now).

The authorities confront a dilemma. CSIS issues an advisory letter to the RCMP. At the very least, steps need to be taken to harden the festival site, and that requires police involvement. But the police still do not have the evidence for a conventional arrest for this latest plot, let alone a prosecution, if Alice will not cooperate. It seems unlikely they would even have enough evidence to make out a case for a preventive detention (technically, a recognizance with conditions).[96] The fact that Bob and Yves have rented a truck is evidence of nothing, since it does not prove what they intend to do. Indeed, the truck plot is a departure from what appeared, earlier, to be a bomb plot. Proof of a truck attack would depend entirely on Alice's testimony, and she is not cooperating.

If CSIS supplied the fruits of its full investigation, the police could possibly obtain a peace bond,[97] imposing some constraints on Bob and Yves. If the police could rely on the fruits of the CSIS wiretaps and their own information on Trent and his travels, they might be able to charge for conspiracy to commit passport fraud, a proxy form of preventive "charging down" to stave-off a more serious threat. But both approaches would culminate an open-court process, and CSIS and the police again worry about the evidentiary-intelligence issues. The two services debate the matter, but since there is no one above the two agencies overseeing the investigation and deciding whether to prioritize information or intelligence or evidential

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96 *Criminal Code*, *supra* note 45, s 83.3.

97 *Ibid*, s 810.011.

purposes, CSIS reluctance to relax its caveats on its information carries the day.

CSIS then makes the decision to deploy its threat reduction powers, and covertly disable the rental truck acquired by Bob, in a manner ensuring it does not start. Since sabotage would break Canadian law, it obtains a warrant from the Federal Court, something it can do using intelligence in a closed-door session, with Alice's identity minimized.[98]

And so, when Bob and Yves try to start the truck on Thursday morning, its engine will not turn over. Because CSIS has been careful, the plotters attribute this fact to a faulty truck and do not suspect that they have been discovered. And so, the parallel investigations remain on track.

But the plotters are frustrated. CSIS and the RCMP continue to follow the men, following their deconfliction protocols to avoid tripping over each other. The next morning, as he does every day, Yves takes the city bus to his workplace in the food-court at Ottawa's Rideau Centre, right next to the Department of National Defence headquarters. He approaches his workplace, as he does every day, passing several uniformed military personnel enjoying their early morning coffees. Suddenly, he takes a large knife from his backpack and repeatedly stabs the nearest armed forces member, gravely wounding him. The CSIS surveillance team – unarmed – can do nothing. But police arrive on the scene and Yves is killed as he continues to resist arrest and threaten members of the public.

In the weeks after, Bob leaves Ottawa and, along with Alice (still a CSIS informant) moves to Toronto. Under continued expensive surveillance by CSIS and the police, he keeps a low profile. That is, until he commences the bomb plot with which this paper began. And the cycle begins again.

## K. The Intelligence "Failure"

In the media and in the National Security and Intelligence Committee of Parliamentarians inquiry that follow, the Rideau Centre attack is characterized as an "intelligence failure." CSIS and the RCMP are roundly criticized, and their brass hauled before parliamentary committees. Parliamentarians respond by enacting new criminal law, making terrorism crimes punishable thrice-over, and giving CSIS new powers to detain people for security intelligence purposes, raising inevitable concerns about secretive detentions by an intelligence agency. Constitutional challenges follow, with

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98 CSIS Act, *supra* note 6, ss 12.1, 21.1.

the typical negative collateral reputational consequences for the security services.

Like usual, all this political *sturm und drang* misses the point. There is no deficit of agency powers. There is no failure in the collection of information, and thus no intelligence failure. No one acted with malice. No one was incompetent. Every decision made reflected a reasonable response, at the time, to a dilemma.

The failure stemmed, instead, from the very existence of that dilemma: intelligence-to-evidence. Fear over the evidentiary-intelligence issue restrained actionable-intelligence sharing, and open court responses built on it. In the result, a victim is gravely wounded, the remaining bad guys are still not in jail, and politicians misdiagnose the problem as a nail, for which the solution must be a bigger hammer.

## VI. Reform

Would there be a better way to resolve the Bob the Bomb-Builder hypothetical? The scenario is obviously a simplified, artificial one. It could be that the degree of information-sharing and deconfliction between RCMP and CSIS would be much greater than I have allowed – those who commented on drafts of this paper were divided on this issue. Moreover, the fact that the plotters went "dark" at a critical point suggests another important issue not addressed by this paper: questions of encryption, lawful access and investigative techniques.

Still, I am persuaded that this hypothetical is realistic enough to underscore the sorts of dilemmas CSIS and RCMP confront in terrorism investigations. And from an I2E perspective, the obvious pivot point in this hypothetical was the decision not to charge Bob, Yves and Trent with conspiracy to forge passports, as a means of incarcerating them once the public safety risk became acute. A prosecution would have required use of the CSIS intercept information, as evidence of guilt. But an arrest and charging of the three plotters would have placed them behind bars, and forcefully disrupted a dangerous situation.

Perhaps my hypothetical is a disservice, and that this is exactly what would have happened. It would be easy, however, to change the facts to make the I2E dilemma even more acute. And so, the topic that deserve attention is this one: what changes in I2E would have made this interruption in the life-cycle of a plot like this the more likely outcome? One

school of thought, expressed most vigorously by the Air India bombing commission, is that I2E is best solved at the back end, with a reformed *Canada Evidence Act* s. 38 process involving a single trial judge. This would eliminate the arduous bifurcation between a trial judge (overseeing the criminal trial) and the Federal Court judge (deciding whether to extend an evidentiary-intelligence shield).

There are good reasons – not least judicial efficacy and swifter trial processes – for reforming Canada's bifurcated s. 38 system. I support efforts to streamline the s. 38 process.[99] But this is not the rocky shore on which I2E reform founders. Fixing s. 38 is unlikely, alone, to solve I2E. The I2E dilemmas in the Bob the Bomb-Builder hypothetical are not driven by "which court will decide whether CSIS's sensitive means and methods will be sheltered from *Stinchcombe*." They stem, for CSIS, from the uncertainty of whether they will be sheltered.[100] Averting to figure 1 above, the problem with s. 38 is uncertainty as to whether shared information will fall into zone AB2 or AB3. Uncertainty on this issue also affects the police. Should they build the case on the foundation of sheltered CSIS intelligence, the failure to disclose that foundation will culminate in a finding by a court that the trial is not fair. The parallel investigation strategy, linked only by disclosure letters and, less often, advisory letters, is fueled by this uncertainty.

In sum, s. 38's ambiguous balancing test does create uncertainty – although it is important not to exaggerate. After all, the Attorney General can cure aberrant disclosure orders with an Attorney General's certificate. But more important sources of uncertainty come in several other guises: What exactly does *Stinchcombe* mean by "clearly irrelevant"? Or put another way, what is the boundary in figure 1 between zone B and zone AB2. Risk adverse prosecutors are likely to conflate "relevance" with "everything" in an information-holding, but as argued above "relevance" is not the same as "everything." Relevance is determined by the trial, not the original investigation.

Another uncertainty is: what is the precise point at which a CSIS and police investigation are so intertwined as to attract the *Stinchcombe* standard for both police and CSIS investigations? Put another way, how big is zone

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99 See Forcese & Roach, *supra* note 7 at chapter 9.

100 See the discussion on this point in Leah West, "The Problem of 'Relevance': Intelligence to Evidence lessons from UK Terrorism Prosecutions" (2018) 41:4 Man LJ 57.

C? Without guidance, risk adverse security services are likely to use a 10-foot pole to hold each other apart, even if a metre stick would suffice.

Step 1 in solving the I2E dilemma is, therefore, to create certainty, in a manner that increases the size of actionable-intelligence in zones AB1 and AB2 – that is, information shared by CSIS that can be used by police. Not all I2E dilemmas can be solved by mere certainty, but certainty would ensure that the ones that do arise are real, and not assumed or feared. Certainty would allow risk to be managed. In the balance of this article, I propose steps moving us further down that path. And I repeat my admonishment at the outset of this paper: solving I2E is a game of Moneyball, in which regular base hits are better than occasional home runs.

## A. Forward Planning and Managing the Relevance Tear-line

I2E solutions should grow the size of zone AB2, and minimize Zone C. CSIS anti-terrorism investigations should be managed so as not to jeopardize the prospect of prosecution. In practice, that means they should be organized as if disclosure was a possibility (because it always is, even now). And that requires planning. If – because of early, close collaboration with specialized, seconded prosecutors – a CSIS anti-terror investigation is undertaken with an understanding of the likely breadth of the relevance window, CSIS will have a better chance of knowing what information will be within the disclosure "tear-line" of zone B, and what information is outside it. And it can manage its investigation accordingly.

For instance, the information likely to form zone AB when shared should be collected to "evidential standards." By this, I simply mean it is managed in a manner most able to survive court scrutiny. For example, do not rely on analytical summaries of destroyed intercept recordings. Ensure continuity and integrity in the information, in the sense that it can be sourced, explained and addressed in testimony. Physical items seized as part of the investigation (not a likely prospect for CSIS anyway) should be properly logged, and chain of custody preserved. Surveillance teams should be trained on how to present evidence, prepare logs and make witness statements. Like their UK MI5 counterparts,[101] CSIS officers should be prepared to testify in court, with protections designed to guard their identities.

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[101] UK Security Service, "Evidence and Disclosure" (last visited 13 May 19) online: <www.mi5.gov.uk/evidence-and-disclosure> [perma.cc/9LHY-9SEV].

Collection to "evidential standards" should also mean that the Crown jewels – information CSIS cannot disclose without prejudice to its operations – should not be irremediably muddled with information within the relevance tear-line. For instance, if a video is made of an informant interacting with a target, it should be produced in a manner that does not compromise that informant's identity protection automatically. Film the encounter with the informant's back to the camera.

Institutionally, the only way to accomplish these objectives is to incorporate evidential thinking at the genesis of any anti-terrorism investigation. The obvious reform step here is to involve specialist prosecutors seconded to CSIS (but not themselves charged with prosecuting any resulting crimes) early in any CSIS terrorism investigation. Indeed, they need not even be employees of the Public Prosecution Service of Canada. The key prerequisite is: prosecutorial, criminal law and investigative expertise, certainly not institutional affiliation. These legal experts would not themselves be the "Crown" in any subsequent prosecution, and therefore would not have their own disclosure obligations. But seconded as a form of operational assistance, they may be able to assist in managing the relevance tear-line,[102] by envisaging creative solutions such as "Al Capone" charging.

This concept of "Al Capone" or "preventive" charging requires some explanation. Whether under the *Stinchcombe* or *O'Connor* standard, the gravamen of disclosure is "relevance." "Relevance," at common law or under the *Charter*, is tied to materiality. And materiality is tied to the issues before a court in a legal proceeding. Where the Crown controls those issues – by, for example, choosing to lay one charge rather than others – it also affects the aperture of the relevance concept. In my hypothetical, the Crown could have moved against Bob, Yves and Trent for conspiracy to engage in passport fraud. "Conspiracy" depends on an intention to agree, the completion of an agreement, and a common design, all linked to the commission of an indictable offence.[103] Passport fraud requires, simply, forging a passport.[104] The unambiguous statements made by the plotters on the CSIS wiretap – coupled with whatever the police had on Trent that had sparked their initial investigation – could have been enough to sustain the

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102 For a discussion of the role of specialized Crown Prosecution Service lawyers managing complex terrorism cases in the United Kingdom, see West, *supra* note 100.

103 *United States v Dynar*, [1997] 2 SCR 462 at para 86, [1997] SCJ No 64.

104 *Criminal Code*, *supra* note 45, s 57(1)(a).

conspiracy charges. The evidence relevant to this charge is everything that, as a matter of logic, makes it more probable (or not) that the plotters conspired to forge a passport. Obviously, the core evidence would be the CSIS intercept. But even if *Stinchcombe* applied, it is hard to see how any of the rest of the CSIS file about Hezbollah and Jordan and CSE is relevant to a fact material to this case, because of the charge laid. This would be true even for the police, had this intelligence been shared with them. Put another way, much of the CSIS information from the broader investigation would be in zone A, or if shared, zone AB1 of figure 1.

But should the Crown also charge the men with a terrorism offence, it would likely need to prove the predicate aspects of "terrorist activity" found in *Criminal Code* s.83.01, including that the men committed their offence "in whole or in part for a political, religious or ideological purpose, objective or cause, and ...in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada." The scope of information that is relevant to these new matters expands immensely.

There would be a lot more in the CSIS investigation file relevant to the terrorism offence charge – and especially the men's intent and motive – than is relevant to the conspiracy to forge a passport charge. Put another way, more information would be in zone AB2 (disclosable under *Stinchcombe*) or zone C (disclosable under *O'Connor*). And so here, if it had disclosure obligations, CSIS would need to worry about protecting its intelligence secrets, using *Canada Evidence Act* s. 38. It could probably do so, but the Crown could not then use all this intelligence on motive and purpose. And the case might be lost.

Managing the relevance tear-line may require, therefore, applying the Al-Capone strategy: mobster Capone was never charged with mobsterism, but rather tax fraud. In the same spirit, bad guys may be charged with the offences with the narrowest aperture of relevance.[105] This requires no legal change and raises no legal doubts. It depends instead on a careful appreciation of existing legal concepts. And it requires premeditation and planning.

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[105] This is precisely the approach applied in the United Kingdom. See discussion in West, *supra* note 100.

## B. Managing Witnesses

Part of this planning should include consideration of how to protect the identity of witnesses and intelligence officers, even while using their testimony. There is no prospect of a fully-closed trial on the merits in criminal matters (although there is, I believe, the prospect of closing collateral aspects of a criminal case, as discussed below in relation to *Garafoli*). The accused has a right to confront their accuser, and I cannot imagine any system, short of a derogation from the *Charter*, that would permit closed proceedings on the merits in criminal trials.

But that does not mean that a trial must be fully open to the public. Put another way, it is possible to have aspects of a trial, *in camera*. This would exclude the public (and media) but not the accused and their counsel. In colloquial language, we sometimes call this a "publication ban" and it is captured by the so-called "Dagenais/Mentuck" test. Courts are presumptively open in Canada. Under the Dagenais/Mentuck test, "public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration."[106] The prospect of *in camera* proceedings (and testimony behind a screen) on national security grounds is now codified in s. 486 of the *Criminal Code*.[107]

Whether careful use of s.486 would relieve anxiety about source protection or other concerns CSIS might have about have about participation in criminal proceedings is unclear to me. Section 486 would not change the pre-trial disclosure obligations. And it would not protect identities from the accused or his or her lawyer. The witness would confront real risks if the accused is, in fact, a threat actor. Witness protection may not be enough to appease many witnesses. But testimony behind screens would at least limit widespread diffusion through the media.

## C. Understanding the Third-Party Threshold

Managing the tear-line means adjusting the size of zone B, and the aperture of *Stinchcombe*. Collecting to evidential standards minimizes the

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106 *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 4.

107 See also Canadian Broadcasting Corp v New Brunswick (Attorney General) (Re R v Carson), [1996] 3 SCR 480, [1996] SCJ No 38 (upholding the provision under s 1 of the *Charter*).

prejudicial impact of being subject to *Stinchcombe*. Managing witnesses reduces, potentially, the scope of source identity diffusion.

CSIS may, however, still wish to preserve third-party, *O'Connor* status (at least for portions of its investigation and information). The *O'Connor* standard does not change the ultimate standard of disclosure to something other than "relevance."[108] It does, however, make it harder for the defence to obtain CSIS disclosure, avoiding defence fishing-expeditions. And CSIS may feel this extra comfort is required, especially since it may not be possible to manage the tear-line perfectly. There will be cases where there is no viable Al-Capone strategy. Imagine, for instance, that police continue to investigate Bob. They intercept a telephone call between Bob where he espouses a violent ideology and lays out the details of a bomb plot. They lay terrorism offence charges. While the prosecutor's case may be built entirely on police evidence, the relevance "tear-line" now extends far into CSIS's holdings, since there is much in CSIS's possession that might relate to Bob's terrorist motive – that is, much information in zone C. If CSIS and police were both subject to first-party *Stinchcombe* disclosure obligations, all that zone C information would be disclosable, subject to a successful s.38 proceeding. CSIS might, therefore, welcome the prospect of *O'Connor* third party status.

Even this may be a thin reed in practice – *O'Connor* increases the burden on the defence to show likely relevance. But once established, third-party status does not then render relevant CSIS information non-disclosable, unless other (privacy) issues balance against the fair trial interest. I doubt these other issues will often prevail. For one thing, "absent an overriding statutory regime governing the production of the record in question, a third-party privacy interest is unlikely to defeat an application for production."[109]

It is true that the Supreme Court has found constitutional a legislated rule that extends third-party status to, and limits disclosure of, certain "private record" information even within the Crown's possession.[110] In doing so, however, it had close regard to the robust privacy interests a person might have in things like medical or psychiatric records, especially in circumstances where the defence wishes to use the records to undermine the credibility of sexual assault victims. The policy justification for a similar approach to CSIS documents – preserving investigative targets, means,

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108 On this point, see the discussion in *McNeil*, *supra* note 33 at paras 39, 47.

109 *Ibid* at para 41.

110 *R v Mills*, [1999] 3 SCR 668, [1999] SCJ No 68.

methods and sources – is not as persuasive. The state does have a strong interest in keeping these records confidential – but there will be fewer individual privacy interests in play.[111] While courts have readily recognized the importance of keeping intelligence secret,[112] the means for doing so is already provided by s. 38 of the *Canada Evidence Act* or other source identity protection rules. I doubt the need substantively for repeating and duplicating these protections in a legislated, *O'Connor* second prong.[113]

In these circumstances, third-party status may be useful. However, because it imposes more of a procedural than substantive means of protecting CSIS secrets, it is not the hill to die on. It is probably not even a slight-rise to die on. Still, I appreciate it might still be proper and appropriate at times, so long as it is structured to minimizes the negative consequences of third-party status, especially to public safety. The police and CSIS investigations should be dovetailed as closely as possible, while still maintaining third-party distance.

It is, however, painfully unclear where the line between third-party and first-party status lies. The parallel investigation structure – where CSIS and RCMP deconflict, but where CSIS provides carefully-curated information through disclosure and advisory letters – lies short of the line.[114] But it may also be more conservative than it needs to be. Based on past caselaw, the operational ingredients of this sort of parallel investigation include the following:

**Table 2:** Facts Cited in Past Cases on CSIS Third-Party Status[115]

| | CSIS Investigation | Police Investigation |
|---|---|---|
| Structure | Investigative relationship between CSIS and police governed by a memorandum of | |

111 The exception would be source identity, but that is already protected by source identity protections in the CSIS Act, *supra* note 6, s 18.1

112 See e.g. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 68 [*Charkaoui*].

113 If this were a question of "either/or" I would prefer to see the balancing done by a trial court as part of a legislated *O'Connor* than by the Federal Court in a collateral *Canada Evidence Act* proceeding. If there were a question of "both," the only likely outcome is: longer, more complex trials.

114 See the discussion of this parallel investigation system, in the context of *O'Connor* disclosure, in *R v Ahmad*, *supra* note 1.

115 Drawn from *ibid*.

| | | |
|---|---|---|
| | understanding, governing information-sharing and the maintenance of separate investigations. | |
| Initiation | Initiated for security intelligence purposes. | Initiated for criminal investigation purposes. |
| Timing | CSIS investigation first in time. | Police investigation prodded by initial CSIS tips, in response to public safety concerns. |
| Scope | Broad international and national investigation. | Narrower investigation, focused on specific individuals in Canada. |
| Control | CSIS runs its investigation, and is free to disregard police views. | Police run their investigation, and are free to disregard CSIS views. |
| Cooperation | Interaction limited, to maintain firewall, with CSIS insulated from the street-level police investigators. CSIS embedding with police about feeding police information to CSIS, not the vice versa. At the management level, cooperation about resolving possible confliction of investigations and to keep a wary eye on public safety. | |
| Information-sharing | Carefully controlled substantive CSIS information sharing with police through disclosure and advisory letters, with information held back even when it could have assisted the police. Where information shared by CSIS on a less structured basis, done for a clear public safety basis. Logistical, deconfliction meetings restricted to ensuring operational awareness between the agencies. Freer flow of information from the police to CSIS, allowing CSIS to remain on top of an investigation and hold-back somewhat in terms | |

| | |
|---|---|
| | of pursuing their investigation to avoid confliction. |
| Sources | Effort to keep management of sources discrete, between agencies. Where CSIS source handed over to police, effort to create a "clean break." After a handover, CSIS no longer gives instructions to the source. |

But this is simply a laundry list of facts that supported the existence of third-party status. The unanswered question is whether each of these elements must be present legally to maintain CSIS third-party status. No court has so asserted. Indeed, the generic criteria for the line between first- and third-party status, to the extent they have been summarized,[116] are less rigid:

- CSIS initiated its investigation as a real security intelligence investigation, not to prosecute an accused;
- CSIS and police did not have full access to each other's files; and,
- CSIS did not take an active role in or direct the police investigation.

Precision as to the line between first and third-party status would be useful. Nothing stops Parliament from legislating statutory third-party status for intelligence services[117] – as noted, legislated third party status exists in other contexts, and indeed reaches information in the hands of the Crown. Put another way, information is given third party status, because of its origin and nature.[118] And, to repeat, there is no reason to assume that the legislated line must produce the same degree of distance maintained in practice between CSIS and police, out of an excess of caution. Indeed, it may be possible to defend a line that encapsulates only the three expectations above. At minimum, therefore, clear statutory guidance should extend the *O'Connor* test to CSIS where: CSIS's investigation is a *bona fide* security intelligence investigation; police, at least, do not have full, unmediated

116 *Ibid* at para 12.

117 For a discussion on legislating third-party status for CSIS, see West, *supra* note 100.

118 See *Criminal Code*, *supra* note 45, ss 278.1, 278.2(2)ff, relating to third-party records containing the personal information of a complainant or witness. See also *McNeil*, *supra* note 33 at para 21.

access to CSIS files; and, CSIS does not take an active role in the police investigation.

But any legislated third-party status should not maintain rigid barriers on information-sharing as one of its ingredients. Parliament might reasonably maintain the CSIS is still engaged in a *bona fide* security intelligence investigation, whose purpose is not prosecution, even with close information-sharing. The key issue should remain whether CSIS's information satisfies the suppositions undergirding *Stinchcombe*: the agency does not have the information for criminal law purposes, and therefore its information holdings are not likely relevant and do not comprise the case against the accused. Unless the defence can show that the CSIS investigation is a "stalking horse" for a criminal proceeding, the justifications for *Stinchcombe* would be absent.

There is no compelling policy reason to fear this stalking horse. A CSIS investigation is not an activity undertaken by an agency with fuller, regulatory access to private information than the police. CSIS investigations are subject to police-like *Charter* obligations,[119] where invasive. CSIS warrants are issued on different standards than police warrants because CSIS investigates diffuse threats and not discrete crimes, but it is wrong to suggest they are laxer or less privacy-protective.[120] Movement of information from a CSIS investigation to a police investigation does not, therefore, raise policy concerns about end-runs around constitutional privacy protections.

In sum, in the Bob the Bomb-Builder hypothetical, it should have been possible for CSIS to share its intelligence earlier and in more detail without losing its third-party status.

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119 *X (Re)*, 2017 FC 1047 at para 168.

120 For a discussion of the different scope of CSIS vs police warrants, see *Huang* FCA, *supra* note 62 at para 33. In 1988, the Federal Court of Appeal concluded that the CSIS warrant system fulfilled *Charter* s 8 requirements in *Atwal v Canada*, [1988] 1 FC 107 (FCA), [1987] FCJ No 714. Kent Roach has discussed whether the fruits of CSIS warrants introduced in criminal proceedings might be deficient because they did not meet crime-based reasonable grounds. He has suggested that even if they violated s 8 standards in these circumstances, they might be upheld under s 1, so long as the CSIS warrant was not being used as a short-cut around a Criminal Code warrant. Roach, *supra* note 4 at 90ff. Since that time, it is worth noting that some police authorizations for things like transmission data (metadata) recorder may now be obtained on reasonable grounds to suspect grounds. See Criminal Code, *supra* note 45, s 492.2. CSIS, meanwhile, would need to meet a reasonable grounds to believe standard for the same information. There is reason to believe, therefore, that CSIS warrants are more demanding on the state than at least some Criminal Code authorizations.

## D. Managing *Garafoli*

Some of the shared CSIS information would be the product of a CSIS wiretap. If the police had arrested Bob, Yves and Trent on conspiracy to forge passports, the evidence for that charge would stem from the CSIS intercept. That means that the aperture of relevance could extend to the warrant process leading to the intercepted information. And in the hypothetical, the CSIS Act warrant was supported by signals and foreign-origin intelligence.

In a *Garafoli* challenge to the warrant, where the CSIS information was used to bring passport fraud conspiracy charges, the defendant would almost certainly be entitled to the warrant and supporting affidavit. Affidavits should be prepared in anticipation of this disclosure, and drafted in a manner that squares the necessity of persuading the issuing judge with the prospect that the affidavit may become public.

Source intelligence not before the judge in support of the warrant application is not generally disclosable. Recall that "relevance" in this context is tied to challenging the warrant. The defence would need to persuade a court that this extraneous material would tend to discredit the warrant authorization. This narrow concept of relevance does not authorize a fishing expedition through documents not before the affiant whose affidavit supported the warrant application. There is also the possibility the CSIS affiant may be cross-examined, but only with leave of the court persuaded it could discredit the CSIS Act authorization and confined to the question of whether the affiant knew or ought to have known about errors or omissions in the warrant application. Out of caution, CSIS warrant teams should be firewalled from information that is, in fact, extraneous to the merits of the warrant application, and trained also in how to best present in court.

Nevertheless, despite these safeguards, there may be much in a CSIS warrant application that CSIS will wish to protect, especially where the warrant is built on foreign and signals intelligence. It will be tempted to use s. 38 to protect this information, but at risk that this non-disclosure will lead a trial judge to conclude that the warrant was impaired or a fair trial is compromised.

The question is, therefore, whether there are other means of narrowing the risk of full disclosure. Specifically, must the *Garofoli* challenge be conducted in open court, with the full participation of the accused and their counsel? This is a novel question, and the mere prospect of a closed process

would ignite condemnation from the defence bar. But given the Supreme Court's jurisprudence on closed-door national security proceedings, I believe such a proceeding would be constitutional.[121] In a *Garofoli* proceeding, neither the guilt nor innocence of the accused is at issue.[122] The focus is entirely on what information was before the warrant-issuing judge, and whether it meet the legal thresholds applicable to that earlier *ex parte* and *in camera* warrant process. Here, neither the accused nor his or her lawyer marshal new facts to second-guess, retrospectively, the warrant. The only value-added they provide is adversarialism. That is, they are motivated to test the legitimacy of the warrant. Yet, there are other means of accomplishing this testing: security-cleared special advocates.

It is near inconceivable to me that a court would find unconstitutional the substitution of a special advocate for defence counsel in a closed *Garofoli* challenge implicating national security information. Such substitutions have been permitted in circumstances much more impairing of due process preoccupations. For example, accused and their counsel are excluded from *Canada Evidence Act* s. 38 proceedings – and here there is no obligation even for a special advocate, although courts have often tasked near-equivalent *amicus curiae* with testing the government's position. A closed s. 38 system is not a trivial exclusion of defence counsel – after all, it is the defence that will be in the best position to gauge the impact non-disclosure would have on their case.[123] And yet, the s. 38 process is constitutional.[124]

Even more significant is the Supreme Court's jurisprudence in the immigration security certificate context. Here, named parties are denied access to classified information used against them, on the *merits* (and not simply on a matter collateral to the merits). This system violates *Charter* s. 7, but is saved under s. 1 where special advocates are present in the closed proceedings to challenge the government case.[125] Notably, the Supreme Court has upheld this arrangement,[126] even while acknowledging that the possible consequences of a security certificate – especially, the prospect of

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121 On this point, see also Roach, *supra* note 4 at 113.

122 See *R v Pires; R v Lising*, *supra* note 34 at para 30 ("the *Garofoli* review hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence.")

123 On this point, see *Huang*, *supra* note 27 at para 48.

124 *Ahmad*, SCC, *supra* note 74.

125 *Charkaoui*, *supra* note 112.

126 *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37.

removal to maltreatment – are more serious than anything that can be inflicted under the *Criminal Code*.[127]

Given this established caselaw, it would be the height of formalism to assume that just because the fruits of a warrant are being used in a criminal proceeding, a collateral *Garofoli* dispute over the CSIS warrant authorization process somehow attracts more rigorous open-court standards than does a proceeding on the *merits* that decides the fate of a person subject to a security certificate. If follows that the same legislated innovation that saves the security certificate regime under the *Charter* – special advocates – would also save a closed-court *Garafoli* proceeding involving CSIS intelligence.

A closed-court *Garafoli* proceeding might significantly reduce CSIS concerns about sharing the fruits of its warrants with the police, greatly increasing the information in zone AB.

## E. Managing Public Safety

Even with all the innovations proposed above, there will be two investigations: the CSIS security intelligence investigation and the police criminal investigation. CSIS may have access to full information. The police may have access to somewhat less information, although ideally the steps noted above would ease information flows. In the hypothetical, who will decide that it is better to pick up Bob, Yves and Trent for conspiracy to commit to passport fraud rather than let the various investigations continue?

Even in systems, such as that in the United Kingdom where police and intelligence anti-terrorism investigations are more blended, there is need for a public safety fusion centre managing the public safety risk.[128] It is not clear to me how much of this "fusion" role is currently accomplished through CSIS/RCMP One Vision 2.0 collaboration. But I worry it is not fully possible to "fuse" where substantive information sharing from CSIS and RCMP is governed by carefully curated disclosure letters, and less regular, advisory letters. How can a fusion centre really operate if one player has full possession of the information, but the other does not?

My suspicion is, therefore, that our fusion centres could benefit from more fusion. A Canadian counterpart to the UK system could receive

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127 *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 54 ("The consequences of security certificates are often more severe than those of many criminal charges.")

128 See discussion in Forcese, *supra* note 5.

investigative information from all-of-government and be fully apprised of the public safety risks associated with an ongoing investigation (or parallel investigations). Since it would include representatives from all the services with legal powers to respond to threats, the full tool chest of legal options could be canvassed by the fusion centre in response to a public safety risk. The decision on whether to intervene, and how, would then be made based on full-information by this collaborative body, and not *de facto* taken by the entity with the most information because of siloed information collection. The interventions managed by this fusion body could be timed to minimize subsequent I2E dilemmas. For instance, arrests could be timed to support charges that requiring the least reliance on classified intelligence, while at the same time balancing the public safety interest.[129] (For example, in their original plot, Bob, Yves and Trent could be arrested while in possession of fake passports.)

The fusion centre would be structured to ensure it is not itself an investigative body or one that creates new information. Kept at arm's length in this manner, it would itself be a third-party to the criminal investigation and information in its possession would not be subject to more assertive disclosure obligations than already exist for CSIS under an *O'Connor* standard. In this manner, CSIS could collaborate with full information without exposing itself to disclosure obligations any greater than exist already.

Put simply: The fusion centre would be a black hole for in-bound information. And its contribution would be confined to making the decision on when to wrap up investigations and move against targets for urgent public safety reasons.

## VII. Conclusion

In sum, I2E is a problem that can be managed, but the dilemmas cannot be outright solved. CSIS cannot wall itself off from the criminal justice system – at least, not without the enactment of a special, absolute privilege created using the "notwithstanding" clause of the *Charter*. (And were such a

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[129] An attending police officer could plausibly point to the fusion centre tip-off as the basis of his or her reasonable and probable cause, even if the tip-off was not itself admissible evidence. *Eccles v Bourque*, *supra* note 49 at 746 ("That this information was hearsay does not exclude it from establishing probable cause" in an arrest context).

statute promulgated, I predict that courts would find other ways to invalidate trials made unfair by the privilege.)

But the disclosure risk can be managed, in a manner that threads the needle between fair trials, legitimate confidentiality concerns and public safety. This management system rests on three legs:

- Manage the relevance "tear-line" so that crimes are charged whose prosecution is less intrusive on CSIS information holdings. This strategy requires applying a prosecutorial insight to those investigations and planning their conduct to not prejudice trials. I bundle this concept within the category of "collecting to evidential standards" and "managing witnesses."
- Legislate standards to create certainty from the murk of evidence law. Here, two innovations stand out. First, legislate *O'Connor* style third-party status for CSIS where: CSIS's investigation is a *bona fide* security intelligence investigation; police do not have full, unmediated access to CSIS's files; and, CSIS does not take an active role in the police investigation. But do not build this legislated third-party status around rigid barriers on information-sharing. Second, legislate *ex parte, in camera* procedures for *Garofoli* challenges of CSIS warrants, substituting special advocates for defence counsel.
- Manage the public safety risk by creating a fusion centre able to receive investigative information from all-of-government and fully apprised of the public safety risks associated with an ongoing investigation (or parallel investigations). Ensure it includes representatives from all the services with legal powers to respond to threats. The fusion centre would not itself be an investigative body, and would have *O'Connor*-style third-party status, something that would not require legislation but which might benefit from it.

I suspect that these three steps would go a considerable distance to easing difficulties in the current conduct of Canadian anti-terrorism. It is true any new system will attract controversy and inevitable challenges by criminal defendants. That is the way the system is supposed to work. But the mere prospect of challenge should not deter, and I believe this system could be sustained. At any rate, the *status quo* has proven a magnet for challenges already, while contributing to a high-risk security environment.

Accordingly, from my (admittedly outsider) vantage point, I see no serious downside-risk to trying something different.

# Canadian National Security in Cyberspace: The Legal Implications of the Communications Security Establishment's Current and Future Role as Canada's Lead Technical Cybersecurity and Cyber Intelligence Agency

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CRITICAL COMMENTARY

## ABSTRACT

National security policy in cyberspace presents a unique security challenge. Operations under the current mandate of the Communications Security Establishment (CSE) may incidentally capture Canadian information and thereby affect Canadian privacy interests. This raises serious concerns that this regime does not comply with sections 8 and 2(b) of the *Canadian Charter of Rights and Freedoms*. However, legislative reform under Bill C-59 implements external accountability measures in a manner that satisfies *Charter* requirements. Finally, Bill C-59 makes significant changes to CSE's mandate, namely the addition of an "active" cyber mandate. These changes raise concerns that the expansion of CSE's offensive capabilities, without careful oversight, may enable CSE to conduct

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cyber operations that do not comply with Canada's international legal obligations and are not authorized by Parliament.

***Keywords***: Bill C-59, *An Act respecting national security matters*, surveillance state, privacy, national security, Communications Security Establishment, cyberspace, cyber security, cyber operations, *Charter* rights, section 8, section 2(b), international law, offensive cyber capabilities.

## I. INTRODUCTION AND OVERVIEW

This paper provides an overview and analysis of the contemporary Canadian approach to national security in cyberspace. Cyberspace presents a unique security challenge, which must be addressed while also meeting constitutional and international legal requirements. Operations under the current mandate of the Communications Security Establishment (CSE) may incidentally capture Canadian information and thereby affect Canadian privacy interests. However, such operations are not currently subject to independent judicial-like accountability. This raises serious concerns that this regime does not comply with sections 8 and 2(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*).[1] However, this analysis also reveals that legislative reform under Bill C-59, which at time of writing is before the Canadian Senate, will likely implement external accountability measures in a manner that satisfactorily fulfills *Charter* requirements.[2] Finally, Bill C-59 makes significant changes to CSE's mandate, namely the addition of an "active" cyber mandate. These changes raise concerns that the expansion of CSE's offensive capabilities, without careful oversight, may enable CSE to conduct cyber operations that do not comply with Canada's international legal obligations and are not authorized by Parliament.

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1 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].

2 Bill C-59, *An Act respecting national security matters*, 1st Sess, 42nd Parl, 2018 (as passed by the House of Commons 19 June 2018) [Bill C-59]; For clarity, the body of this paper refers to "sections" in Bill C-59 when referring to the provisions of specific acts the bill will create, however because the bill has yet to be enacted into law, they are formally considered "clauses" (as is reflected in this paper's footnote citations). Post-submission update: Bill C-59 received royal assent on June 21, 2019.

## II. The Complex Nature Of National Security In Cyberspace

Cyberspace is a non-physical network that does not occupy any physical space and connects networks of computers to one another.[3] Vast quantities of data concerning private information are transferred and stored in cyberspace and therefore privacy interests are engaged by its operation and regulation. However, the fact that cyberspace exists due to a connection between physical devices means that that physical territory cannot be ignored in its regulation.[4] Cyberspace can also be used as a weapon for both for defensive and offensive purposes, such as cyberwarfare, which takes the form of cyber-attacks. In a cyber-attack, attackers utilize malware to penetrate computers, networks or websites to cause political, military, economic or other types of damage.[5] In 2011, foreign hackers, allegedly from China, launched an unprecedented attack on the Canadian government, targeting Defence Research and Development Canada, a civilian agency of the Department of National Defence.[6] These hackers thereby accessed highly classified information and forced the Finance Department and Treasury Board, two critical government institutions, to temporarily cut-off their internet access.[7] Connected attacks also targeted major Bay Street law firms, financial institutions and public-relations agencies involved in a foreign takeover attempt of Potash Corporation of Saskatchewan, in an effort to acquire inside information.[8] A state's contemporary infrastructure assets, such as those involving its military, transportation networks, electrical grids, natural resources and financial services are particularly vulnerable given

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3 *ACLU v Reno*, 929 F Supp 824, 830-844 (ED Pa 1996), aff'd, 521 US 844 (1997) at 849-850.

4 Matthew E Castel, "International and Canadian Law Rules Applicable to Cyber Attacks by State and Non- State Actors" (2012) 10:1 CJLT 89 at 90.

5 *Ibid* at 91.

6 Greg Weston "Foreign hackers attack Canadian Government", *CBC News* (16 February 2011), online: <www.cbc.ca/news/politics/foreign-hackers-attack-canadian-government-1.982618> [perma.cc/Y4D3-QHLB].

7 *Ibid*.

8 Jeff Gray "Hackers linked to China sought Potash deal details: consultant", *The Globe and Mail* (30 November 2011), online: <www.theglobeandmail.com/technology/tech-news/hackers-linked-to-china-sought-potash-deal-details-consultant/article534297/> [perma.cc/94Y3-V4CL].

their incorporation of and reliance on integrated computer technologies.[9] Events such as these cyber-attacks demonstrate the need for an effective national security policy capable of dealing with cyberthreats.

Complicating matters, competing interests make the implementation of national security measures in cyberspace more challenging. In addition to the agenda of national security and intelligence institutions, the interests of businesses and consumers, the privacy and expressive rights of individuals and a multitude of other interests must be taken into account.[10] Legislation promulgated in the wake of the September 11, 2001 terrorist attacks has strengthened the abilities of states to monitor internet activity with little independent oversight.[11] Some commentators argue that technology can amplify the effect of legislative changes favouring surveillance policies.[12] They argue that sophisticated surveillance technologies that harness the globally interconnected nature of communications reveal serious issues about compliance with the rule of law, which requires state action to be subject to oversight and accountability.[13]

## III. THE CANADIAN NATIONAL SECURITY APPARATUS IN CYBERSPACE

### A. Cybersecurity Policy in Canada

In June 2017, the federal government released an updated defence policy white paper entitled *Strong, Secure, Engaged: Canada's Defence Policy*, that presented the Government of Canada's long-term vision and approach to future defence policy.[14] A significant aspect of this update was the

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9 Castel, *supra* note 4 at 95.

10 Eloise F Malone & Michael J Malone, "The 'wicked problem' of cybersecurity policy: analysis of United States and Canadian policy response" (2013) 19:2 Can Foreign Policy J 158 at 171.

11 Arthur J Cockfield, "Who Watches the Watchers? A Law and Technology Perspective on Government and Private Sector Surveillance" (2003) 29 Queen's LJ 364 at 381, 385-386.

12 *Ibid* at 394.

13 Lisa M Austin, "Lawful Illegality: What Snowden Has Taught Us About the Legal Infrastructure of the Surveillance State" in Michael Geist, ed, *Law, Privacy, and Surveillance in Canada in the Post-Snowden Era*, (Ottawa: University of Ottawa Press, 2015) 103 at 104.

14 Canada, Department of National Defence & Canadian Armed Forces, *Strong, Secure, Engaged: Canada's Defence Policy*, (Ottawa: National Defence, 2017), online (pdf):

Government's explicit acknowledgement that cybersecurity is an increasingly integral part of an effective modern national security regime. In the white paper, the Trudeau government declared that it "will assume a more assertive posture in the cyber domain" not only by strengthening its defensive capabilities, but also by developing an active cyber operations capacity.[15] The white paper noted that rapid technological development in the cyber domain presents a challenge that requires domestic and international legal frameworks to adapt.[16] It warned that technological advancement has revealed new cyberspace-related security issues. Terrorist groups, state-sponsored espionage and disruptive operations are all making use of the vulnerability arising out of the nature of cyberspace.[17] Jurisdictional challenges, arising out of the possibility that attacks on Canada can be carried out remotely from outside Canada, further complicate a national security response. In a military context, state and non-state actors may exploit vulnerabilities in existing technologically dependent military systems.[18] The white paper cautioned that Canada must develop advanced cyber capabilities to address such threats.[19] This is particularly significant because it represents the first time that the Canadian government has formally called for the development of an offensive cyberwarfare capability to respond to external threats.

A year later, the government released the 2018 *National Cyber Security Strategy*, which serves as an update to its first cybersecurity strategy released in 2010.[20] It defines cybersecurity as "the protection of digital information and the infrastructure on which it resides."[21] Like the 2017 white paper, the 2018 strategy calls for a stronger federal government response to cyberthreats.[22] Of particular significance is the (albeit brief) mention of

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<dgpaapp.forces.gc.ca/en/canada-defence-policy/docs/canada-defence-policy-report.pdf> [perma.cc/RJC9-SUZX] at 11.

15 *Ibid* at 15.

16 *Ibid* at 55.

17 *Ibid* at 56.

18 *Ibid*.

19 *Ibid* at 57.

20 Public Safety Canada, *National Cyber Security Strategy*, (Ottawa: Public Safety Canada, 2018), online (pdf): <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-cbr-scrt-strtg/ntnl-cbr-scrt-strtg-en.pdf> [perma.cc/23W4-5MER] at 2.

21 *Ibid* at 7.

22 *Ibid* at 11.

funding to support the newly created Canadian Centre for Cyber Security.[23] The Canadian Centre for Cyber Security, initially announced in February 2018, is housed within CSE and gained initial operational capability in Fall 2018. It is expected to be fully operational by Spring 2020.[24] The decision to open the centre within CSE represents an explicit choice of the government to consolidate cybersecurity operations under the authority and control of CSE.[25] However, beyond this, the report is limited to vague commitments to greater federal leadership, investment, collaboration and support of the private sector. The *National Cyber Security Strategy* provides little specificity regarding the nature of cybersecurity operations. The remainder of this paper considers the constitutional and international legal implications of CSE's current and future roles as Canada's lead technical cybersecurity and cyber intelligence agency.

## B. The Current CSE Mandate

CSE is Canada's signals intelligence service. Signals intelligence involves the interception and analysis of communications and other electronic signals.[26] CSE exercises its authority under the *National Defence Act*, RSC 1985 c N-5 [*NDA*]. CSE's mandate authorizes it to do three things: "to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence" (Mandate A); to advise, guide and provide "services to help ensure the protection of electronic information and of information infrastructures" (Mandate B); and to assist "federal law enforcement and security agencies in the performance of their lawful duties" (Mandate C).[27] Mandates A and B are constrained by a requirement that activities are not "directed at Canadians or any person in Canada; and…shall be subject to measures to protect the privacy of Canadians in the use and retention of intercepted information."[28] Only under Mandate C may CSE target Canadians in its spying activities.

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23 "Canadian Centre for Cyber Security" (last modified 16 November 2018) *Canada Communications Security Establishment*, online: <www.cse-cst.gc.ca/en/backgrounder-fiche-information> [perma.cc/8C3Z-8ECP].

24 *Ibid.*

25 *Ibid.*

26 "Foreign signals intelligence" (last modified 25 July 2019), online: *Canada Communications Security Establishment* <www.cse-cst.gc.ca/en/inside-interieur/signals-renseignement> [perma.cc/K9FQ-BULV].

27 *National Defence Act*, RSC 1985, c N-5, s 273.64(1) [*NDA*].

28 *Ibid*, s 273.64(2).

However, this mandate is restricted to activities that CSE has explicit legal authorization to do.[29] Thus Mandate C allows CSE to extend technical assistance to the Canadian Security Intelligence Service (CSIS), Canada's principal national intelligence service, in the domestic context.[30] There is an implicit legal requirement in the domestic context (explained below) that a warrant must be sought for any actions that would otherwise violate section 8 of the *Charter*, which provides the right against unreasonable search or seizure.[31] While Mandates A, B and C appear discrete in theory, CSE cyber operations can result in legally problematic overlap in practice.

The potential for CSE Mandate A activities, which can only be carried out on foreign targets, to have domestic impacts or impacts on Canadians abroad is contemplated by the *NDA*, which specifies that the Minister of National Defence may authorize CSE "to intercept private communications."[32] This recognizes that situations may arise where information about Canadians is incidentally intercepted.[33] The law restricts such authorization to situations where the Minister is satisfied that: the interception is directed at foreign targets; the information cannot reasonably be obtained by other means; the value derivable from the information justifies the interception; and that privacy measures are in place to protect Canadian communications if they are unintentionally collected.[34] In practice, because one cannot be certain that a given activity will not accidentally implicate Canadian communications, ministerial authorizations are sought pre-emptively on a routine basis.[35]

This ministerial authorization regime raises profound accountability issues. CSE's ministerial regime differs from a traditional judicial warrant regime, which police agencies and CSIS are required to comply with, in two critical regards. Unlike the warrant process that police agencies and CSIS engage in, which authorizes surveillance in narrow circumstances (i.e. where

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29 *Ibid*, s 273.64(3); Craig Forcese, "One Warrant to Rule Them All: Reconsidering the Judicialisation
of Extraterritorial Intelligence Collection" in Randy K Lippert et al, eds, *National Security, Surveillance and Terror*, 1st ed (Cham, Switzerland: Palgrave McMillan, 2016) 27 at 30 [Forcese 2016].

30 Forcese 2016, *supra* note 29 at 30.

31 *Ibid*.

32 *NDA*, *supra* note 27, s 273.65(1).

33 Forcese 2016, *supra* note 29 at 32.

34 *NDA*, *supra* note 27, s 273.65(2).

35 Forcese 2016, *supra* note 29 at 33.

the target, location and nature of the surveillance practices are specified), the ministerial process authorizes broad surveillance practices that are not constrained to specific individuals or subject matters).[36] Second, the ministerial process lacks judicial oversight. Unlike warrant processes, which require the approval of independent judges, ministerial authorizations are only subject to the approval of the Minister of Defence, a member of the executive.[37] Moreover the CSE mandate, codified in 2001, does not reflect the extent to which technological advancement has blurred the line between foreign and domestic targets. For instance, an email or instant message intercepted overseas could belong to a Canadian or originate from within Canada.[38] The collection of metadata is a prominent example of such blurring that raises privacy concerns. CSE describes metadata as "the context, but not the content of a communication," including information such as location data, an internet protocol address or the time of a communication.[39] The agency acknowledges: "some metadata associated with Canadian communications is likely to be present in the subsets of metadata collected by CSE."[40] CSE collects such information without ministerial or judicial authorization.[41] This practice raises significant concerns regarding the legality of CSE's intelligence gathering activities in cyberspace.

## IV. THE CSE MANDATE AND THE *CHARTER*

### A. *Charter* Concerns arising out of the CSE Mandate

Academic commentators have warned that the scope of "national security" has expanded from the targeting of foreign states and agents to also include the targeting of ordinary citizens.[42] The primary legal concern that arises out of CSE's current cyber operations that this analysis will examine is its potentially unconstitutional impact on privacy rights. In

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36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 "Metadata and our Mandate" (last modified 25 July 2019), online: *Canada Communications Security Establishment* <www.cse-cst.gc.ca/en/inside-interieur/metadata-metadonnees> [perma.cc/82LB-KLC8].

40 *Ibid.*

41 Forcese 2016, *supra* note 29 at 34.

42 Austin, *supra* note 13 at 2.

Canada, there is no explicit constitutional right to privacy.[43] However as this paper will explain below, it is widely recognized that section 8 of the *Charter,* which provides a right against unreasonable search and seizure, can be utilized to protect individuals' privacy interests.[44] In addition to protections afforded under section 8, expert commentators posit that freedom of expression protections under section 2(b) of the *Charter* may also afford privacy protections.[45]

Section 8 of the *Charter* provides a right against unreasonable search or seizure, which shares a nexus to privacy protections.[46] The Supreme Court of Canada's (SCC) unanimous decision in *R v Spencer*, 2014 SCC 43 [*Spencer*] illustrates this point. In *Spencer*, the police identified the internet protocol address of a computer that had been used to access and store child pornography through an Internet file-sharing program.[47] This information, which led to Mr. Spencer's identification, arrest, and consequent conviction, was obtained from his Internet Service Provider without prior judicial authorization.[48] The question of whether Mr. Spencer's rights under section 8 of the *Charter* were engaged turned on whether he enjoyed a reasonable expectation of privacy in the information that his internet service provider disclosed to the police.[49] Cromwell J, writing for the Court, explained that "anonymity is…particularly important in the context of Internet usage…[and can be] claimed by an individual who wants to present ideas publicly but does not want to be identified as their author."[50] Legal expert David Tortell aptly observes that *Spencer*, a section 8 case, thus expanded constitutional protection for free speech without any reference to

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43 "Your privacy rights" (last modified 29 July 2019), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/privacy-topics/your-privacy-rights/> [perma.cc/76HY-6KF3] [OPC]; Cockfield, *supra* note 11 at 370.

44 OPC, *supra* note 43; "Rights and Freedoms in Canada", online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/cp-pm/just/06.html> [perma.cc/ELP3-297A].

45 While some privacy advocates have also suggested that sections 7 and 15 of the *Charter* may raise privacy implications, these are narrow and less analytically persuasive. For example, see David M Tortell, "Surfing the Surveillance Wave: Online Privacy, Freedom of Expression and the Threat of National Security" (2017) 22:2 Rev Const Stud 211 at 219-220 [Tortell 2017]. The following analysis is restricted to privacy guarantees under sections 8 and 2(b) of the *Charter*.

46 *Charter*, *supra* note 1, s 8.

47 *R v Spencer*, 2014 SCC 43 at para 1 [*Spencer*].

48 *Ibid* at para 1.

49 *Ibid* at para 16.

50 *Ibid* at para 45.

section 2(b) of the *Charter*.[51] This represents a shift in the jurisprudence on the relationship between speech and privacy. Traditionally, privacy and expressive rights are conceptualized as existing in tension.[52] In the context of defamation, the expressive rights of one party are viewed as existing at odds with the reputational privacy interests of another party.[53] However *Spencer* suggests that privacy and expressive rights can be conceptualized as existing in a complementary relationship, wherein expressive rights are augmented by the protection of privacy.[54]

It is constitutionally dubious whether CSE's current widespread collection of metadata, which can result in the incidental interception of Canadian communications (as described in the preceding section), is compliant with the privacy requirements that section 8 of the *Charter* entails. It is generally acknowledged that section 8 requires authorities to obtain a warrant from an independent judicial officer to engage in practices that intrude upon individuals' reasonable expectations of privacy.[55] While metadata provide only the context of communications, they can reveal significant personal information, including a person's habits, beliefs and conduct, for which there exists a reasonable expectation of privacy.[56] The *Spencer* decision, which affirmed that a police request for subscriber information corresponding to anonymous Internet activity "engages a high level of informational privacy," supports this conclusion.[57] Consequently, current CSE practices that involve the collection of constitutionally protected data should be subject to an independent judicialized process to ensure constitutional compliance.[58]

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51 David M Tortell, "Two Tales of Two Rights: *R v. Spencer* and the Bridging of Privacy and Free Speech" (2016) 36:2 NJCL 253 at 255-256 [Tortell 2016].

52 *Ibid* at 255.

53 *Ibid* at 255.

54 *Ibid* at 256.

55 Craig Forcese, "Putting the Law to Work for CSE" (December 2017) Brief to the Commons Standing Committee on Public Safety and National Security at 3, online (pdf): <www.ourcommons.ca/Content/Committee/421/SECU/Brief/BR9326418/br-external/ForceseCraig-e.pdf> [perma.cc/6GWQ-G94U] [Forcese 2017].

56 *Ibid.*

57 *Spencer*, *supra* note 47 at para 50; Forcese 2017, *supra* note 55 at 4.

58 Forcese 2017, *supra* note 55 at 4; This issue is at the core of a legal action that the British Columbia Civil Liberties Association launched against CSE in 2013. In 2016, lawyers for the Attorney General of Canada utilized a legal procedure to move this matter from open court to a closed proceeding due to its national security implications. For more

The right to freedom of expression provided under section 2(b) of the *Charter* may also extend privacy protections. Commentators argue that the rising use of surveillance technology, which has accompanied the growth of cyberspace, may encroach on freedom of expression.[59] Professor Arthur Cockfield, a former legal and policy consultant to the Department of Justice and the Office of the Privacy Commissioner, Tortell, and others persuasively argue that if people believe their activities may be monitored, they modify their behaviour, and in doing so edit or limit their expression.[60] The SCC jurisprudence on privacy and the *Charter* supports this conclusion. McLachlin CJ, writing for the majority in *R v Sharpe*, 2001 SCC 2 explained that "[p]rivacy may also enhance freedom of expression claims under [section] 2(b) of the *Charter*, for example in the case of hate literature…because the freedoms of conscience, thought and belief are particularly engaged in the private setting."[61] Likewise, the unanimous decision in *Spencer* exemplifies this link between privacy and freedom of expression in a cyber context. While that case proceeded on a claim under section 8 of the *Charter*, the Court explicitly linked the protection of speech (which is usually protected under *Charter* section 2(b) protections for freedom of expression) with privacy. Specifically, Cromwell J's reference to the particular importance of cyber anonymity in empowering individuals to present ideas publicly without being identified as their author illustrates a clear conceptual link in the Court's understanding of the relationship between privacy and freedom of expression.[62]

Finally, legal scholars invoke principles of statutory interpretation to read privacy protections into section 2(b). It is a widely accepted principle of interpretation that courts should interpret the sphere of protected expression under section 2(b) of the *Charter* in a broad and inclusive

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information, see Michelle Zilio & Colin Freeze, "Ottawa accused of breaking intelligence agency transparency vow", *The Globe and Mail* (2 June 2016), online: <www.theglobeandmail.com/news/national/ottawa-accused-of-breaking-intelligence-agency-transparency-vow/article30256336/> [perma.cc/J45M-R8J6]; "Spying in Canada: Civil Liberties Watchdog Sues Surveillance Agency Over Illegal Spying On Canadians" Press Release, *British Columbia Civil Liberties Association*, online (pdf): <bccla.org/wp-content/uploads/2013/10/Final-Press-Release-Spying-10_21_131.pdf> [perma.cc/U4NW-RQWT].

59 Cockfield, *supra* note 11 at 394.

60 *Ibid*; Tortell 2016, *supra* note 51 at 215.

61 *R v Sharpe*, 2001 SCC 2 at para 26.

62 *Spencer*, *supra* note 47 at para 45; Tortell 2017, *supra* note 45 at 221.

manner.[63] Such a broadly interpreted sphere of protected expression should encompass the need to protect the privacy necessary to enable individuals' free expression. Second, legal scholars invoke the constitutional "living tree" doctrine, which requires that the constitution be interpreted progressively in a manner that accommodates modern realities.[64] Such scholars argue that the doctrine requires section 2(b) to be understood to provide constitutional protection that addresses the practical reality that individuals' privacy must enjoy protection to defend expressive rights in cyberspace.[65] Therefore, on the same basis as described with respect to section 8 of the *Charter* above, protections under section 2(b) provide another basis on which the constitutionality of CSE's current practices that incidentally gather Canadian information can be challenged.

## B. Bill C-59 as a Response to *Charter* Concerns

Under the *NDA,* CSE's current home statute, CSE obtains "ministerial authorizations" where it conducts cyber operations that may incidentally collect Canadian private communications.[66] As discussed in Section 3.b above, this statutory regime raises profound accountability issues. Ministerial authorizations are broad in nature and lack independent judicial oversight. This process is subject to much less accountability than a traditional judicial warrant process, which requires law enforcement agencies to seek judicial approval for specific surveillance activities that are narrow in scope. In contrast to ministerial authorizations, judicial approval is constrained to specific targets, locations and methods of surveillance. The lack of similarly strict accountability requirements for CSE's current surveillance practices raises serious concern whether such practices are *Charter*-compliant. Moreover, inter-agency cooperation practices mean that CSE may share incidentally-collected information with other partner security agencies, such as CSIS.[67] Resultantly CSE may share information with police and intelligence agencies that such agencies could otherwise only lawfully collect under the authority of a warrant.[68] However, Professor Craig

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63 *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 1 SCR 927 at 969-970, 58 DLR (4th) 577.

64 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

65 Tortell 2017, *supra* note 45 at 223.

66 *NDA*, *supra* note 27, s 273.65; Forcese 2017, *supra* note 55 at 2-3.

67 Forcese 2017, *supra* note 55 at 4.

68 *Ibid* at 5.

Forcese, an expert in national security law, warns that imposing a judicial warrant process is not necessarily an appropriate fix, given that CSE's collection activities differ significantly from surveillance conducted by police or CSIS:

> [While] the latter invade privacy under warrants that meet strict specificity standards...[CSE] does not target Canadians and persons in Canada under its foreign intelligence and cyber security mandates – and therefore never *intentionally* targets the privacy of any constitutionally-protected individual.[69]

An appropriate authorization regime must therefore account for the "foreseeable but incidental" nature of the collection of constitutionally protected information.[70] Thus stricter specificity requirements, like those in a judicial warrant process, cannot form the basis of an appropriate accountability mechanism for CSE's operations.[71] However, the fact that *Charter* interests are at stake suggests that an appropriate regime must find a way to provide adequate independent judicial-like oversight.

Bill C-59 is an omnibus national security bill which implements several changes that respond to these *Charter* concerns. Professor Forcese characterizes Bill C-59 as "unquestionably the biggest overhaul of national security law and the institutional setting in which it operates" since the creation of CSIS in 1984.[72] Two elements of the bill have major implications for CSE's cyber operations. First, Part 3 of the bill will enact a "Communications Security Establishment Act," which has significant implications for CSE's cybersecurity mandate that will be addressed in Section 5 of this paper.[73] The second major change under Part 2 of the bill addresses these *Charter* concerns arising out of a lack of independent oversight and accountability. Bill C-59 creates the office of the Intelligence Commissioner (IC) to remedy these concerns.[74]

The IC is, among else, responsible for reviewing the Minister's "Foreign Intelligence Authorizations" and "Cybersecurity Authorizations."[75] This statutory overhaul and new oversight mechanism is the Federal Government's attempt to create a *Charter*-defensible regime that ensures

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69 *Ibid* at 6 [emphasis in original].

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Ibid*, Part 3, *Communications Security Establishment Act*.

74 Bill C-59, *supra* note 2, Part 2, *Intelligence Commissioner Act*.

75 *Ibid*, ss 13, 14.

that CSE's incidental collection of protected information is *Charter* compliant.[76] The IC regime represents an attempt to emulate the independent judicial oversight that *Charter* compliance entails, but also to ensure that the institution tasked with oversight has the institutional competence (knowledge and capacity) to make determinations in a complex national cybersecurity context. Bill C-59 stipulates a requirement that the IC must be a retired judge of a superior court.[77] This is intended to secure the independent judicial-like accountability that is required for constitutional compliance where *Charter* interests are at stake. The creation of the IC is also superior to assigning these oversight duties to a Federal Court judge because it creates an office with greater institutional expertise and field sensitivity to oversee complex technological aspects of CSE operations.[78] However, retired judges are not necessarily subject to the exact impartiality standards imposed on sitting judges.[79] Nonetheless, this regime of independent IC oversight represents a significant improvement over the current regime of ministerial authorization.

Furthermore, a revision of the bill (as passed by the House of Commons on June 19, 2018) responds to concerns raised in a December 2017 brief to the Commons Standing Committee on Public Safety and National Security. In an earlier draft of the bill, IC oversight was only triggered for activities in contravention of "an Act of Parliament."[80] Critics argued this trigger was under inclusive, and would thus not be triggered for *all* activities that may implicate constitutionally protected information.[81] In the bill's updated articulation, ministerial authorization (which prompts the vetting process by the IC) must be sought for any activities that contravene "any other Act of Parliament – or involve the acquisition…of information from the global information infrastructure that interferes with the reasonable expectation

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76 Forcese 2017, *supra* note 55 at 7.

77 Bill C-59, *supra* note 2, cl 4.

78 Forcese 2017, *supra* note 55 at 7.

79 For example, retired Justice John Gomery (who headed the Commission of Inquiry into the Sponsorship Program and Advertising Activities) was held to a lower standard of impartiality in his role as Commissioner than the standard expected of sitting judges. See *Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2009 FC 802 at paras 72-73.

80 Bill C-59, *supra* note 2, Part 2, *Intelligence Commissioner Act*, cl 23(1).

81 Forcese 2017, *supra* note 55 at 8.

of privacy of a Canadian or a person in Canada."[82] This modification arguably addresses outstanding *Charter* concerns because it lowers the trigger for independent judicial-like oversight to the same threshold for interests under section 8 of the *Charter*.[83]

## V. International Legal Implications Under CSE's Expanded Mandate

While Bill C-59 marks a major improvement in terms of CSE's *Charter* compliance regarding privacy issues, it also raises new questions surrounding CSE's revised mandate. The bill expands CSE's active (i.e. offensive) cyber operations mandate with two changes that have significant international legal implications. First, the bill expands what is currently Mandate C to include the provision of "technical and operational assistance to federal law enforcement and security agencies, the Canadian Forces and the Department of National Defence."[84] In addition, the bill creates a new CSE mandate to engage in "active cyber operations…to degrade, disrupt, influence, respond to or interfere with the capabilities, intentions or activities of a foreign individual, state, organization or terrorist group as they relate to international affairs, defence or security."[85] Under the new statutory regime, the Minister will be required to authorize active cyber operations under section 30(1), which specifies the circumstances in which such action can be authorized.[86] The language of section 30(1) states that such offensive operations can be authorized "despite any other Act of Parliament or of any foreign state."[87] Leah West, an Anti-Terrorism Law Research Fellow and counsel for the Department of Justice's National Security Litigation and Advisory Group, notes that this language does not authorize CSE to violate Canada's international legal obligations (even though Parliament could use legislation to approve actions in contravention

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82 Professor Forcese proposed this solution in Forcese 2017, *supra* note 55 at 9 [emphasis added].

83 There does not appear to be a principled reason to lower the threshold for interests under other sections of the *Charter*; Forcese 2017, *supra* note 55 at 9.

84 Bill C-59, *supra* note 2, cl 20.

85 *Ibid*, cl 19.

86 *Ibid*, cl 30(1).

87 *Ibid*.

of international law).[88] Had Parliament intended to authorize CSE to breach Canada's international legal obligations, they could have used broader language such as "notwithstanding any other law" or "without regard to any other law" which are phrases employed in the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23.[89] When combined with the principle of interpretation that legislation is presumed to conform with international law, the wording in section 30(1) suggests that Parliament intends for CSE to comply with Canada's international legal obligations in its active cyber operations.[90]

The question thus becomes whether a cyber-attack (i.e. an active cyber operation) by CSE is an act prohibited by international law. Article 2(4) of the *Charter of the United Nations* demands that "[a]ll Members…refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[91] This prohibition is widely recognized as a principle of customary international law.[92] Commentators have suggested that this may create an international legal prohibition on state-sponsored cyber-attacks, however the extent of the use of force required to engage this prohibition is debated.[93] What is clear is that a cyber operation that results in death, injury, physical damage, or destruction would constitute a use of force.[94] Whether a specific non-lethal cyber-attack qualifies as a use of force is not settled in international law. An extensive review of this issue by 19 international law experts suggests that an "effects-based" approach that considers eight factors: severity; immediacy; directness; invasiveness; measurability of effects; military character; state involvement; and presumptive legality should be taken.[95] While a full international legal analysis is beyond the scope of this paper, this contextual approach suggests that decision-makers authorizing CSE's active cyber operations must remain sensitive to potentially complex

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88 Leah West, "Cyber Force: The International Legal Implications of the Communication Security Establishment's Expanded Mandate under Bill C-59" (2018) 16 CJLT 381 at 392.

89 *Ibid*; *Canadian Security Intelligence Service Act*, RSC 1985, c C-23.

90 West, *supra* note 88 at 393; *R v Hape*, 2007 SCC 26 at para 53.

91 *Charter of the United Nations,* 26 June 1945, Can TS 1945 No 7, art 2(4).

92 West, *supra* note 86 at 394.

93 Castel, *supra* note 4 at 96; West, *supra* note 86 at 398.

94 West, *supra* note 86 at 398.

95 *Ibid* at 399-402.

international legal implications that will likely result from CSE activities under its new offensive mandate. This will require that decision-makers seek expert advice on international law, particularly international humanitarian law, and that they pay special attention to potential international implications in overseeing CSE's cyber operations. Without due consideration by decision-makers at both strategic and operational levels, it is clear that CSE's expanded mandate under Bill C-59 could facilitate cyber operations that do not comply with Canada's international legal obligations and are not authorized by Parliament.

## VI. Conclusion

Ultimately, cyberspace presents a unique security challenge that requires a tailored national security apparatus capable of responding to threats in a cyber context that complies with both constitutional and international legal requirements. Under Canada's national cybersecurity framework, CSE provides technical leadership on cybersecurity and intelligence operations. Operations under the current CSE mandate may incidentally capture Canadian information in a manner that is inconsistent with the *Charter*. Ministerial oversight alone does not provide the independent judicial-like accountability that the *Charter* requires. However, this paper has argued that reform under Bill C-59, which expands external oversight and accountability under the office of the IC, provides satisfactory constitutional compliance where *Charter* interests are at stake. This reform also ensures that oversight rests with a body, the IC, which has the technical expertise and field sensitivity to appropriately oversee the technologically complex aspects of CSE operations. Finally, planned expansions to CSE's mandate under Bill C-59 that provide the agency with an active cyber operations mandate could have significant international legal implications. This raises a concern that, without careful oversight from decision-makers with access to appropriate legal advice, such a mandate expansion could result in CSE conducting cyber operations that are unauthorized by Parliament and counter to Canada's international legal obligations.

# Over-Indebted Criminals in Canada

STEPHANIE BEN-ISHAI*
AND ARASH NAYERAHMADI**

## ABSTRACT

The criminal justice system often imposes financial, as well as penal, consequences upon offenders. Often these fines and surcharges are levied on those who are least able to bear the cost. This article examines the "justice debt" regime, including the formerly mandatory victim surcharge, to illustrate the ways it interacts with the lives of indigent Canadians. After canvassing American scholarship on the topic, the authors conclude with recommendations on how the problem can be alleviated, and how the topic can be more fully researched in a Canadian context.

## I. INTRODUCTION

Gerry Williams, a 45-year-old man from a First Nations reserve near James Bay, had accumulated over $65,000 of debt by 2016.[1] This was not the result of reckless spending, or poor financial management, like an ill-advised second mortgage or suddenly losing ones job. Mr. Williams' debt largely arose from fines he accumulated while living on the streets and battling his addiction to alcohol.

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* Professor, Osgoode Hall Law School. The authors are grateful to Professors Palma Paciocco, Freya Kodar, Virginia Torrie, Tony Duggan, and Shanti Sethi for comments on an earlier draft. The authors also thank the participants in the 2018 Commercial Law Workshop at the University of Alberta. Sheen Kachroo and Mandy van Waes provided excellent research assistance. All remaining errors are our own. We acknowledge with gratitude the funding providing by the Foundation for Legal Research.

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1 See generally Alex Ballingall "Judge Drops $65,000 in Fines Against Former Homeless Man", *Toronto Star* (4 October 2016), online: <www.thestar.com/news/gta/2016/10/04/judge-drops-65000-in-fines-against-former-homeless-man.html> [perma.cc/8JAY-AY3X] [Ballingall]; "Osgoode Law Student Helps Drop $65K in Fines

Debt is often seen as a middle-class problem. A person funds purchases through credit, and then struggles to repay the loan. Underpinning this idea is the agency of the debtor: the borrower has access to credit, and chooses to spend beyond their means. Difficulty in repayment is the inevitable consequence of that decision. Put simply, debt is seen as the result of someone's choices, and an accumulation of debt is often viewed as a side-effect of profligacy. This narrative stands in stark contrast to Mr. Williams' story, and the daily experiences of many homeless or indigent offenders.

The costs of regulatory or criminal offences—the fine, potential court appearances with associated fees, and further sentencing—are often unaffordable for those who bear the costs. This debt that results from the non-payment of regulatory offence penalties, criminal offence fines, court fees, restitution, and victim surcharges, is referred to in this article as "justice debt." Many of the fees and fines that make up justice debt cannot be waived or reduced for indigency. The resulting debt is also not released after a bankruptcy, furthering the cycle of financial hardship and poverty.

Justice debt has recently attracted the attention of Canada's highest court. In *R v Boudreault*, a majority of the Supreme Court of Canada (SCC) found the mandatory victim surcharge regime to be invalid.[2] The surcharge was imposed in connection with certain criminal justice offences.[3] The Court strongly articulated the gross disproportionality of these potentially indeterminate sentences by saying:

> The inability of offenders to repay their full debt to society and to apply for reintegration and forgiveness strikes at the very foundations of our criminal justice system. Sentencing in a free and democratic society is based on the idea that offenders will face a proportionate sentence given their personal circumstances and the severity of the crime. Criminal sanctions are meant to end. Indeterminate sentences are reserved for the most dangerous offenders. Imposing them in addition to an otherwise short-term sentence flouts these fundamental principles and is grossly disproportionate. [4]

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for Former Homeless Man", *CBC News* (3 October 2016), online: <www.cbc.ca/news/canada/toronto/programs/metromorning/law-student-homeless-tickets-fines-appeal-1.3788734> [perma.cc/JK4E-QDV3] [CBC]; Ashifa Kassam, "Former Homeless Man's £38,500 Fines Quashed by Court in Canada", *The Guardian* (6 October 2016), online: <www.theguardian.com/world/2016/oct/06/former-homeless-mans-38500-fines-quashed-by-court-in-canada> [perma.cc/7DJ4-2UWV].

2 *R v Boudreault*, 2018 SCC 58 at para 5 [*Boudreault*].

3 *Ibid* at para 1.

4 *Ibid* at para 79.

This paper argues that these sentiments are equally applicable for the other components of justice debt not at issue in *Boudreault*. The holding of the SCC that mandatory victim surcharges rise to the level of cruel and unusual punishment is the first of many steps required to properly recognize the issue, and address the consequences of justice debt in Canada.

In Canada, most of the research on the post-conviction interaction between the criminal justice system and poverty is focused either on sentencing (without much consideration of the consequence of the sentence on the offender), or on if fines are a suitable alternative to prison time. Despite the limited research on the consequences of justice debt, it is nevertheless a real and pressing issue for indigent offenders in Canada. Research in the U.S. is more developed, and illustrates that justice debt has significant consequences for those that are least able to pay.[5]

Justice debt is a unique and understudied aspect of debtor/creditor and consumer protection law that deserves the attention of bankruptcy and consumer protection practitioners, researchers, and regulators. It also merits greater involvement by criminal law stakeholders, including lawmakers, judges, advocates and officials, and improved data collection on the consequences of justice debt for indigent offenders. This article seeks to examine and assess the challenge in the Canadian context, before presenting areas for future research and reform. In Part II, an overview of the fees and fines in the Canadian criminal justice system will be provided.

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[5] Three reports were produced in 2016 as part of a collaborative project between the Criminal Justice Policy Program at Harvard Law School and the National Consumer Law Center called *Confronting Criminal Justice Debt: A Comprehensive Project for Reform*. One report discusses the urgent need for reform and the other two are guides for litigation and policy reform respectively. The project is tailored to tackling the justice debt problem in the U.S. As a result of the differences between the U.S. and Canadian criminal justice fines and fees regimes (discussed in more detail in Part III), we have relied on the project as an initial source to understand the justice debt problem; however, we refer to the underlying research of the project to support the arguments and views of this article. See generally Abby Shafroth & Larry Schwartzol, "Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform" (2016), online (pdf): *National Consumer Law Centre* <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-1.pdf> [perma.cc/T8N5-VP7T]; Abby Shafroth et al, "Confronting Criminal Justice Debt: A Guide for Litigation" (2016), online (pdf): *National Consumer Law Centre* <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf> [perma.cc/8NBE-55ZZ]; National Consumer Law Centre, "Confronting Criminal Justice Debt: A Guide for Policy Reform" (2016), online (pdf): <www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-3.pdf> [perma.cc/WRF7-VUAC].

Personal narratives emerging from the case law will then be utilized to illustrate how indigent Canadians interact with, and are burdened by, the fees and fines within the Canadian criminal justice system. This section will conclude with an assessment of the victim surcharge regime in Canada in light of the SCC's recent judgement in *Boudreault*. In Part III, *Boudreault* and research from the U.S. will be used to explore the consequences of justice debt on indigent offenders in Canada. Finally, the paper will conclude by suggesting a number of reforms aimed at alleviating the burden of justice debt, and outlining the key areas where further research would benefit this area of study.

## II. JUSTICE DEBT IN CANADA

Research on the effects of justice debt on indigent offenders is scarce in Canada.[6] The statutory frameworks affecting this area of law, the *Criminal Code* and the *Bankruptcy and Insolvency Act*, do not sufficiently address the effects of justice debt on indigent offenders in Canada.[7] This section begins by offering a brief presentation of the fees and fines associated with the Canadian criminal justice system to frame the subsequent analysis. This overview is followed by the narratives from two offenders who exemplify the unaffordability of the criminal justice system for indigent Canadians. Finally, the section will conclude with a discussion of the state of the mandatory victim surcharge law in Canada leading up to and including the decision in *Boudreault*.

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6 These issues can be traced to the eighteenth-century British policy of penal transportation. At that time, there were harsh sentences for petty crimes (*e.g.* petty theft, etc.), which led to overcrowded British prisons. That the British prisons at the time were private resulted in prisoners accumulating a debt just for being incarcerated. Eventually, overcrowded prisons prompted a policy of transporting prisoners to the British Colonies—originally to the American colonies and then to the Australian colonies after the outbreak of the American Revolutionary war. For a general discussion of these issues, see Philippa Hardman, *The Origins of Late Eighteenth-Century Prison Reform in* England (PhD Dissertation, University of Sheffield, 2007) [unpublished]; R V Jackson, "Jeremy Bentham and the New South Wales Convicts" (1998) 25:2/3/4 Intl J Soc Economics 370.

7 See *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(1)(a) [*BIA*]. Both the *Criminal Code* and the *BIA* address only one element of justice debt, making comprehensive reform more difficult.

## A. Understanding the Origins of Justice Debt

Justice debt may be accumulated in several ways, including as a penal consequence, a regulatory offence, or a fee associated with use of the court system. Criminal fines are incurred as a result of a criminal charge are framed as restitution for the harm committed.[8] The mandatory victim surcharge, which will be discussed in detail later in this section, is perhaps the most notable example of a criminal fine.[9] Regulatory offences, like panhandling or loitering, have a much lower threshold for liability than criminal offences.[10] Rather than require the presence of a "guilty mind" to be found guilty of an offence, conducting the prohibited action alone is sufficient to incur liability.[11] These "on the spot fines" are often viewed as an administratively simple way of dealing with the large volume of offences ranging from environmental protection, to gambling, to managing noise.[12] Ontario's *Safe Streets Act*, which is explored later in this paper, is one such example.

In the Canadian context, nearly every court-related interaction gives rise to a fee. Provincial regulations dictate the fees associated with each court action. For example, *Ontario Regulation* 293/92 outlines the fees associated engaging with the Ontario Superior Court of Justice and the Court of Appeal.[13] Fees are charged for the most common court interactions, including for commencing a proceeding, filing documents, scheduling hearings, or seeking the enforcement of judgments or court orders.

Fee waivers are available to alleviate the cost of court fees for indigent parties who meet the statutory guidelines set out in provincial legislation. In Ontario, fee waivers are governed by the *Administration of Justice Act* and its regulations.[14] The statute specifies how and when an individual can apply for a fee waiver, as well as the financial criteria required for eligibility. As of April 2019, a waiver is available if the individual's annual income falls

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8 See Patrick Healy, "Sentencing from There to Here and From Then to Now" (2013) 17:3 Can Crim L Rev 291 at 301.

9 *Ibid*.

10 See generally Frederico Picinali, "The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification" (2017) 11:4 Crim L & Philosophy 681 at 683–686.

11 *Ibid* at 681.

12 See Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies*, (New York: Routledge-Cavendish, 2009) at 79–80.

13 See generally *Superior Court of Justice and Court of Appeal – Fees*, O Reg 293/92.

14 *Administration of Justice Act*, RSO 1990, c A.6; *Fee Waiver*, O Reg 2/05.

within a set threshold based on the number of individuals in their household, if their liquid assets are less than $2,600, and if their household net worth is less than $10,500.[15] Waivers are available for proceedings in family, civil, and small claims court. However, there are exceptions to eligibility beyond meeting the financial criteria. In Ontario, an individual whose court or enforcement fees are paid by Legal Aid or whose lawyer was retained under a contingency fee agreement is not eligible for a fee waiver. Waivers are also unavailable for criminal matters; there is no alternative for indigent offenders to seek relief from restitution orders, victim surcharges, or court-imposed fines. [16]

The application process for a fee waiver is substantially similar across the country. A fee waiver can be requested at any time before or during a case, including the enforcement stage. In Ontario, if the applicant meets the financial requirements for a fee waiver, they must complete a "Fee Waiver Request to Registrar, Clerk, or Sheriff" form. If a person is not financially eligible for a fee waiver, but still believes they should be entitled to one, they can complete a "Fee Waiver Request to Court" form instead.[17]

Indigent parties who are ineligible for fee waivers, such as those facing criminal charges, or are unaware of their existence often find themselves unable to pay. Non-payment of fees does not necessarily have serious consequences. In Ontario, it is possible to request an extension if an offender needs more time to pay a fine. This requires that the debtor speaks to a justice of the peace who will review the request. [18] However, the requirement of a formal interaction with the court may act as barrier for disenfranchised members of society. Parties who feel alienated by the justice system, such as homeless or those from marginalized communities, may be less likely to seek formal avenues of relief. A 2013 cross-country study conducted by the Canadian Bar Association concluded that the majority of

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15 O Reg 2/05, *supra* note 14, s 2.

16 *Ibid.*

17 See generally Ministry of the Attorney General, "A Guide to Fee Waiver Requests" (2005), online (pdf): <www.ontla.on.ca/library/repository/mon/10000/249893.pdf> [perma.cc/DG8X-XSN5] [Fee Waiver Guide].

18 See Ontario Ministry of the Attorney General, "Tickets and Fines" (last modified: 27 Nov 2018), online: <www.attorneygeneral.jus.gov.on.ca/english/justice-ont/tickets_and_fines.php> [perma.cc/U4UB-FGZ2].

those interviewed felt that, "the greater one's marginalization, the more distant the enforcement of their legal rights."[19]

Debtors who fail to pay a fine or fee, absent a request for an extension or a fee waiver, may face conviction for their failure to pay. Once this process has started, it imposes a deadline on the offender for payment of outstanding amounts, including court fees. Failure to pay after a conviction is entered could result in collateral consequences, such as the suspension of the debtor's driver's license, or information about the default being provided to a credit bureau.[20] These consequences will make it harder or more expensive for the debtor to receive credit, and could affect the debtor's ability to generate the income needed to pay the fine. Incarceration, the gravest available penal consequence, is also possible for non-payment of fines in Canada.[21] Committal in default is available when the court is satisfied that: (i) the other statutory remedies (provided by sections 734.5 and 734.6) "are not appropriate in the circumstances" or (read as "and") "(ii) that the offender has, without reasonable excuse, refused to pay the fine…"[22] If a fine is not paid, the debtor may be incarcerated for the lesser of the amount of the fine, divided by eight times the provincial minimum hourly wage; and the maximum jail term the judge could have imposed at conviction.[23]

In contrast to prescribing penal consequences for non-payment of criminal justice fees and fines, all jurisdictions in Canada—with the exception of Newfoundland and Labrador and Ontario—have Fine Option Programs.[24] These initiatives allow individuals to settle fines owed to the court by doing unpaid community service work. Manitoba's program, for

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19 See Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members" (2013) at 2, online (pdf): *Canadian Bar Association's Access to Justice Committee* <www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf> [perma.cc/UB9K-9FTE].

20 *Supra* note 18.

21 *Criminal Code*, *supra* note 7, s 734(1).

22 *Ibid*, ss 734(1)(b)(i)-(ii). The SCC has clarified that, in cases where "the offender's 'reasonable excuse' under subparagraph (ii) for failure to pay a fine is poverty," both elements of section 734(1)(b) must be present. See *R v Wu*, 2003 SCC 73 at para 61 [*Wu*].

23 *Criminal Code*, *supra* note 7, ss 734(4)-(5).

24 See Canada, Department of Justice, *The Federal Victim Surcharge: The 2013 Amendments and Their Implementation in Nine Jurisdictions*, by Moira A Law, (Ottawa: DOJ, 2016) at vii-viii, 18, 24, online (pdf): <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr16_vic/rr16_vic.pdf> [perma.cc/DRC3-C476].

example, allows offenders to work a certain number of pre-determined hours helping residents in the community, or repairing and maintaining community spaces including churches, schools, and parks.[25] However, Fine Options Programs are not always a complete solution to justice debt. In Manitoba, the program is not available for "Provincial Offence Act, Highway Traffic Act, parking offences and surcharges."[26] Similar alternatives have been contemplated or put in place in other parts of the world, and will be explored in greater depth in Section IV.

## B. Personal Narratives

### *1. Gerry Williams*

By 2016, Mr. Williams had accumulated over $65,000 of justice debt following a nine-year period of battling alcoholism and homelessness. The debt was tied to approximately 430 tickets issued for quasi-criminal, regulatory offences that included violating liquor laws, public intoxication, trespassing on private property, and panhandling.[27]

In 2016, Justice Mulligan agreed to a Crown-defense deal to wipe Mr. Williams' provincial debt, in return for Mr. Williams serving two years of probation and completing 156 hours of community service for a single conviction of "soliciting in an aggressive manner" under the *Safe Streets Act* [*SSA*].[28] At the time the story gained media attention, Mr. Williams also held approximately $5,000 of debt for outstanding federal tickets that were the subject of a separate appeal.[29]

The case of Mr. Williams' debt is unfortunately not unique. This sort of debt is prevalent among the homeless in the province of Ontario.[30]

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25 See Manitoba Justice, "Fine Option Program" (last visited 18 July 2019), online: <www.gov.mb.ca/justice/courts/fine.html> [perma.cc/U9AN-UP2M].

26 *Ibid.*

27 Ballingall, *supra* note 1; CBC, *supra* note 1.

28 See Joseph Marando, "The Unconscionable and Unconstitutional Safe Streets Act" (26 July 2017), online: *Homeless Hub* <www.homelesshub.ca/blog/unconscionable-and-unconstitutional-safe-streets-act> [perma.cc/E3Y3-D86Y]; Ballingall, *supra* note 1; *Safe Streets Act*, SO 1999, c 8 [*SSA*].

29 CBC, *supra* note 1.

30 See Daniel Ciarabellini "The Problem with Handing Out Fines to Homeless People", *National Post* (7 October 2016), online: <www.nationalpost.com/opinion/daniel-ciarabellini-the-problem-with-handing-out-fines-to-homeless-people> [perma.cc/433G-HLH7].

According to Mr. Williams, a homeless person can receive anywhere from five to ten tickets a day.[31] Needless to say, individuals in these circumstances cannot afford to pay the fines. As a result, the tickets are often thrown away without the prospect of collection, and the police often decline to pursue their enforcement.[32]

### *2. Sunshine Madeley*

Sunshine Madeley was 36 years old when she was arrested for threatening to cause death and for breach of probation after making a threatening gesture to a store clerk who had caught her shoplifting. At the time of the court hearing, Ms. Madeley was unemployed, addicted to drugs, and was supported by the Ontario Disability Support Program. She also had a history of mental illness, homelessness, and run-ins with the law. Her criminal record included an array of offences relating to prostitution, theft, and breach of court orders.[33]

Ms. Madeley appeared in court to challenge the constitutionality of a $200 victim surcharge that was a required levy for every conviction, in addition to any fines that might have been ordered.[34] She argued that the surcharge would cause her undue hardship, and would violate her s. 15 *Charter* rights.[35] Justice Paciocco (as he then was) agreed.[36] In his judgment, Justice Paciocco commented critically on the mandatory victim surcharges, especially for an offender who is clearly indigent and suffers from mental distress:

> [T]he marginalization and pointless harassment of the impoverished disabled with mandatory surcharge levies is a cost that is too heavy to bear in order to remedy distrust of judicial discretion in the collection of funds for victim services, even bearing in mind that the mentally disabled who are harassed by outstanding victim surcharge obligations have been convicted of offences. They are independently being sentenced for their crimes by sanctions that are tailored to their circumstances. I do not believe that the *Charter* can accept that the cost of this form of discrimination should be borne by the mentally ill, in order to achieve the

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31 CBC, *supra* note 1.

32 *Ibid.*

33 See *R v Madeley*, 2016 ONCJ 108 at para 2 [*Madeley* 2016].

34 *Criminal Code*, *supra* note 7, s 737(1).

35 See *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

36 *Madeley* 2016, *supra* note 33 at para 172.

> benefit of collecting money for victim services that might otherwise be lost through appealable abuses of judicial discretion.[37]

Unfortunately, Ms. Madeley's exoneration was reversed on appeal.[38] The Ontario Superior Court of Justice found that the "evidentiary record…does not support the conclusions reached by the trial judge."[39] While the SCC has since invalidated the victim surcharge law, the declaration is only prospective in effect for non-parties.[40]

## C. *Boudreault* and the Mandatory Victim Surcharge Law

The most notable case on the victim surcharge has been the SCC's decision in *R v Boudreault*. In that case, the majority judgement highlighted the danger of sentence that cannot be discharged on indigent offenders.[41] It also emphasized the harm faced by an already disadvantaged group posed by the fear of imprisonment, the reality of short-term detention before a hearing for non-payment, and the risk that judges may not be able to distinguish an ability to pay compared to a refusal to pay.[42] The majority went on to stress that the victim surcharge regime "ignores the 'fundamental principle' of proportionality set out in s. 718.1 of the *Code*…[and that] it does not allow sentencing judges to consider mitigating factors or to look to the appropriate sentences received by other offenders in similar circumstances."[43] Finally, the majority also noted that the law "utterly ignores the objective of rehabilitation," which must be tailored to the specific offender, and that it "undermines Parliament's intention to ameliorate the serious problem of overrepresentation of Indigenous peoples in prison."[44]

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37 See *R v Madeley*, 2016 ONCJ 579 at para 52; See also "Piling Fines on the Homeless Makes no Sense: Editorial", *The Toronto Star* (11 October 2016), online: <www.thestar.com/opinion/editorials/2016/10/11/piling-fines-on-the-homeless-makes-no-sense-editorial.html> [perma.cc/24US-RVYB].

38 See *R v Madeley*, 2018 ONSC 391 at para 45.

39 *Ibid* at para 43.

40 *Boudreault*, *supra* note 2 at para 105.

41 *Ibid* at para 3.

42 *Ibid* at paras 69–71.

43 *Ibid* at para 81.

44 *Ibid* at paras 82–83.

### *1. The State of the Law Pre-Boudreault*

Concerns about the legality of fines for indigent offenders are not new. Both the *Magna Carta* and the *Bill of Rights* of 1688 forbade excessive fines.[45] Scholarship was developed before the advent of the *Charter* on how these fines could constitute cruel and unusual punishment, although jurisprudence was lacking in a Canadian context.[46] Since the introduction of the *Charter*, this definition has been elaborated upon, most notably in the eventual declaration that the mandatory victim surcharge violates s. 12.

In the years leading up to *Boudreault*, there was a series of cases in the lower courts that challenged the law's validity based on the infringement of sections 7 and 12 of the *Charter*. The Courts of Appeal in Ontario and Quebec had established the validity of the law, despite the disagreement on the issue in the courts of first instance across the country.[47]

The constitutional validity of the mandatory victim surcharge regime had been in question shortly after the amendments removing judicial discretion came into force. In 2014, Justice Paciocco found that the victim surcharge regime violated section 12 of the *Charter* as cruel and unusual punishment.[48] In his decision, Justice Paciocco was critical of the consequences of justice debt for indigent offenders:

> In the case of victim surcharges, imposing unpayable monetary penalties is a legislatively accepted consequence. If it proves to be true that Mr. Michael never gets out from under the debt the impugned legislative scheme seeks to impose, it is a consequence that would befall him. He will remain indebted to society with all of the stigma and stress that imposes.
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> ...
>
> [E]xtending time to pay for someone who will not be able to pay in the foreseeable future is nothing more than a promise of ongoing legal obligation, with all of the stress and risks that this implies, only that stress is compounded by the imposition of impending deadlines that are apt to be unrealistic from the start.[49]

In the same year, Justice Schnall also determined that mandatory victim surcharges violate section 12 of the *Charter*, a finding made in five other

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45 See KB Jobson, "Fines" (1970) 16:4 McGill LJ 633 at 674.

46 See e.g. *ibid* at 673.

47 See *R v Tinker*, 2017 ONCA 552 [*Tinker* CA]; *R c Boudreault*, 2016 QCCA 1907.

48 See *R v Michael*, 2014 ONCJ 360 at para 75, 81 [*Michael*].

49 *Ibid*. This decision pre-dated the Ontario Superior Court of Justice's decision in *R v Tinker*, 2015 ONSC 2284 [*Tinker* SCJ]. In *R v Eckstein*, 2015 ONCJ 222, a decision that followed *Tinker* SCJ, Justice Paciocco reluctantly held that the victim surcharge regime was constitutional. However, between paragraphs 18 and 25 of *Eckstein*, Justice Paciocco opined on the shortcomings of the *Tinker* SCJ decision.

cases that had come before her.[50] In contrast to the decisions of Justice Paciocco and Schnall, Justice Fergus O'Donnell found, with some caution, that the mandatory victims charges were constitutional.[51] He arrived at this decision without relying on earlier case law upholding the constitutionality of the mandatory victim surcharge regime.[52] Elsewhere, Justice Murphy of the Supreme Court (Trial Decision) in Newfoundland and Labrador, held that the victim surcharge is a punishment; however, it does not violate section 12 of the *Charter*.[53]

Prior to the SCC's declaration of invalidity, trial judges had developed a workaround to issuing the mandatory victim surcharge in cases where the sentence did not combine incarceration and probation.[54] Judges would choose to award nominal fines for offences, resulting in a surcharge calculated at 30 per cent of the nominal fine, as opposed to the fixed fines based on the offence. In Quebec, Justice Healy in *R c Cloud*, used the nominal fine method in order to avoid awarding the blanket $100–200 surcharge per offence.[55] This approach was also used by Justice Paciocco, among other judges across Ontario.[56] The SCC, in contemplating the appropriate remedy in *Boudreault*, noted that imposing a nominal fine for the purpose of reducing the victim surcharge ignores legislature's intent, and that striking down the law was a more principled approach.[57]

### *2. Victim Surcharges Going Forward*

In declaring the law invalid, the SCC, found a middle ground on the submissions put before it. On the one hand, it refused the Crown's request to allow the victim surcharge regime to remain in effect for 6 to 12 months, while on the other hand, refusing the appellant's request to read the discretion removed by Parliament in 2013 back into the *Criminal Code*.[58]

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50 See *R v Flaro*, 2014 ONCJ 2 at para 8.

51 See *R v Novielli*, 2015 ONCJ 192 at para 12.

52 See *Tinker* SCJ, *supra* note 48.

53 See *R v Williams*, 2017 NLTD(G) 45 at para 41 [*Williams*].

54 See *R v Blacquiere* (1975), 24 CCC (2d) 168 (Ont CA), [1975] OJ No 443 (QL); *Williams*, *supra* note 53 at para 100. The SCC prohibited judges from imposing fines—even nominal ones—when the sentence includes a combination of incarceration and probation.

55 *R c Cloud*, 2014 QCCQ 464 [*Cloud*].

56 *Michael*, *supra* note 49 at para 102.

57 *Boudreault*, *supra* note 2 at para 92.

58 *Ibid* at paras 98–99.

The SCC emphasized that explicitly overruling Parliament on their recent decision would be intrusive.[59] The Court determined that the most principled approach was the declaration of invalidity, which would afford Parliament the opportunity to freely "consider how best to revise the imposition as well as the enforcement of the surcharge."[60]

The invalidity of the law is a victory for many. However, it is not a relief for those who had previously been charged the victim surcharge because the declaration only applies to future cases.[61] Indigent Canadians who were sentenced to pay victim surcharges still need to either pay the sentenced amount, seek continuous extensions, or "seek relief in the courts...by recourse [of] s. 24(1) of the *Charter*."[62]

### *3. The Government of Canada's Plan to Reintroduce Discretion in Victim Surcharges*

The SCC's decision to only award a declaration of invalidity awards a degree of deference to Parliament's decisions on how best to address the law. In October 2016, the Minister of Justice, introduced Bill C-28 with the primary intention to return discretion in ordering victim surcharges back to judges.[63] However, the Bill was abandoned after the first reading. The issue remained dormant until March 2018, when the Minister of Justice introduced Bill C-75, which proposed a reform to the victim surcharge law as part of a broader set of amendments.[64] Bill C-75 received Royal Assent in June 2019, once again giving judges the flexibility to decline to order the

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59 *Ibid* at para 100.

60 *Ibid* at para 101.

61 *Ibid* at para 105.

62 *Ibid* at para 109.

63 See Gloria Galloway "New Legislation Will Empower Judges to Waive Victim Surcharge", *The Globe and Mail* (21 October 2016), online: <www.theglobeandmail.com/news/politics/new-legislation-will-empower-judges-to-waive-victim-surcharge/article32481681> [perma.cc/8V9M-6996]; Bill C-28, *An Act to Amend the Criminal Code (Victim Surcharge)*, 1st Sess, 42nd Parl, 2016 (first reading 21 October 2016).

64 See Andrew Stobo Sniderman & Vincent Larochelle "Larochelle and Sniderman: High Time to do Away with the Mandatory Victim Surcharge", *Ottawa Citizen* (16 April 2018), online: <ottawacitizen.com/opinion/columnists/larochelle-and-sniderman-high-time-to-do-away-with-the-mandatory-victim-surcharge> [perma.cc/E5F8-QS6Y].

levy on indigent offenders.[65] In the 2009/2010 fiscal year, victim surcharges were imposed anywhere from 52% of cases in Prince Edward Island to 4% in Nunavut.[66] If discretion is going to be reintroduced in the application of the victim surcharge, an understanding of the consequences of the charge on indigent offenders is essential.

## III. THE CONSEQUENCES OF DEBT ON INDIGENT OFFENDERS[67]

The SCC discussed the consequences of justice debt in *Boudreault*, which, while focused on mandatory victim surcharges, equally applies to all justice debt:

> Many of the people involved in our criminal justice system are poor, live with addiction or other mental health issues, and are otherwise disadvantaged or marginalized. When unable to pay the victim surcharge, they face what becomes, realistically, an indeterminate sentence. As long as they cannot pay, they may be taken into police custody, imprisoned for default, prevented from seeking a pardon, and targeted by collection agencies. In effect, not only are impecunious offenders treated far more harshly than those with access to the requisite funds, their inability to pay this part of their debt to society may further contribute to their disadvantage and stigmatization. [68]

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65 See Bill C-75, *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (Royal Assent 21 June 2019).

66 See Minister of Justice and Attorney General of Canada, *Inquiry of Ministry* (Response to Q-170, from Mr. Cotler (Mount Royal)) (6 December 2013) at 1. The statistics for the other provinces and territories are: 52% in Prince Edward Island; 36% in the Yukon; 34% in New Brunswick; 31% in Nova Scotia; 30% in Newfoundland & Labrador; 29% in Alberta; 29% in British Columbia; 26% in the Northwest Territories; 23% in Saskatchewan; and 4% in Nunavut.

67 While this section relies almost exclusively on English sources, there are a number of relevant French sources which may be consulted for additional detail. See generally Marilyn Coupienne, *L'Emprisonnement pour Non-Paiement d'amendes des Personnes en Situation d'itinérance est-il un Traitement Cruel et Inusité au sens du Pluralisme Philosophique en Droit Pénal Canadien?* (LLM, McGill University, 2017); Céline Bellot et Marie-Eve Sylvestre, "La Judiciarisation de l'Itinérance à Montréal: Les Dérives Sécuritaires de la Gestion Pénale de la Pauvreté" (2017) 47 RGD 11; Véronique Fortin & Isabelle Raffestin, "Le Programme d'Accompagnement Justice – Itinérance à La Cour Municipale de Montréal (PAJIC): Un Tribunal Spécialisé Ancré dans le Communautaire" (2017) 47 RDG 177.

68 *Boudreault*, *supra* note 2 at para 3.

Indigent offenders are at a greater risk for remaining under the constant supervision of the criminal justice system. They live in fear of imprisonment, despite no matter how unlikely that might be. In the case of victim surcharges, offenders in Ontario, for example, receive a form with "[a]lmost half of the front… dedicated to threatening the offender with imprisonment if he or she fails to pay [the fee]."[69] Moreover, indigent offenders and those with prior convictions for non-attendance at court, are more likely to be detained while waiting for a committal hearing if they default on payments.[70]

In considering the consequences of justice debt on indigent offenders, we present them under two branches: economic and non-economic. The former considers the loss of income and spending power, as well as the financial burden on the offender's extended family. Non-economic consequences assess the psychological strain and disenfranchisement experienced by indigent offenders burdened by justice debt. The overwhelming consensus is that justice debt perpetuates financial hardship, and unfairly affects indigent and marginalized Canadians.

As a result of the limited research exploring justice debt in Canada, the remaining sections of this article draw heavily on U.S. scholarship. The similarity between fees and fines in the Canadian and American criminal justice systems enables the extension of U.S.-specific research to Canada. While the regimes have differences in scope and implementation, they both contribute to indigency in a way that is not easily addressed by the debtor.

In order to apply the U.S. scholarship to Canada, the first subsection that follows explores the differences between the fees and fines in the Canadian and American criminal justice systems. Understanding the differences allows for a more accurate and relevant application of U.S. scholarship to the Canadian context. The second subsection explores the economic and non-economic consequences of justice debt on indigent offenders in Canada.

## A. Differences Between the Canadian and American Criminal Justice Fee Systems

The major points of difference between the Canadian and American regimes are the interest charged on non-payment of fees, and privatized

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69 *Ibid* at para 69.

70 *Ibid* at para 70.

probation. Canadian provinces do not charge interest on court fees and fines, nor do they add late penalties. Offenders in the U.S. are charged both interest fees and late penalties for not paying court fees and fines on time. For example, the interest rate in Washington was 12% in 2017.[71] Interest and penalties further increases the burden of justice debts, and increases the difficulty of becoming debt-free. Beyond interest charges and late penalties, the privatized probation branch in the U.S. results in extended offender supervision and potential conflicts of interest. The highly privatized system for probation in the U.S. is referred to as the "offender-funded" model.[72] Offenders are charged a "supervision fee" by private probation companies who monitor their payment of court-ordered fees and fines.[73] Conversely, in Canada, provincial governments handle probation without sending offenders to third-party agencies, and supervision fees are not required.

In our process of applying American scholarship to the Canadian context, we verified that the consequences discussed in the following subsection are those that Canadian offenders face. As Canadian research increases on this topic, it will be possible to delve deeper into these consequences and rely less on American scholarship. More depth on the topic in Canada will also help identify the consequences most prevalent and costly to indigent offenders.

## B. The Economic and Non-Economic Consequences of Justice Debt on Indigent Offenders

The overwhelming consequence of justice debt is the perpetuation of indigency and poverty. Economically, indigent offenders and their families are prevented from maximizing their earnings and see their spending power reduced. On the other hand, non-economic consequences inhibit the offender's ability to more fully reintegrate into society. They increase the possibility of recidivism, developing health problems, and difficulty maintaining a stable life, all of which acts as a further barrier to overcoming indigency.

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71 See Neil L Sobol, "Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses" (2017) 88:4 U Colo L Rev 841 at 874.

72 See Human Rights Watch, "Profiting from Probation America's 'Offender-Funded' Probation Industry" (2014) online: <www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry#> [perma.cc/H3TA-Z6K8] [Profiting from Probation].

73 *Ibid.*

The most commonly identified consequences of justice debt are economic in nature. In the simplest form, economic consequences include the loss of personal and family income.[74] Indigent offenders are often forced to choose between paying their legal debt or meeting their basic needs.[75] These problems can be further exacerbated when offenders are forced to borrow money from their families and friends, which leads to potential interrelation tensions.[76] Justice debt is also problematic because it take money from the public to fund government expenditures related to legal debt collection, rather than fund more accessible public goods.[77]

Debt also makes it difficult, if not impossible, for offenders to obtain loans or credit, which limits their attempts to maximize resources. Indigency is not static.[78] Justice debt, even if it not immediately due, significantly hinders the ability of these members of society to access credit that could be used to assist with monthly living or work-related expenses. Contrary to popular belief, low-income and indigent Canadians have access to a variety of credit.[79] The types of debt held by these groups include mortgages, vehicle

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74 See Abbye Atkinson, "Consumer Bankruptcy, Nondischargeability, and Penal Debt" (2017) 70:3 Vand L Rev 917 [A Atkinson]; Torie Atkinson, "A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prison" (2016) 51:1 Harv CR-CLL Rev 189 [T Atkinson].

75 See Tamar R Birckhead, "The New Peonage" (2015) 72:4 Wash & Lee L Rev 1595 at 1596; American Civil Liberties Union of Washington & Columbia Legal Services, "Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor" (2014) at 4, online (pdf): <www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> [perma.cc/UG66-DNUE] [Debtors' Prisons]; Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (New York: Russell Sage Foundation, 2016) at 49 [*Harris*].

76 See Mitali Nagrecha, Mary Fainsod Katzenstein & Estelle Davis, "First Person Accounts of Criminal Justice Debt When All Else Fails, Fining the Family" (2015) at 20, online (pdf): *Centre for Community Alternatives* <www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf> [perma.cc/QS68-JM89].

77 See Ed Spillane "Why I Refuse to Send People to Jail for Failure to Pay Fines", *Washington Post* (8 April 2016), online: <www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.a696034909f4> [perma.cc/KM72-HUQA].

78 *Wu*, *supra* note 22 at para 31. Justice Binnie, writing for the majority, recognized at para 31 that "[i]t is wrong to assume… that the circumstances of the offender at the date of the sentencing will necessarily continue into the future."

79 See generally Stephanie Ben-Ishai & Saul Schwartz, "Bankruptcy for the Poor?" (2007) 45 Osgoode Hall LJ 471 at 475–477.

loans, credit cards, and student debt.[80] The latter is especially targeted to assist students with the greatest need for financial assistance and, similar to justice debt, is not dischargeable.[81] Access to credit, however, is limited when applicants already hold debt that is not in active repayment.

A unique economic consequence is borne out of the non-dischargeable nature of justice debt.[82] In the U.S., the logic for designating justice debt as non-dischargeable is based on the notion that offenders incurred the debt through misconduct.[83] This arbitrary distinction between dischargeable and non-dischargeable debt has negative economic and social implications for disenfranchised communities, where these debts may be concentrated.[84] The problem is further exacerbated when we consider that these communities are the least able to bear such ongoing debt.[85] Furthermore, the structure of the debt relieves the debtor from the possibility of a financial clean slate through bankruptcy. The non-dischargeable nature of justice debt forces offenders back into the court system to seek a remedy, similar to the process that Mr. Williams undertook.

Non-economic consequences can be less apparent, despite being just as pervasive as their economic counterparts. Justice debt affects the physical and mental health of offenders and can create a feeling of guilt and shame.[86] Research using national data from the U.S. has found that offenders, or those "who have contact with the criminal justice system regularly avoid making contact with institutions like medical facilities, financial institutions, workplaces and schools."[87] Life expectancy is generally lower for those with lower socioeconomic status, and debt can be "destructive to mental health."[88] While the health consequences relating to debt are potentially applicable to all debtors, justice debt is particularly damaging, as it is disproportionately borne on the indigent and low-income members of society. Criminal fines and fees have also been shown to incentivize criminal

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80 *Ibid* at 476; Statistics Canada, "Survey of Financial Security, 2016 – Table 2", online: <www150.statcan.gc.ca/n1/daily-quotidien/171207/dq171207b-eng.htm> [perma.cc/XG5V-853E].

81 *Ibid.*

82 *BIA*, *supra* note 7, s 178(1)(a).

83 A Atkinson, *supra* note 74 at 917.

84 *Ibid.*

85 *Ibid.*

86 T Atkinson, *supra* note 74 at 222.

87 Harris, *supra* note 75 at 49.

88 *Ibid.*

behaviour and increase the risk of recidivism, as offenders attempt to meet the payment amounts.[89] These difficulties are worsened by "collateral" consequences, such as license suspension and wage garnishment, which create job, housing, and family instability.[90]

Ultimately, beyond the direct consequences of justice debt on indigent offenders, this structure of criminal justice fines and fees also shifts accountability from the system to the offenders. An offender accountability system functions under the expectation that offenders need to take responsibility for their crimes while under supervision.[91] This is in contrast to system accountability, which refers to "how criminal justice procedures and resources support or further punish individuals involved in the criminal justice system."[92] A system reliant on monetary sanctions effectively shifts the accountability from the justice system to the offenders.[93] That many offenders may never be able to pay their justice debts means that the implications on these offenders are unknown.[94] Moreover, such a system results in monitoring offenders well after they have served time and, in the U.S., may put offenders in certain supervision programs that effectively creates a perpetual paternalistic system.[95]

## IV. Proposed Reforms

Before avenues for reform are considered, it is important to consider the stakes of continuing to get this policy wrong. Penal consequence that fails to achieve its desired purpose has the potential for wide-ranging effects that can harm offenders, their families, and the communities they live in. Indigency and contact with the justice system are related, making it especially harmful to place an additional financial burden on those least capable of repayment. In 2008, 70% of those entering prison had not

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89 See Roopal Patel & Meghna Philip, "Criminal Justice Debt: A Toolkit for Action" (2012) at 2, online (pdf): *Brennan Center for Justice at the NUY School of Law* <www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf> [perma.cc/37CM-YUUV].

90 See Kevin R Reitz, "The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)" (2015) 99:5 Minn L Rev 1735 at 1744.

91 Harris, *supra* note 75 at 150.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid* at 144-145.

completed high school, and a similar figure had "unstable job histories."[96] These pressures may result in the opposite of what the policy was intended to do – rather than discouraging offenders from re-offending, it may only exacerbate the pressures that prompted the infraction.

The problems associated with justice debt should be addressed in two ways. First, Parliament should implement a series of legislative and administrative reforms; and second, by changing the structure of the criminal justice system to reflect the *Boudreault* decision and recognize the perpetuation of indigency associated with justice debt. The remainder of this article calls on researchers and stakeholders within the justice system, as well as scholars and practitioners, to contribute the missing data and research necessary to appropriately address the problem of justice debt.

This section of the article presents possible reform solutions that have been identified based on the holistic review of the research on justice debt. These reforms generally focus on: increasing participation in the use of fee exemptions, abolishing fines for low-level offences, offering alternatives to monetary fines and fees, implementing an offender-tailored sanctioning system, and implementing administrative reforms tailored to supporting indigent offenders through the criminal justice process. We posit that these reforms will be effective in Canada, both as stand-alone measures and in conjunction with other changes.

## A. Increasing the Availability of Fee Exemptions and Educating Key Stakeholders

Costs associated with the criminal system are ineligible for fee waivers. The first step of this recommendation is to extend the fee waiver programs to include costs associated with criminal proceedings. Once this is complete, it is vital to educate offenders in the criminal justice system about the availability of fee exemptions for indigency and perform indigency checks as part of court hearings. Although Canada has a fairly comprehensive system in place to waive court fees for indigent Canadians, this is ineffective if they are not aware of the potential relief.[97] Educational programs that inform offenders of their rights can help promote access to justice. This

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96 See Hugh Segal, "Tough on Poverty, Tough on Crime", *Toronto Star* (20 February 2011), online: <www.thestar.com/opinion/editorialopinion/2011/02/20/tough_on_poverty_tough_on_crime.html> [perma.cc/GL4V-Z8G7].

97 *Ibid* at 14; Debtors' Prisons, *supra* note 75 at 20.

reform can go hand-in-hand with ensuring indigent offenders have access to counsel before appearing in court for fee or fine collection matters.[98]

Educating offenders about the availability of fee exemptions can also work in concert with performing indigency checks as part of court hearings. Indigency checks can further elevate the onus of raising the fee exemption issue in favour of offenders. The checks would have the greatest desired impact if completed at the early stages of the offender's interaction with the justice system: "Ideally…before costs, penalties, and additional fees accrue and before the [offender] reaches the point of nonpayment."[99]

In line with educating the offenders and running indigency checks, educating judges and justices of the peace on the availability and use of alternatives to incarceration is essential. Increasing the awareness of relief programs across the justice system creates additional opportunities to promote access to programs available to help indigent Canadians. It may also be beneficial in assisting offenders arrive at a solution to pay their legal debt.[100]

## B. Abolishing Fines for Low-Level Offences and Eliminating Collateral Consequences

In Canada, abolishing non-restitution monetary sanctions for low-level criminal and quasi-criminal offences would be a significant reform, as these financial burdens are ineligible for fee waivers or bankruptcy.[101] Ordering indigent offenders to pay these fees and fines is counterproductive to the process of rehabilitation and reintegration into society.[102] We should note that the abolition of fines for low-level, non-restitution offences are currently in place at all three levels of government. While criminal fines can be abolished federally, regulatory offences must be dealt with provincially, and city by-laws addressed municipally.

An example of a non-restitution monetary sanction is the SSA, which prohibits "solicitation in aggressive manner," as well as "solicitation of

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98 Patel & Philip, *supra* note 89 at 20.

99 T Atkinson, *supra* note 74 at 234–235.

100 See Jessica M Eaglin, "Improving Economic Sanctions in the States" (2015) 99:5 Minn L Rev 1837 at 1865.

101 Fee Waiver Guide, *supra* note 17 at 2.

102 See Alexes Harris, "The Cruel Poverty of Monetary Sanctions" *The Society Pages* (4 March 2014), online: <thesocietypages.org/papers/monetary-sanctions/> [perma.cc/7XA9-HG42].

captive audience."[103] If an individual is found guilty of violating the Act, they are subject to "a fine of not more than $500" for a first conviction, and "a fine of not more than $1,000 or...imprisonment for a term of not more than six months, or...both" for subsequent convictions.[104] The Act was passed in response to concerns around "squeegee kids," and after confrontations between panhandlers and the police.[105] The "broken window" theory is also present in this legislation. The theory suggests that "the absence of social and legal responses to petty crime and to the first signs of disorder in a neighbourhood, [like a broken window,] may signal to potential offenders that a neighbourhood is not concerned with preserving order in its public spaces and that crime will be tolerated or accepted."[106]

In theory, the *SSA* is a means of regulating the survival techniques of indigent Canadians, in particular, though not exclusively homeless Canadians. However, in practice, the vague definition of "solicitation" "question[s]...the legality of an indigent person in public space."[107] Following the passage of the *SSA* and similar legislation in British Columbia, the frequency of ticketing increased starkly.[108] Between 2000 and 2006, Ontario saw an 870% increase in the number of tickets issued.[109] There has also been a concentration in who the tickets are being issued to. In Toronto, 6.2% of those ticketed accounted for 51.4% of the total tickets issued.[110] It has been demonstrated that this dramatic increase in ticketing is unrelated to an increase in the level of crime, the number of people who are homeless, the prevalence of aggressive solicitation, complaints from the

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103 See e.g. Catherine T Chesnay, Céline Bellot & Marie-Ève Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55 Can J Corr 161. See also Marie-Eve Sylvestre & Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Martha Jackman & Bruce Porter eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 155; SSA, *supra* note 28, ss 2(2), 3(2); *Safe Streets Act*, SBC 2004, c 75, ss 2-3.

104 SSA, *supra* note 28, s 5(1).

105 Chesnay, Bellot & Sylvestre *supra* note 103 at 166.

106 Sylvestre & Bellot, *supra* note 103 at 166.

107 Chesnay, Bellot & Sylvestre, supra note 103 at 167.

108 *Ibid* at 170-173.

109 *Ibid* at 170.

110 *Ibid* at 172.

public, or in relation to gang-linked crime.[111] Effectively, the *SSA* and other laws that directly affect the homeless—either by constraining their mobility or survival techniques, or by aiming to control public spaces—penalize homelessness and push them away from the public sphere.[112]

The taxing nature of regulatory offences is reflected in the cases like Gerry Williams', where many hours of work are necessary to obtain relief for individual plaintiffs through a burdensome appeals process.[113] While the most effective way to obtain relief would come from challenging the constitutionality of laws like the *SSA*, it is not without its challenges. The *SSA* was challenged in Ontario on *Charter* grounds, only to be upheld by the lower courts and affirmed by the Court of Appeal.[114] Moreover, neither indigency nor homelessness have been accepted by the Canadian courts as analogous grounds under section 15 of the *Charter*.[115] Legislative action at the provincial level, especially if undertaken as part of comprehensive reforms, could offer a more complete response to the harms and potential inequalities inherent with these laws.

In line with abolishing fines for low-level offences, legislators should also consider eliminating the collateral consequences for non-willful failure to pay justice debt. While not directly monetary, collateral consequences arising from justice deb make it extremely difficult for offenders to maintain stability in their lives. For example, the suspension of an indigent offender's driver's license is an unnecessary and counterintuitive burden which can become an obstacle to obtaining or maintaining gainful employment.[116] In turn, the offenders have an even greater difficulty paying the court fees and fines owed.

The non-payment of justice debt also undermines the policy's ability to act as a revenue-generating tool for the issuing jurisdiction. According to a study conducted by the Canadian Observatory on Homelessness at York University, between 2000 and 2010, police issued at least 4 million dollars

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111 See Bill O'Grady, Stephen Gaetz & Kristy Buccieri, "Tickets…and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act" (2013) 39:4 Can Pub Pol'y 541 at 552–553.

112 Sylvestre & Bellot, *supra* note 103 at 168. For commentary on the penalization of homelessness, see also Chesnay, Bellot & Sylvestre, *supra* note 103.

113 Ciarabellini, *supra* note 30.

114 See *R v Banks*, 2007 ONCA 19.

115 Sylvestre & Bellot, *supra* note 103 at 157.

116 Birckhead, *supra* note 75 at 1603; Ministry of the Attorney General, *supra* note 17.

in panhandling tickets, at the cost of approximately $1 million.[117] Ninety-nine percent of these remained unpaid at the time the study was conducted in 2004.[118] It is clear that the fine system, at least for panhandling, is highly ineffective and costly, both for the offender and the public purse. A more effective response to the challenges of indigency and disenfranchised communities would use valuable government resources to address the source of the challenge, not expend capital to deepen the problem.

## C. Alleviating the Burden Criminal Justice Fines and Fees and Alternative Payment Options

### *1. The Quantum of Fees and Fines Should be Reduced, or Redirected*

Perhaps the simplest method to alleviate the burden of justice debt on indigent offenders is to reduce the quantum of monetary sanctions. Lower monetary sanctions reduce the likelihood of probation revocation and rearrests. The steeper the fees and fines in the criminal justice system, the more likely it is that probation will be revoked.[119] Moreover, "those sentenced to lower monetary sanctions are more likely to pay back the amount in full, and...defendants who pay more toward their owed restitution have lower re-arrest rates."[120] Consequently, higher fees have the potential for an inverted effect, where they can encourage offenders reoffend instead of reintegrating into society.

An alternative to lower monetary sanctions is the implementation of a fine option payment program in every province, which would act as a productive alternative to dichotomy between a "fine or jail." Fine option programs afford individuals the opportunity to settle fines by doing unpaid, supervised community service work as an alternative to financial payments.[121] Although these programs exist in various Canadian provinces,

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117 See Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Can I See Your ID? The Policing of Youth Homelessness in Toronto*, (Toronto: Justice for Children and Youth & Homeless Hub Press, 2011) at 35, online (pdf): <homelesshub.ca/sites/default/files/CanISeeYourID_nov9.pdf> [perma.cc/BAR8-M27C].

118 *Ibid* at 81.

119 Harris, *supra* note 75 at 25.

120 *Ibid* at 25-26.

121 See Government of Saskatchewan, "Alternatives to Paying a Provincial Fine" (last visited 18 March 2019), online: <www.saskatchewan.ca/residents/justice-crime-and-the-law/courts-and-sentencing/alternatives-to-paying-a-provincial-fine> [perma.cc/V4ME-5CFM].

including Alberta, Saskatchewan, Manitoba, Nova Scotia, and New Brunswick, they do not exist nation-wide. A federal initiative to implement such programs in every province would promote productive use of indigent offenders' time, while decreasing their crippling justice debt. Other alternatives in lieu of paying a fine include community service at non-profit agencies or government entities, as well as educational classes for anger management or therapeutic care for other cognitive disabilities.[122] These classes can help reduce the likelihood of committing certain crimes or regulatory offences by providing certain resources that indigent or low-income Canadians may not have access to because of the cost.

Focusing the efforts of the criminal justice system on rehabilitation through meaningful workforce development and training can also improve the ability of offenders to pay and manage their debt. Skills education and training programs are a powerful tool in increasing the likelihood that offenders will be able to successfully reintegrate back into their communities and abstain from reoffending.[123] This is especially true for indigent offenders who need a source of income to pay their justice debt.

### *2. Applying Gladue for Indigent Indigenous Offenders' Criminal Justice Debt*

A potential relief available to Indigenous offenders is the application of *Gladue* criminal sentencing principles to reduce the monetary amount of a criminal justice penalty.[124] The principles holds that, when sentencing Aboriginal offenders, judges must consider:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

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122 Spillane, *supra* note 77.

123 Patel & Philip, *supra* note 89 at 3; Birckhead, *supra* note 75 at 1675.

124 See *R v Gladue*, [1999] 1 SCR 688 at para 66, [1999] SCJ No 19 (QL) [*Gladue*]; It has been suggested by the decision in Mr. Williams's case that there is potential for applying *Gladue* criminal sentencing principles to regulatory quasi-criminal offences in Ontario. See Fair Change, "Fair Change Makes Headlines" (17 October 2016), online: <www.fairchange.ca/blog/2016/10/17/fair-change-makes-headlines> [https://web.archive.org/web/20190319143641/http://www.fairchange.ca/blog/2016/10/17/fair-change-makes-headlines].

> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[125]

For the *Gladue* principles to apply, a Court will need to accept that the assignment of fines as sanctions or punishment in the context of sentencing.

Both the majority and dissent in *Boudreault* agreed that victim surcharges constitute punishment.[126] This finding is fundamental to the potential application of the *Gladue* sentencing principles to victim surcharges in the future. *Gladue* sentencing is hinged on the concept of restorative justice, rather than denunciation.[127] In *Boudreault*, the SCC explicitly noted that "[j]ust as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order."[128] While victim surcharges indirectly benefiting the communities harmed, they are a form of punishment.

Since *Gladue* and *Boudreault*, the courts have not yet applied them to the context of mandatory victim surcharges.[129] However, in *R v Shaqu*, the court recognized that all aspects of sentencing should reflect the *Gladue* principles, and consequently applied a nominal fine workaround established in *Cloud*.[130] Since victim surcharges are part of a sentence, "[w]here a surcharge is mandatory, a sentencing judge is precluded from determining if the punishment is proportionate to the level of wrongdoing of the offender as required by s. 718.2(e) of the *Criminal Code*, a requirement given constitutional status in *R v Gladue* and *R v Ipeelee*."[131] If victim surcharges are considered a part of sentencing by the SCC, then *Gladue* principles should offer an alternative avenue of relief for Aboriginal offenders.

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125 *Gladue*, *supra* note 124 at para 66.

126 *Boudreault*, *supra* note 2 at paras 37, 125.

127 *Gladue*, *supra* note 124 at paras 70-72; *R v Ipeelee*, 2012 SCC 13 at para 59.

128 *Boudreault*, *supra* note 2 at para 83.

129 See *R v Chamakese*, 2014 SKQB 44. In *Chamakese*, the court imposed a $200 surcharge to an aboriginal woman with a *Gladue* report and whom the court thought would struggle to pay.

130 See *R v Shaqu*, [2014] OJ No 2426, 2014 CarswellOnt 6741 (WL Can) at para 11 (ONCJ).

131 See Graham Mayeda, "Squeezing Blood from the Stone: Narrative and Judicial Resistance to the Mandatory Victim Surcharge" (2016) 21 Can Crim L Rev 195 at 232.

The *Gladue* principles can also potentially relieve, in part or in full, the monetary fines that could be ordered against indigent Indigenous offenders. Considering an offender's Indigenous status may result in creative and restorative justice. In *R v Nagano*, the court was unwilling to make a decision regarding the novel argument that *Gladue* and *Ipeelee* should be applied to fines.[132] However, the court did consider several factors in determining sentencing including: "Ms. Nagano's Aboriginal status, and the fact that her conduct is particularly detrimental to members of her own community and the First Nation fishery in general...that there is value in including in her sentence a component that she make reparations to her own First Nation."[133] The ultimate fine of $5,000 was divided into two separate payment orders. One half was payable through a 12-month probation order. The other half was to be a donation of five hats and five mitts produced by Ms. Nagano using her traditional skills to the Tr'ondëk Hwëch'in Justice Program, where each item was valued at $250.[134]

## D. Implementing Offender-Tailored Sanctions

The implementation of a day-fine system would incorporate consideration of the offender's socio-economic situation, and decrease outstanding amounts. The system is based on proportionality and considers both the severity of the crime and the offender's income.[135] The amount owed by an offender is determined using a penalty unit, assigned based on the seriousness of the convicted offence, multiplied by the defendant's adjusted daily income.[136] Although this system involves certain administrative costs in obtaining the daily income of defendants, it has the potential to increase revenue and collection if fines are tailored to an offender's ability to pay.[137] This system is successfully used in parts of Europe, including Finland. For example, Finish day-fines are set at "half of a daily discretionary income," and is accessible for the police in a national database.[138] An offender-tailored system would mean that indigent

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132 See *R v Nagano*, 2014 YKTC 55 at paras 50-51.

133 *Ibid* at para 52.

134 *Ibid* at paras 53-59.

135 T Atkinson, *supra* note 74 at 235.

136 *Ibid* at 56; T Atkinson, *supra* note 74 at 235.

137 See Beth A Colgan, "Graduating Economic Sanctions according to Ability to Pay" (2017) 103:1 Iowa L Rev 53 at 89.

138 T Atkinson, *supra* note 74 at 235.

offenders, such as Mr. Williams or Ms. Madeley, would face considerably lower fines that, in hand with reasonable time to pay, could be affordable.

A further alternative to the current blanket criminal justice fines and fees system is to utilize a graduated fine system for minor offences, where only a warning is issued for the first offence, before graduating to a fine. For many low-level offences, criminal justice fines for a single violation may be a difficult barrier to overcome. Instead, it may be more appropriate to have a recorded warning at the first instance of violation.[139] Providing a time period to remedy the violation before having to pay a fee allows indigent offenders time to resolve the issue without further consequences.[140] Such a system could function similarly to the tickets the police may issue requiring that car headlights or signalled be fixed. If the issue is not remedied after the prescribed length of time, the ticket can be waived. Moreover, such a system promotes and emphasizes addressing the violation of the law over simply punishing an offender for the violation.

Finally, implementation of individualized personal payment plan programs is a further alternative that would allow indigent offenders the opportunity to pay fees that are within their means.[141] Such a system is consistent with s. 734(5) of the *Criminal Code*, which states that an individual may only be incarcerated for non-payment of a court fine or fee when it is willful, fairer, and more effective. In this way, judges would also have more flexibility in their rulings.[142]

## E. Administrative Reform to Offer More Support to Indigent Offenders

### *1. Creating a Mechanism to Hear and Relieve Justice Debt for Indigent Offenders*

The SCC in *Boudreault* proposed a possible administrative remedy to ensure that the *Charter* rights of those already ordered to pay victim surcharges are protected.[143] While the Court did not go into the details of such a mechanism, governments could set up an administrative body to adjudicate if victim surcharges rise to the level of cruel and unusual

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139 *Ibid* at 229.

140 *Ibid.*

141 Profiting from Probation, *supra* note 72 at 8, 14.

142 *Criminal Code*, *supra* note 7, s 734.

143 *Boudreault*, *supra* note 2 at para 109.

punishment for that offender. Relying on an administrative body alleviates the need for offenders to enter the formal criminal justice system to receive a just remedy after the declaration of invalidity. In the same vein, the mechanism also relieves the possible strain on courts from hearing the individual challenges of victim surcharges already imposed.

We believe that this administrative alternative can also be an effective remedy for relief of justice debt from other criminal and quasi-criminal fines and fees, including those discussed in Part II and that burdened Mr. Williams. Governments would have flexibility in determining the process to ensure the efficiency and effectiveness of protecting offenders' *Charter* rights.

### *2. Creating More Child-Friendly Courtrooms*

Although children are permitted in all levels of Canadian courts, it can still be difficult for parents with young children to appear in court. Moreover, a parent's fear of stigma or shame from appearing in court before their children may disincentivize parents from making court appearances. Encouraging courtrooms and their surrounding areas to become more child-friendly could ease this burden for parents. For example, creating an area outside courtrooms equipped with colouring books and toys can keep children occupied while their parents appear in court.[144] More child-friendly courtrooms could reduce the number of parents who fail to appear at court.

### *3. Allowing Justice Debt to be Discharged for Indigent Offenders and Eliminating the Cost of Filing for Bankruptcy*

As discussed in Parts I and III, justice debt is non-dischargeable. Allowing a legislative mechanism to discharge justice debt through bankruptcy for the truly indigent could play an essential role in preventing justice debt from perpetuating indigency. For indigent offenders, bankruptcy could be the fastest and most effective means to overcome the lasting financial consequence of justice debt. It would allow those working toward reintegration, such as Mr. Williams, to more easily restart their lives. Moreover, it would alleviate the need for lengthy and resource-demanding appeals to the courts, which frees judicial resources, and allows legal clinics to help more clients.

The difficulty of this type of legislative reform is in defining and prove "truly indigent." The focus would need to be on the state of the offender

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144 Spillane, *supra* note 77.

before and during the accumulation of the justice debt. There are obvious cases with strong public policy reasons for bankruptcy to not be available for an indigent offender because of the crimes he or she has committed. For example, it would be inappropriate for the orchestrator of a financial fraud to receive the benefits of a bankruptcy.

It is important that this change accompany additional reforms to the bankruptcy system in general. For example, the fee paid to the Office of the Superintendent in Bankruptcy should be eliminated. Additional administrative costs associated with bankruptcy, including court fees, mailing costs, and government-set fees for filing, should be reduced or eliminated.[145] These reforms would eliminate the problem of an individual being "too poor to go bankrupt."[146]

### *4. Creating a Federal Framework for Justice Debt*

Although federal frameworks exist to govern commercial debt, there is rarely a counterpart for criminal justice. While commercial debt is governed federally by the *BIA*, rules and regulations protecting consumers and prohibiting unfair and deceptive debt practices vary by province. [147] In contrast, the U.S. has the federal *Fair Debt Collection Practices Act*, as well as the Consumer Financial Protection Bureau (CFPB) to protect consumers.[148] Adopting similar federal legislation for justice debt in Canada would help many individuals address their financial obligations. Moreover, an active agency like the CFPB could provide outreach and training programs for both debt collectors and the general public.[149]

### *5. Creating Province-Wide Public Defense Programs for Indigent Persons*

Currently, there is no overarching right to legal aid in Canada – it only arises when an accused cannot afford a lawyer.[150] The existence of public defenders can be integral to maintaining access to justice for indigent

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145 See Bankruptcy Canada "What is The Cost of Bankruptcy?" (last visited 18 March 2019), online: <www.bankruptcy-canada.ca/cost-of-bankruptcy> [perma.cc/XR6E-NSFB].

146 A Atkinson, *supra* note 74 at 971.

147 *BIA*, *supra* note 7.

148 Sobol, *supra* note 71 at 884-885, 893.

149 *Ibid* at 908.

150 See *R v Rowbotham*, 25 OAC 321 at para 183, 41 CCC (3d) 1; *R v Smart*, 2014 ABPC 175 at para 91.

offenders. Province-wide public defense programs can be individually operated to assist in upholding the rights of indigent offenders.[151] Government-funded public defense programs can allow indigent offenders access to competent legal representation. By making these programs independently operated and headed by a commission or board, offenders can be confident they are receiving objective advice that is in their best interest.[152] A province-wide program is also desirable in that it allows for enforceable, uniform performance and standards for public defenders, thus further promoting equality.[153]

In *Boudreault*, the SCC alluded to the benefit of having defence counsel representation in the victim surcharge context. It noted that self-represented offenders are more likely to plead guilty to all charges and pay higher victim surcharges, in contrast to offenders represented by defence counsel.[154] Many indigent offenders represent themselves in criminal proceedings due to financial concerns, while being unable to qualify for or access Legal Aid.

## V. CONCLUSION[155]

Without underlying empirical data that is specific to the Canadian context, reform is unlikely to succeed. Nevertheless, we hope that this article can act as a starting point for future research and data collection on the effects of justice debt in Canada.

To address any of the reforms mentioned in the previous section, the data collection must be extensive and exhaustive. It should come from all levels of government to be able to gain a complete picture of offenders' interactions with both criminal and regulatory offences. At the minimum, it should focus on the following areas: the financial costs of both the status quo and alternative models; the leading crimes or regulatory offences that result in justice debt; and increased statistics on offenders, including the percentage owing justice debt, how justice debt is distributed geographically,

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151 See Norman Lefstein, "Will We Ever Succeed in Fulfilling Gideon's Promise?" (2018) 51:1 Ind L Rev 39 at 48.

152 *Ibid.*

153 *Ibid.*

154 *Boudreault*, *supra* note 2 at para 87.

155 The ideas governing this section are largely inspired by Alexes Harris's *A Pound of Flesh*. While the book is focused on the U.S. and, in particular, the state of Washington, her research acts as a helpful catalyst for areas in Canada where we either need more data collection or further academic analysis. See Harris, *supra* note 75.

the average amount that each offender carries, and demographic data on offenders carrying debt. Finally, researchers should conduct localized, first-hand interviews of the experiences of indigent offenders, court staff, judges, and police officers. This research should reveal the extent and perception of justice debt from the perspectives of both stakeholders and decision makers.

In Ontario, the existing research on the costs of running justice debt systems and their effectiveness is severely lacking. One study, mentioned earlier, found that between 2000 to 2010, police had issued at least $4 million in panhandling tickets, costing the police approximately $1 million.[156] Another study found that, between 2000 and 2006, only 0.3% of certificates of offences issued in Ontario were paid.[157] In Montreal, offenders spent over 70,000 days in prison between 1994 and 2003 for default of statements of offences.[158] At an average daily expenditure of approximately $141.72 per night in 2003 and 2004, the cost of defaulted tickets in Montreal over that period constituted several millions of dollars.[159] However, these reports are only the first step in helping us understand the cost of issuing, tracking, and pursuing regulatory and criminal fines. Similar research conducted in a county in Washington showed that the county was not generating the cost of "prosecution, sentencing, and incarceration of debtors, nor [did] it generate large amounts of money in restitution for defendants."[160] It is crucial for all levels of government to enable data collection on a mass scale and for researchers to have access to the results in order to analyze the effectiveness of the current criminal justice fines and fees system.

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156 O'Grady, Gaetz & Buccieri, *supra* note 117 at 35.

157 See Marie-Eve Sylvestre et al, "Le Droit est Aussi une Question de Visibilité: Occupation des Espaces Publics et Parcours Judiciaires des Personnes Itinérantes à Montréal et à Ottawa" (2011) 26 RCDS 531 at 550.

158 Céline Bellot et al, "Judiciarisation et Criminalisation des Populations Itinérantes à Montréal" (2005) at 111, online (pdf): *Réseau d'aide aux Personnes Seules et Itinérantes de Montréal* <www.rapsim.org/docs/rapport_Bellot_05_VF.pdf> [perma.cc/3Z4R-LT9D]; Sylvestre & Bellot, *supra* note 103 at 181.

159 See Statistics Canada, *Adult Correctional Services in Canada, 2005/2006*, by Laura Landry & Maire Sinha, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, June 2008) at 24, online (pdf): <www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2008006-eng.pdf?st=FOaq4uQn> [perma.cc/ZJ7G-62R5]; Sylvestre & Bellot, *supra* note 103 at 181.

160 Harris, *supra* note 75 at 93.

The research from Washington went on to illustrate that less than half of the amounts received from justice debt were allocated to the actual victims.[161] The funds from the debt that was repaid tended to be used as revenue for the counties.[162] In some counties, the revenue to the county represents a higher percentage than the amounts allocated to restitution.[163] It would be beneficial to conduct similar analyses in Canada to identify how courts distribute the money received from offenders. Does restitution take priority in Canada? This analysis would be significant in order to determine whether the fines and fees are truly effective.

Moreover, studies should be conducted on the awareness of the different stakeholders on the effects of justice debt and their perception of indigent offenders. First-hand interviews have the potential to reveal the perception of decision makers in the criminal justice system. For example, interviews conducted in Washington revealed that court officials and county clerks believed that indigent offenders should be searching for work.[164] They often believed if they could not see the offender working hard to pay the fines, then they must not be working at all.[165] One prosecutor even suggested that indigent offenders could collect cans to make money to pay the fees.[166] There is a mentality held by some that, if the offender has money to buy drugs or food, they have money to pay the fees.[167] Another official revealed that there are options to waive up to half of the accumulated interest rates for offenders who cooperate, but that this information is not given to the offenders initially.[168] The information is revealed only when the court official finds that the offender is compliant with court orders.[169] There also appeared to be a gap in judicial understanding of how the collections system worked, including the time and cost required to monitor and collect fees.[170] The result is a system that functions bureaucratically, without an understanding of the overall consequence of the actions. It is crucial to

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161 *Ibid.*
162 *Ibid* at 95-97.
163 *Ibid* at 96-97.
164 *Ibid* at 142.
165 *Ibid* at 141.
166 *Ibid* at 142.
167 *Ibid.*
168 *Ibid* at 143.
169 *Ibid.*
170 *Ibid.*

conduct similar research to understand whether this disconnect exists in the Canadian context.

In *Boudreault*, the SCC recognized that, while some judges will look at the specific circumstances of an offender, others may take a less deferential approach to the current financial position of offenders.[171] The Court cited *Tinker* SCJ,[172] where Justice Glass opined that "[i]f a person does not choose to set aside money or pay in instalments when given very reasonable time to pay, the individual becomes the author of their own misfortune when they come to the end of the period given to pay the surcharge."[173] These comments, and similar opinions that may be shared by other members of the judiciary, give credence to the SCC's fear that judges may struggle "to draw the line between an inability to pay and a refusal to pay."[174] These are the opinions that must be understood and addressed in order to realize change and address the consequences of justice debt on indigent offenders.

The research from Washington helps illustrate the types of insights that may be gained by similar research in the Canadian context. If the mindset in Canada is similar to that in the U.S., policies would need to be implemented to address it. In the same vein, if stakeholders already have ideas and opinions on how the system could be improved, these should be considered. The combination of interview research and extensive statistical analyses can help provide both the grand picture and the case-by-case realities, which will bring us closer to the full story on criminal justice and debt in Canada.

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171 *Boudreault*, *supra* note 2 at para 71.

172 *Ibid.*

173 *Tinker* SCJ, *supra* note 48 at para 41.

174 *Boudreault*, *supra* note 2 at para 71.

# Theorizing Anxiety and its Relation to Fear (of Crime): An Heideggerian Inspired Polemic

PRASHAN RANASINGHE *

## ABSTRACT

While there is a voluminous literature on the fear of crime, it is marred by significant gaps. Particularly, while anxiety has been acknowledged as important to understanding fear (of crime), the failure to explicate and adequately theorize anxiety has impoverished intellectual inquiry. This article addresses this issue by theorizing anxiety in great detail. To this end, Martin Heidegger's insightful analysis of fear and anxiety is introduced and discussed. The article draws on the paradoxes of anxiety "developed" by Heidegger to address the purported risk-fear paradox that has dominated fear of crime research and explicates why this paradox is more apparent than real.

***Keywords*:** fear (of crime); anxiety; Martin Heidegger; Dasein; being; nothing(ness); knowledge production; paradoxes

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The author thanks the three anonymous reviewers for their time and helpful and constructive feedback on the article. Thanks are also due to Professor Richard Jochelson for his guidance. Finally, the author is grateful to Patrick Laurin who provided invaluable research assistance that this article has benefitted from. The usual disclaimers apply.

## I. INTRODUCTION

Murray Lee writes that "[t]he term fear of crime is a recent invention" in that it "did not have linguistic currency prior to 1965."[1] This "newness" aside, the concept is immensely popular in the social sciences, especially in criminology, evinced in the voluminous literature explicating a plethora of issues related to crime, as well as safety and security more broadly.[2] One fruitful endeavour in fear of crime research has probed why it is that despite declining crime rates across North America beginning in the 1990s,[3] fear about crime and other safety related issues continued to remain consistent or even rise.[4] One explanation focused on fear about disorder in the mould articulated in the "broken windows" theory.[5] More recently, attention has broadened – ranging from concerns over the Internet to violence in domestic spaces – to make sense of fear of crime.[6] As a whole, fear of crime has been a useful research endeavour that has shed important light on the meaning of fear including its causal or contributory factors and what ought to or can be done about it, especially concerning its reduction.

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1 Murray Lee, *Inventing Fear of Crime: Criminology and the Politics of Anxiety* (Collumpton, Devon: Willan Publishing, 2007) at 7.

2 *Ibid* at 2. There were approximately 240,000 entries on the subject about a decade ago, which was exponentially larger than two decades ago, with only about 200.

3 See Alfred Blumstein & Joel Wallman, eds, *The Crime Drop in America* (Cambridge: Cambridge University Press, 2000).

4 See George L Kelling & Catherine M Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities* (New York: The Free Press, 1996).

5 James Q Wilson & George L Kelling, "Broken Windows: The Police and Neighborhood Safety" (1982) 249:1 Atlantic Monthly 29; Prashan Ranasinghe, "Public Disorder and its Relation to the Community-Civility-Consumption Triad: A Case Study on the Uses and Users of Contemporary Urban Public Space" (2011) 48:9 Urban Studies 1925; Prashan Ranasinghe, "Jane Jacobs' Framing of Public Disorder and its Relation to the 'Broken Windows' Theory" (2012) 16:1 Theoretical Criminology 63. In the wake of "broken windows," two forms of disorder, namely, social and physical, have been brought to light. Social disorder refers to disorderly behaviour, for example, panhandling, squeegeeing or loitering, among a whole host of others, while physical disorder refers to disorder of the material sort, for example, graffiti, unkempt lawns and gardens or dilapidated or abandoned buildings (see Wesley G Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (New York: The Free Press, 1990) at 4).

6 See the essays in Murray Lee & Gabe Mythen, eds, *The Routledge International Handbook on Fear of Crime* (London: Routledge, 2018).

These explications of fear of crime have acknowledged the import of anxiety: it is now presupposed that the two are "close cognate[s]" as Wendy Hollway and Tony Jefferson state,[7] and there exists a voluminous literature that acknowledges the import of anxiety to explicating fear of crime.[8] Yet, as much as anxiety is heralded as important to making sense of fear (of crime),[9] there are three significant, and related, concerns that require attention. First, there is a troubling tendency to treat anxiety as if it is clear and settled as to what is precisely meant by the term, especially its relation to fear of crime. It is possible to read myriad articles touting the import of anxiety, especially its connection to fear of crime, but which do not engage in even the slightest effort – or, have even the slightest desire – to articulate, even define, what is meant by anxiety.[10] Secondly, fear and anxiety appear to be conflated and confounded so that it is unclear which is being discussed

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7 Wendy Hollway & Tony Jefferson, "The Risk Society in an Age of Anxiety: Situating Fear of Crime" (1997) 48:2 Brit J Sociology 255 at 256.

8 See Alexandra Fanghanel, "The Trouble with Safety: Fear of Crime, Pollution and Subjectification in Public Space" (2016) 20:1 Theoretical Criminology 57; Stephen Mugford, "Fear of Crime – Rational or Not? A Discussion and some Australian Data" (1984) 17:4 Austrl & NZ J Crim 267; Tony Jefferson, "Policing the Crisis Revisited: The State, Masculinity, Fear of Crime and Racism" (2008) 4:1 Crime Media Culture 113 at 118; Will McGowan, "The Perils of 'Uncertainty' for Fear of Crime Research in the Twenty-First Century" in Murray Lee & Gabe Mythen, eds, *The Routledge International Handbook on Fear of Crime* (London: Routledge 2018) 190; Hollway & Jefferson, *supra* note 7.

9 What follows uses both the phrases "fear (of crime)" and "fear of crime." The former is intended to speak to the dual nature of the relationship, that is, that some factor, for example, anxiety, is related both to fear on its own accord as well as fear of crime. The latter is straightforward and refers strictly to fear of crime.

10 See Ian Taylor, "Crime, Anxiety and Locality: Responding to the 'Condition of England' at the End of the Century" (1997) 1:1 Theoretical Criminology 53; René Van Swaaningen, "Public Safety and the Management of Fear" (2005) 9:3 Theoretical Criminology 289; Chris Hale, "Fear of Crime: A Review of the Literature" (1996) 4:2 Intl Rev Victimology 79; Steven Box, Chris Hale & Glen Andrews, "Explaining Fear of Crime" (1988) 28:3 Brit J Crim 340; Robbie M Sutton and Stephen Farrall, "Gender, Socially Desirable Responding and the Fear of Crime: Are Women Really More Anxious about Crime?" (2005) 45:2 Brit J Crim 212; George Morgan, Selda Dagistanli & Greg Martin, "Global Fears, Local Anxiety: Policing, Counterterrorism and Moral Panic over 'Bikie Gang Wars' in New South Wales" (2010) 43:3 Austl & NZ J Crim 580; David Garland, "On the Concept of Moral Panic" (2008) 4:1 Crime Media Culture 9.

and whether – and, if so how – each is related to the other.[11] Perhaps these issues are what lead Lee to note that "the term fear of crime is so loaded with meaning."[12] Interestingly, even his own work is not immune from these very problems. In his comprehensive discussion of the concept of the fear of crime – including its genealogy – Lee does well to articulate the pressing issues surrounding it. Yet, and while he appears to differentiate fear of crime and anxiety in several places,[13] there are far too many instances when the two look very much the same so that it is difficult to decipher whether they are different, one and the same or related and if so, how.[14] Equally problematic is Lee's failure to theorize anxiety – indeed, it is not defined even once in his work, another apt example of the rather taken-for-granted nature of the term. Finally, and equally important, anxiety tends to be undertheorized, a claim originally made about two decades ago.[15] This means that it is difficult, if not impossible, to fully make sense of anxiety and its place to fear (of crime). In fact, it is fair to claim that Holloway and Jefferson themselves appear to underplay how grave the problem is, because, in reality, the issue is not under theorization but the virtual absence of theorization. Thus, even where the term is defined or its various iterations noted (e.g., state versus trait anxiety; annihilation anxiety, social anxiety),

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11 Taylor, *supra* note 10 at 58; Box, Hale & Andrews, *supra* note 10 at 340; Rob Mawby, Paul Brunt & Zoe Hambly "Fear of Crime among British Holidaymakers" (2000) 40:3 Brit J Crim 468 at 469; Van Swaaningen, *supra* note 10 at 291; Jonathan Jackson & Emily Gray, "Functional Fear and Public Insecurities About Crime" (2010) 50:1 Brit J Crim 1 at 1; Emily Gray, Jonathan Jackson & Stephen Farrall, "Reassessing the Fear of Crime" (2008) 5:3 Eur J Criminology 363 at 365; Emily Gray, "The Ebbs and Flows of Anxiety: How Emotional Responses to Crime and Disorder Influenced Social Policy in the UK Into the Twenty-First Century" in Murray Lee & Gabe Mythen, eds, *The Routledge International Handbook on Fear of Crime* (London: Routledge 2018) 47 at 49. This problem also includes the conflation of fear of crime and risk and fear of crime and uncertainty (see McGowan, *supra* note 8 at 91; Hale, *supra* note 10 at 79, 96-97, 119).

12 Lee, *supra* note 1 at 124.

13 See *ibid* at 47, 68.

14 See *ibid* at 5, 10, 27, 122-123; see also Stephen Farrall & Murray Lee, "Critical Voices in an Age of Anxiety: A Reintroduction to the Fear of Crime" in Murray Lee & Stephen Farrall, eds, *Fear of Crime: Critical Voices in an Age of Anxiety* (Abingdon, Oxon: Routledge-Cavendish, 2009) 1 at 10.

15 Hollway & Jefferson, *supra* note 7 at 256.

there is little to no attempt to theoretically engage the concept and enrich the discussion.[16]

It is important to note that there are a few exceptions to the foregoing, many of which have sought to explicate the way anxiety constitutes everyday subjectivities. Jefferson and Hollway,[17] for example, articulate how notions of risk, security and uncertainty shape anxiety, while Robin Robinson and David Gadd[18] discuss how what is referred to as "annihilation anxiety" can have almost paralytic effects and the way these are tied to class, race and gender. Similarly, the work of Alexandra Fanghanel and Jefferson[19] analyse how anxiety and fear are locked into a reciprocal relation with racialized subjectivities, among others.[20] This article draws inspiration from these interesting and insightful engagements with anxiety, but also claims that there is still a significant messiness – a conflation and confounding, in fact – between anxiety and fear (of crime) that needs addressing, first by way of a decoupling and next, and only then, a reconstitution. A good example of this problem is the often-noted risk-fear paradox[21]: the least likely groups to be victimized (e.g. the elderly) are the most fearful while the most likely groups to be victimized (e.g. teenagers) are the least fearful. This paradox – that speaks of an "irrational" assessment of crime and victimization – is constituted as such because of a failure to properly account for the relation between anxiety and fear (of crime). Suffice it to say, then, that while

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16 See Matthew M Yalch et al, "Interpersonal Style Moderates the Effect of Dating Violence on Symptoms of Anxiety and Depression" (2013) 28:16 J Interpersonal Violence 3171; Michelle SR Hanby et al, "Social Anxiety as a Predictor of Dating Aggression" (2012) 27:10 J Interpersonal Violence 1867; Jerome E Storch & Robert Panzarella, "Police Stress: State-Trait Anxiety in Relation to Occupational and Personal Stressors" (1996) 24:2 J Crim Justice 99; Barry J Evans et al, "The Police Personality: Type A Behavior and Trait Anxiety" (1992) 20:5 J Crim Justice 429; Deborah Wilkins Newman & M LeeAnne Rucker-Reed, "Police Stress, State-trait Anxiety, and Stressors among U.S. Marshals" (2004) 32:6 J Crim Justice 631.

17 Hollway & Jefferson, *supra* note 7.

18 Robin A Robinson & David Gadd, "Annihilation Anxiety and Crime" (2016) 20:2 Theoretical Criminology 185; see also David Gadd & Tony Jefferson, "Anxiety, Defensiveness and the Fear of Crime" in Murray Lee & Stephen Farrall, eds, *Fear of crime. Critical voices in an age of anxiety* (Abingdon, Oxon: Routledge-Cavendish, 2009) 125.

19 Fanghanel, *supra* note 8; Jefferson, *supra* note 8.

20 See also Sandra Walklate, "Excavating the Fear of Crime: Fear, Anxiety or Trust?" (1998) 2:4 Theoretical Criminology 403 at 404.

21 Mark C Stafford & Omer R Galle, "Victimization Rates, Exposure to Risk, and Fear of Crime" (1984) 22:2 Criminology 173.

"research into fear of crime has indubitably become more sophisticated and reflective," there still exist "tangible gaps."[22] This article serves as a modest attempt to attend to these through a deeper exploration, explication and theorization of anxiety and fear (of crime). So doing fills a crucial piece of the puzzle and provides valuable insights to conceptualize fear of crime and illuminates that the risk-fear paradox is more apparent than real, and what is labelled as irrational fear is far from that.

The article takes its cue from Martin Heidegger's penetrating analysis of fear and anxiety, "kindred phenomen[a]" as he states.[23] Several reasons influence the invocation of Heidegger. The first concerns the largely neglected stature of Heidegger's work in studies in fear of crime of which criminology plays an important part.[24] This article, it is hoped, will shed light on some promising and fruitful lines of inquiry that can emerge by invoking Heidegger, which could, in turn, provide a more diverse set of theoretical tools to explicate fear of crime, this especially in relation to circumventing the dogma that sometimes encapsulates the field, particularly with regards to its "scientific" – read positivistic – voracity. Secondly, Heidegger is, if not the only endeavour, then, certainly only a handful of endeavours that does not approach the conceptualization of anxiety from a presupposition. He, in other words, does not assume what anxiety is, but seeks to discursively unpack its constitution. Equally important, Heidegger also does not read anxiety as a pejoration of being, in contradistinction, for example, to Sigmund Freud[25] whom, as will become apparent, Heidegger is

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22 Murray Lee & Gabe Mythen, "Introduction" in Murray Lee & Gabe Mythen, eds, *The Routledge International Handbook on Fear of Crime* (London: Routledge 2018) 1 at 2.

23 Martin Heidegger, *Being and Time*, translated by John Macquarrie & Edward Robinson (New York: Harper and Row Publishers, 1962/1927) at 227.

24 A few noteworthy exceptions include Don Crewe, "Will to Self-Consummation, and Will to Crime" in Ronnie Lippens & Don Crewe, eds, *Existentialist Criminology* (London: Routledge-Cavendish, 2009) 12; David Polizzi, "Heidegger, Restorative Justice and Desistance: a Phenomenological Perspective" in James Hardie-Brick & Ronnie Lippens, eds, *Crime, Governance and Existential Predicaments* (Basingstoke: Palgrave Macmillan, 2011) 129; David Polizzi & Bruce A Arrigo, "Phenomenology, Postmodernism and Philosophical Criminology: A Conversational Critique" (2009) 1:2 J Theoretical & Philosophical Criminology 113.

25 See Sigmund Freud, "Anxiety" in James Strachey & Angela Richards, eds, *Introductory Lectures on Psychoanalysis*, translated by James Strachey (Middlesex, UK: Penguin Books 1974/1916-1917) 440 [Freud, "Anxiety"]; Sigmund Freud, "The Uncanny" in Werner Hamacher and David E Wellbery, eds, *Writings on Art and Literature*, translated by James Strachey (Stanford, CA: Stanford University Press 1997/1919) 193.

indebted to.[26] In particular, this means that Heidegger does not view anxiety strictly in negative terms.[27] Most pertinently in regards to what has been laid out above, Heidegger does not view anxiety strictly as an emotion (in contradistinction to many others, especially Freud). Rather, he views anxiety as an ontological state – what he calls a fundamental attunement[28] – that sheds light on what it means to <u>be</u> (human), the being of being as he puts it. Thus, Matthew Ratcliffe writes that Heidegger "indicates that anxiety is never absent but is instead 'covered up', as though it were lying dormant"[29] and Joseph Schear alludes to the dormancy of anxiety when he notes that for Heidegger anxiety is latent.[30] In other words, while Heidegger's conceptualization of anxiety permits a reading of it as an emotion in the traditional sense, there is much more to the way he frames it, and it is this latter aspect – as constitutive of being despite not being overwhelming or, at least overwhelming in the orthodox sense, what is referred to as "real" or "authentic" anxiety[31] – that is deeply illuminating and capable of shedding important insights on its relation to fear (of crime). What is claimed, then, is that looking at anxiety as constitutive of being provides novel insights into fear (of crime). This endeavour, it is claimed, helps provide a more rich,

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26 Freud distinguished what he referred to as "realistic" anxiety from "neurotic" anxiety noting that the former "strikes us as something very rational and intelligible" thereby finding beneficial aspects about this form of anxiety, while reserving the problematics commonly associated with anxiety for the latter (Freud, "Anxiety", *supra* note 25 at 441).

27 There are some exceptions to this line of thinking in fear of crime research. Hollway and Jefferson (*supra* note 7), for example, appear to speak of the import of anxiety in their analysis. In terms of fear, Jackson and Gray (*supra* note 11) speak of its functionality, thereby suggesting that some level of fear need not be problematic (see also, Gray, Jackson & Farrall, *supra* note 11).

28 Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude*, translated by William McNeill & Nicholas Walker (Bloomington: Indiana University Press, 1995/1929-1930) at 59.

29 Matthew Ratcliffe, "Why Mood Matters" in Mark A Wrathall, ed, *The Cambridge companion to Heidegger's* Being and Time (Cambridge: Cambridge University Press, 2013) 157 at 168.

30 Joseph K Schear, "Historical Finitude" in Mark A Wrathall, ed, *The Cambridge companion to Heidegger's* Being and Time (Cambridge: Cambridge University Press 2013) 360 at 368.

31 Heidegger, *supra* note 23 at 234; Iain Thompson, "Death and Demise in Being and Time" in Mark A Wrathall, ed, *The Cambridge companion to Heidegger's* Being and Time (Cambridge: Cambridge University Press 2013) 260 at 261; Ratcliffe, *supra* note 29 at 171.

textured and layered analysis of fear of crime that can overcome the myriad problems raised by many of its ardent critics.[32]

What follows is strictly a theoretical endeavour, a "think-piece" offered as a polemic to conventional social-scientific (especially criminological) inquiry, and in this spirit, is bereft of a case study. The next section undertakes a detailed exploration of Heidegger's analysis of fear and anxiety. This is followed by a discussion of how it is possible to reimagine the connection between fear (of crime) and anxiety, in particular and counterintuitively, by drawing on a set of paradoxes to attend to the risk-fear paradox. The conclusion locates what the article has sought to endeavour with this approach.

## II. FEAR, ANXIETY AND THE REVELATION OF BEING

### A. Dasein

For Heidegger, anxiety (like fear, as will become apparent) is "a basic state of mind of Dasein."[33] To fully understand anxiety (and, its relation to fear), it is prudent to work through what Heidegger has in mind with this concept. The problem, however, is that Heidegger's explication of Dasein is rather cryptic and riddled with ambiguities.[34] The literal translation of

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32 E.g. Lee, *supra* note 1; Murray Lee, "The Enumeration of Anxiety: Power, Knowledge and Fear of Crime" in Murray Lee & Stephen Farrall, eds, *Fear of Crime: Critical Voices in an Age of Anxiety* (Abington, Oxon: Routledge-Cavendish, 2009) 32; Jackson & Gray, *supra* note 11; Gray, Jackson & Farrall, *supra* note 11; Walklate, *supra* note 20; Robinson & Gadd, *supra* note 18.

33 Heidegger, *supra* note 23 at 179.

34 For example, Heidegger writes that "This entity which each of us is himself and which includes inquiring as one of the possibilities of its Being, we shall denote by the term '*Dasein*'"(Heidegger, *supra* note 23 at 27 [emphasis in original]). His fuller and detailed explication only adds to the confusion:

> Dasein is an entity which does not just occur among other entities. Rather, it is ontically distinguished by the fact that, in its very Being, that Being is an issue for it. But in that case, this is a constitutive state of Dasein's Being, and this implies that Dasein, in its Being, has a relationship towards that Being – a relationship which itself is one of Being. And this means further that there is some way in which Dasein understands itself in its Being, and that to some degree it does so explicitly. It is peculiar to this entity that with and through its Being, this Being is disclosed to it. Understanding of Being is itself a definite characteristic of Dasein's Being. Dasein is ontically distinctive in that it is ontological (*ibid* at 32 [emphases omitted]).

Dasein is being-there, which Heidegger puts as such: "We name the being of man being-there, Da-sein."[35] Even this, however, is not without contention.[36] Perhaps more importantly, what precisely being-there means is also not clear. Hubert Dreyfus suggests that being-there ought to be thought of as Heidegger's interest "in the human *way of being*,"[37] which provides important insights to deciphering Dasein, as does relying on Heideggerian scholars for guidance. In his introduction to a collection of Heidegger's essays, David Krell comments that "Heidegger thinks of the being that raises questions. He names it Dasein, the kind of being that is open to Being."[38] An equally useful explanation is found in the translators' introduction to Heidegger's[39] important *Introduction to Metaphysics*, where Gregory Fried and Richard Polt "think of Dasein…as a condition into which human beings enter, either individually or collectively, at a historical juncture when Being becomes an issue for them."[40] Given the foregoing, Dasein can be thought of as a way of being that has as its concern the meaning of existence: what it means to be, the being of beings as Heidegger puts it.[41]

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35 Heidegger, *supra* note 28 at 63 [emphases omitted].

36 Where Heidegger hyphenates the Dasein, as in Da-sein, which he often does, as evinced in this quote, it is believed by some that a more appropriate translation should be being-*here* (see Gregory Fried & Richard Polt, "Translator's Introduction" in Martin Heidegger, *Introduction to Metaphysics*, translated by Gregory Fried & Richard Polt (New Haven: Yale University Press, 2000) vii at xii).

37 Hubert L Dreyfus, *Being-in-the-World: A Commentary on Heidegger's* Being and Time, *Division 1* (Cambridge, MA: MIT Press, 1991) at 14 [emphases in original].

38 David F Krell, "General Introduction: The Question of Being" in David F Krell, ed, *Basic Writings*, Revised and Expanded Edition (London: Harper Perennial, 2008) 3 at 32 [emphases added].

39 Martin Heidegger, *Introduction to Metaphysics*, translated by Gregory Fried & Richard Polt (New Haven: Yale University Press, 2000/1935).

40 Fried & Polt, *supra* note 36 at xii.

41 There is an important distinction between being(s) (used interchangeably for human being(s), that is, designating a person or persons) and being (often penned as Being to differentiate it from being). The latter captures an ontological state or the constitution of humans, in other words, a metanarrative or theory of what makes humans, human, that is, and to draw upon Dreyfus, the way of being human (Dreyfus, *supra* note 37). The corpus of Heidegger's work focuses on being in this ontological sense, that is, the being of beings. This article uses being rather than Being because, and to draw upon and follow Dreyfus' cautionary note: "If one writes Being with a capital B in English, it suggests some entity; indeed, it suggests a supreme Being, the ultimate entity" and for

## B. Dasein and Moods

One aspect of Dasein is that it is constituted by moods, two of which, namely, anxiety and fear, are important for present purposes.[42] By mood Heidegger means a state of mind, that is, an "everyday sort of thing: our mood, our Being-attuned."[43] To put this differently, "A mood makes manifest 'how one is, and how one is fairing'. In this 'how one is', having a mood brings Being to its 'there'."[44] Given that Dasein concerns being and moods are part and parcel of Dasein in that they reveal "how one is," means that there is an important relation between Dasein and mood, because, as Dreyfus puts it, "moods…manifest the tone of being-there."[45] Accordingly, Heidegger notes that "ontologically mood is a primordial kind of Being for Dasein, in which Dasein is disclosed to itself *prior to* all cognition and volition, and *beyond* their range of disclosure."[46] This is why he immediately states that "we are never free of moods."[47] Moods, in other words, disclose Dasein and this disclosure is not only *a priori* to all knowledge, but also temporally before all knowledge, which is to say that it is in the being of beings, there, that is, from the very inception of being, hence the literal translation of being-there.[48] This is why Heidegger writes that "A mood assails us. It comes neither from 'outside' nor from 'inside', but arises out of Being-in-the-world, as a way of such Being…The mood has already

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Heidegger, "being is not an entity" (Dreyfus, *supra* note 37 at 11). Unfortunately, many translations utilize Being rather than being, as evinced in the translation relied here.

42 Heidegger views anxiety and boredom as the basic moods of/in modernity (Jonathan McKenzie, "Governing Moods: Anxiety, Boredom, and the Ontological Overcoming of Politics in Heidegger" (2008) 41:3 Can J Political Science 569 at 570; on the mood of boredom and its relation to Heideggerian scholarship, see Leslie P Thiele, "Postmodernity and the Routinization of Novelty: Heidegger on Boredom and Technology" (1997) 29:4 Polity 489.

43 Heidegger, *supra* note 23 at 162.

44 *Ibid* at 173.

45 Dreyfus, *supra* note 37 at 169 [emphasis added].

46 Heidegger, *supra* note 23 at 175 [emphasis in original].

47 *Ibid* at 175 [emphases added].

48 Matthew Ratcliffe (*supra* note 29) states that moods constitute being in a fashion that is both pre-subjective and pre-objective, alluding to the *a priority* of knowledge. Heidegger's analysis of anxiety is influenced by the work of Sigmund Freud. On anxiety being prior to all knowledge, Freud writes: "We believe that it is in the *act of birth* that there comes about the combination of unpleasurable feelings, impulses of discharge and bodily sensations which has become the prototype of the effects of a mortal danger and has ever since been repeated by us as the state of anxiety" (Freud, "Anxiety", *supra* note 25 at 444 [emphases in original]).

disclosed, in every case, Being-in-the-world as a whole, and makes it possible first of all to direct one-self towards something."[49] Thus, a mood "implies a disclosive submission to the world, out of which we can encounter something that matters to us."[50] In other words, a mood discloses and reveals Dasein to beings, that is, the very constitution of what it means to be human,.[51]

## C. The Without-Nature of Fear

Fear, like anxiety, is a mood that discloses Dasein. Heidegger claims there are three related points of view through which to consider fear: that in the face of which one fears, fearing and about what is feared. With respect to the first, Heidegger notes "That in the face of which we fear, the 'fearsome', is in every case something which we encounter within-the-world"[52] and this fearing of what is fearsome "can be characterized as threatening."[53] Accordingly, fear is something that emanates from without, that is, from "within the world," which means that it is not something that emanates from within the individual. This is important because it is from the without-nature of fear that the potentiality for its threatening character is found. The sequence by which something becomes threatening unfolds as follows. To say that something is threatening, Heidegger explains, is to claim that this something "has detrimentality as its kind of involvement,"[54] that is, this something is detrimental to being. This detriment, Heidegger writes, "is itself made definite, and comes from a definite region,"[55] but "is not yet within striking distance, but it is coming close."[56] The threatening character, in other words, emanates from being at a striking distance. Here, the without-nature of fear is illuminated for the step from which something moves from being innocuous to becoming a concern is situated in a specific

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49 Heidegger, *supra* note 23 at 176 [emphases omitted].

50 *Ibid* at 177 [emphases omitted].

51 Drawing upon Heidegger, Sarah Ahmed ("Not in the Mood" (2014) 84:1 New Formations 13) equates moods to an atmosphere, writing that "it is not that we catch a feeling from another person but that we are caught up in feelings that are not our own...[M]oods become almost like companions; what we carry with us is how we are carried."

52 Heidegger, *supra* note 23 at 179.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 *Ibid* at 179-180.

object with a specific locus that originates from the outside. As the detriment – the something – draws closer, "We say, 'It is fearsome'."[57]

Thus, it is possible to see not only the processes by which an object gets turned into something to be feared, but also that, this is always something that emanates from without, never within, a significant point that helps distinguish fear from anxiety.[58] Given the above, it is also possible to see that in the process of fearing – the second vantage point from which Heidegger examines fear – something needs to happen to turn the object into a concern about a threat, one that is detrimental to being. As Heidegger says, "In fearing as such, what we have thus characterized as threatening is freed and allowed to matter to us,"[59] and the fact it matters is the moment when the threat is turned into something to fear. The step in coming to fear something, the fearing – the move from point one to two – is possible because Dasein is always concerned with its being and this concern constitutes Dasein: it is, to put it differently, something that is within Dasein and this within-nature means that Dasein is always on the lookout for things that are detrimental to its being. Thus, Heidegger writes that "Circumspection" – Dasein's urge to be cautious about itself and everything surrounding it – "sees the fearsome because it has fear as its state of mind."[60] This latter point leads to the final vantage point from which to makes sense of fear, that is, that about which one fears. This last point, essentially, the shift from one and two to three, is only possible because Dasein, as noted above, is itself fearful, that is, that it has fear as one of its moods: "That which fear fears about is that very entity which is afraid – Dasein. Only an entity for which in its Being this very Being is an issue, can be afraid. Fearing

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57 *Ibid* at 180. There are other variations, which are only mentioned in passing here because they are not germane to the discussion. Where there is a threatening situation but it is not proximally close enough, fear can become a source of alarm, but only so when what is threatening "is proximally something well known and familiar" (*ibid* at 181). In other instances, where what is threatening "has the character of something altogether unfamiliar, fear becomes *dread*" (*ibid* at 182 [emphasis in original]). Additionally, "where that which threatens is laden with dread, and is at the same time encountered with the suddenness of the alarming, fear becomes *terror*" (*ibid* [emphasis in original]).

58 Freud ("Anxiety" *supra* note 25 at 443) perhaps put it best: anxiety "relates to the state and disregards the object" while fear "draws attention precisely to the object."

59 Heidegger, *supra* note 23 at 180 [emphases omitted].

60 *Ibid*.

discloses this entity as endangered and abandoned to itself."[61] As Heidegger puts it pithily: "different possibilities of Being emerge in fearing."[62]

For Heidegger, fear should not be simply looked at as a negative, but as something that has important positive aspects in relation to both the constitution of being and the very cognizance and understanding of being itself. This knowledge and understanding, however, does not come to full realization in fear, but is to be found in, and realized through, anxiety. That said, fear is that first step in Dasein recognizing its limits – its demise or mortality – and this has important implications for how beings come to terms with being:

> Dasein is in every case concernful Being-alongside. Proximally and for the most part, Dasein *is* in terms of *what* it is concerned with. When this is endangered, Being alongside is threatened. Fear discloses Dasein predominantly in a privative way. It bewilders us and makes us 'lose our heads'. Fear closes off our endangered Being-in, and yet at the same time lets us see it, so that when the fear subsided, Dasein must first find its way about again.[63]

In other words, a being that is concerned with itself – Heidegger refers to this as care[64] – is one who takes the necessary steps to eliminate or minimize these threats, essentially amounting to the care of the self.

As noted above, however, as much as fear discloses and reveals Dasein – as a being concerned with the care for, and of, its being – fear is unable to fully disclose the constitution of Dasein, which means that a being cannot properly care for its being. This is why Heidegger writes that fear "bewilders us and makes us 'lose our heads,'"[65] essentially highlighting that as much as fear discloses, it simultaneously occludes and conceals because of the very nature of fear itself, that is, its inability to be fully transparent. In expanding upon this, Jonathan McKenzie notes that for Heidegger, "[f]ear is inauthentic because it backs away from itself and it does not take hold of any definite possibility."[66] This is why fear is unable to fully disclose and reveal. If Heidegger's reasoning is plausible, then – and, this will (likely) court controversy – this means that there will exist in the field of knowledge production a particular gap that empirical inquiry will not – because it cannot – shed light upon, a premise that is consonant and consistent with,

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61 *Ibid.*

62 *Ibid* at 181 [emphases added].

63 *Ibid* at 180-181 [emphases in original].

64 *Ibid* at 225-244.

65 *Ibid* at 181.

66 McKenzie, *supra* note 42 at 575 .

and constant in, Heidegger's pessimistic outlook towards the sciences as a whole.[67] This would also mean that social scientists interested in explicating fear – especially its cause and effect or, at least its contributory factors – will be, according to Heidegger, unable to shed much insights. In fact, even philosophical (in particular existential and phenomenological) inquiry will always be unable to shed complete light on issues. Dreyfus explicates Heidegger's reasoning well when he notes that Ontology "is always unfinished and subject to error" because an "explication of our understanding of being can never be complete because we dwell in it."[68] This would mean, according to Dreyfus, "the more important some aspect of our understanding of being is, the less we can get at it"[69]

This contentious matter can be held in abeyance momentarily because, as noted above, the mood of fear does not fully bring this to light. That said, what fear does not disclose – the problem about fear itself – can be addressed via anxiety, which can shed additional light on this issue. Thus, by way of the oft noted risk-fear paradox, the mood of anxiety can be invoked to illustrate the shortcomings with fear, in particular, that what is thought of as a paradox, is, in fact, far from paradoxical.

## D. The Revelatory Nature of the Paradoxes of Anxiety

Echoing Freud – who wrote that "there is no question that the problem of anxiety is a nodal point at which the most various and important questions converge, a riddle whose solution would be bound to throw a flood of light on our whole mental existence"[70] – Heidegger claims that "As one of Dasein's possibilities of Being, anxiety…provides the phenomenal basis for explicitly grasping Dasein's primordial totality of Being."[71] In other words, and as Dreyfus explains, Heidegger "needs to find a special method for revealing Dasein's total structure" and, therefore, "[t]o reveal Dasein simple and whole Heidegger chooses anxiety."[72] For Heidegger, then, "the basic state-of-mind of anxiety [i]s a distinctive way in which Dasein is

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67 Heidegger, *supra* note 28 at 5; Martin Heidegger, "What is Methaphysics?" in David F Krell, ed, *Introduction to Methaphysics*, Revised and Expanded ed (London: Harper Perennial 2008/1929) 93.

68 Dreyfus, *supra* note 37 at 22.

69 *Ibid.*

70 Freud, "Anxiety", supra note 25 at 441.

71 Heidegger, supra note 23 at 227 [emphases added].

72 Dreyfus, supra note 37 at 176,177.

disclosed,[73] and this is because "in anxiety Dasein gets brought before itself through its own Being"[74] There is, in other words, something authentic about anxiety, in contradistinction, for example, to fear.[75] It requires underlining, then, that something profoundly different constitutes fear and anxiety, despite being, as noted above, "kindred phenomena." Anxiety is closer to the constitution of being than fear – it is *a priori* in humanity, even before, as Freud claims, birth, that is, life itself – so that only through anxiety, not fear, can the essence of being be discovered and illuminated.

Recall that a particular problem in fear of crime research has been not only the failure to treat fear and anxiety as explicitly different phenomena, but also confound and conflate them. Heidegger, though writing in a much different time and context, underlines this very problem in the broader literature , stating that "for the most part they have not been distinguished from one another: that which is fear, gets designated as 'anxiety', while that which has the character of anxiety, gets called 'fear'."[76] What follows focuses on a key distinction between the two, namely, the source of their emanations and then explicates anxiety as an important constitution – what Heidegger calls a fundamental attunement[77] – of being.

A lengthy passage introduces the distinction Heidegger carves between the origins of fear and anxiety:

> What is the difference phenomenally between that in the face of which anxiety is anxious and that in the face of which fear is afraid? That in the face of which one has anxiety is not an entity within-the-world. Thus it is essentially incapable of having an involvement. This threatening does not have the character of a definite detrimentality which reaches what is threatened, and which reaches it with definite regard...That in the face of which one is anxious is completely indefinite. Not only does this indefiniteness leave factically undecided which entity within-the-world is threatening us, but it also tells us that entities within-the-world are not 'relevant' at all...[T]he world has the character of completely lacking significance. In anxiety one does not encounter this thing or that thing which, as something threatening, must have involvement.[78]

The foregoing highlights several matters of import. First, and to repeat, fear originates from without, anxiety from within. Heidegger is unequivocal

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73 Heidegger, supra note 23 at 228 [emphases added].

74 *Ibid.*

75 See McKenzie, supra note 42 at 575.

76 Heidegger, *supra* note 23 at 230.

77 Heidegger, *supra* note 28 at 29-77.

78 Heidegger, *supra* note 23 at 230-231 [emphases added].

on this. The implication of this premise is even more important: with anxiety, unlike fear, the issue is not about the way something gets turned into a threat because of its detrimental nature to being; rather, in anxiety, concern over being reigns supreme – certainly more than with fear – because the threat to being is already extant, extant even before life.[79]

The most important premise from the foregoing passage, however, needs further elucidation in two steps. First, Heidegger is clear that what beings are anxious about is completely indefinite. Given this, two significant issues arise. First, if something is indefinite, it means that it is not definite, which means that it is, in many (or some) ways, intangible, and this would render it difficult (or even impossible) to clearly articulate (that is, to get a lucid sense of what the it is). Second, and related, to claim that definiteness is inexistent is to claim the absence of certainty, precision and the fixed-nature of something, this something being not only the source of anxiety, but anxiety itself. That is, the uncertainty, imprecision and most importantly for present purposes, lack of clarity means that there are no conditions or characteristics that can be extrapolated to meaningfully make sense of anxiety. To claim, then, that anxiety is indefinite – and, to underline, Heidegger states that this indefiniteness is complete or completely so – is to say that the source of anxiety and, most importantly, anxiety itself, are unclear, that is, they are not subject to clarity and clarification. Unlike fear – which has a clear and definite external source and can be pinpointed and located – anxiety has no such source or locus and what might look like such is itself murky and confounding. Thus, if Heidegger's premises are followed to their rightful conclusion, it is not just the sources or origins of anxiety that are unclear, but anxiety itself. This is perhaps what leads Ratcliffe to note that "the referent of the term 'anxiety' starts to look a little unclear."[80]

The indefiniteness of anxiety leads to the second step alluded to above, and with it, the most significant conclusion to draw, namely, given the lack of clarity about anxiety, it is, unlike fear, not easily amenable to explication. Indeed, if the argument is followed logically through to the end, what must be concluded is not just that anxiety is not easily explicable but that it is (largely) inexplicable. Heidegger writes that "when something threatening

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79 Freud, "Anxiety", *supra note* 25 at 443; see also Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, UK: Polity Press, 1991) at 44.

80 Ratcliffe, *supra* note 29 at 172.

brings itself close, anxiety does not 'see' any definite 'here' or 'yonder' from which it comes. That in the face of which one has anxiety is characterized by the fact that what threatens is *nowhere*."[81] Here, the import of sight and site require attention. It is not just that in anxiety beings are unable to see the source of anxiety, but importantly, the inability to see is a product of the fact that there is nothing to see. This conclusion, certainly agonistic, is drawn from the fact that a locus of (and for) anxiety does not exist. Anxiety, unlike fear, cannot be properly sited. It can be claimed, for example, that anxiety emanates from the unconscious, that is, the within, as Freud[82] states, a point that others embrace as well.[83] Yet, this site is not simply vast, but also ambiguous. It exists, but in a paradoxical way, in that it exists – and certainly takes hold of beings – but is simultaneously nowhere. Crucially, then, if anxiety is nowhere and yet constitutes being, then it must be so while also not-being and, as well, being nowhere while also concomitantly being somewhere (perhaps everywhere). Heidegger alludes to this: "Anxiety 'does not know' what that in the face of which it is anxious is...Therefore that which threatens cannot bring itself close from a definite direction within what is close by; it is already 'there', and yet nowhere; it is so close that it is oppressive and stifles one's breath, and yet it is nowhere."[84] If this reasoning is plausible, then, the inexplicable nature of anxiety must also be acknowledged. Anxiety exists but its existence cannot be meaningfully made sense of. It consumes and swallows as a whole, but, again, an explanation for such cannot be provided. Anxiety is the (largely) inexplicable mood that constitutes being.

Another way to conceptualize the nowhere/somewhere paradox of anxiety is through what Heidegger refers to as the uncanny. "In anxiety," Heidegger writes, "one feels 'uncanny.'"[85] By uncanny, Freud, who laid its framework, refers to "something which is secretly familiar, which has undergone repression and then returned from it" so that "the uncanny is the class of the frightening which leads us back to what is known of old and long familiar."[86] The uncanny, to put simply, is the familiarity with

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81 Heidegger, *supra* note 23 at 231 [emphasis in original].
82 Freud, "Anxiety", *supra* note 25 at 459.
83 E.g. Giddens, *supra* note 79 at 44-45.
84 Heidegger, *supra* note 23 at 231.
85 *Ibid* at 233.
86 Freud, "The Uncanny", *supra* note 25 at 222, 195.

something frightening.[87] Drawing on this, Heidegger expands the notion of the uncanny to speak of its intangible nature, which is also implicit in Freud's formulation. With the uncanny, Heidegger says, "the peculiar indefiniteness of that which Dasein finds itself alongside in anxiety, comes proximally to expression: the 'nothing and nowhere'. But here 'uncanniness' also means 'not-being-at-home'."[88] One reason that anxiety leaves beings in an indefinite state constituted by the absence of clarity is because in this nowhere from which it emerges (itself a paradox), anxiety, which is something, is also nothing (yet another paradox). Thus, to the nowhere/somewhere paradox, it is necessary to also add the nothing/something paradox that constitutes anxiety.

How is it, then, that nothing comes to constitute anxiety and with it being? Heidegger writes that "[a]nxiety reveals the nothing."[89] This is because even though a feeling of unease exists or persists because of anxiety, it is difficult, if not impossible, to explicate why such a feeling envelops, permeates, consumes and swallows one. "We can" Heidegger says, "get no hold on things" and, thus, "[i]n the slipping away of beings only this 'no hold on things' comes over us and remains."[90] This means, Heidegger says, that "anxiety leaves us hanging,"[91] and rather unsettled, that is, without firm footing or gound(ing) to know and understand being. "In this altogether unsettling experience," he writes, "there is nothing to hold on to,"[92] even

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87 A more detailed explanation of the uncanny provided by Freud helps make sense of the homelessness of the term that Heidegger, as will become apparent, draws attention to: In the first place, if psycho-analytic theory is correct in maintaining that every affect belonging to an emotional impulse, whatever its kind, is transformed, if it is repressed, into anxiety, then among instances of frightening things there must be one class in which the frightening element can be shown to be something repressed which *recurs*. This class of frightening things would then constitute the uncanny; and it must be a matter of indifference whether what is uncanny was itself originally frightening or whether it carried some *other* affect. In the second place, if this is indeed the secret nature of the uncanny, we can understand why linguistic usage has extended das Heimliche ['homely'] [brackets in original] into its opposite, das Unheimliche; for this uncanny is in reality nothing new or alien, but something which is familiar and old-established in the mind and which has become alienated from it only through the process of repression (Freud, "The Uncanny", *supra* note 25 at 217 [emphases in original]).

88 Heidegger, *supra* note 23 at 233 [emphasis added].

89 Heidegger, *supra* note 67 at 101.

90 Ibid.

91 Ibid.

92 Ibid.

though one is still hanging or, at least has a profound sense or need to hang (onto something). In other words, and most crucially, one is hanging onto nothing. What remains is an emptiness, a sense of nothingness: "we must say that that in the face of which and for which we were anxious was 'properly' – nothing. Indeed: the nothing itself – as such was there."[93] The very attempt to explicate anxiety – itself something, yet nothing, itself somewhere but also nowhere – only leaves beings "bewildered" (just like fear does), because there is a constant grasping onto something that needs immediate and grave explication but one that is simply not amenable to it. Dreyfus explains this as follows:

> Anxiety is thus the disclosure accompanying a Dasein's preontological sense that it is not the source of the meanings it uses to understand itself; that the public world makes no intrinsic sense for it and would go on whether that particular Dasein existed or not. In anxiety Dasein discovers that it has no meaning or content of its own; nothing individualizes it but its empty thrownness.[94]

What has been penned thus far looks bleak especially considering the concealed nature of fear and that the risk-fear paradox was to be resolved by introducing anxiety, which, however, is constituted by its own paradoxes that have further muddied matters. This problem, however, is more apparent than real. What follows focuses on the redemptive aspect of anxiety, a redemption of (and about) being as being in its true self brought to the fore and illuminated brightly.

One aspect of the uncanniness of anxiety, noted above, is that it is concomitantly something and nothing and, as well, nowhere and somewhere. Another aspect of it, also noted above, is that uncanniness reveals something precise about being, that is, that being is, always, not at home, essentially homeless. Heidegger notes that "uncanniness pursues Dasein constantly,"[95] and thus, "Being-in enters into the existential 'mode' of the '*not-at-home*,'"[96] alluding to the inherent homelessness of the being of beings. Thus, it is not just the paradoxes of anxiety – something/nothing and nowhere/somewhere – that are (largely) inexplicable for the subject, but uncanniness as well. This, Heidegger puts as such: "the mood of

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93 Ibid.

94 Dreyfus, supra note 37 at 180.

95 Heidegger, *supra* note 23 at 234.

96 *Ibid* at 233 [emphases in original].

uncanniness remains, factically, something for which we mostly have no existentiell understanding."[97]

Yet, what anxiety does that fear does not – because it cannot and this is because anxiety speaks to the inner, that is being itself, while fear speaks to an outside entity – is reveal the very shortcomings of being: essentially the paradoxes of life, but more precisely, that life lived as being is one that is without-home and nothing. Rather than read anxiety problematically as most do, Heidegger rescues anxiety from such a predicament and holds it up as the beacon of hope, a beacon that brightly shines light on the essence of being. Thus, while anxiety reveals the somewhere/nowhere and the something/nothing as a problem of being, it also reveals that this problem is, in fact, not a problem, but simply indicative of what it means to be:

> in anxiety there lies the possibility of a disclosure which is quite distinctive; for anxiety individualizes. This individualization brings Dasein back from its falling [the failure to see it in its truest sense], and makes manifest to it that authenticity and inauthenticity are possibilities of its Being. These basic possibilities of Dasein...show themselves in anxiety.[98]

This, then, is what Heidegger sees in anxiety: its revelatory potential (that fear does not possess). Fear speaks to and illuminates what happens to beings when an outside entity is thought to be relevant to it (regarding detrimentality to being). Anxiety speaks to the very core of being human – a fundamental attunement – one constituted by profound paradoxes that reveal deeply and unequivocally its limits: death.[99] Similar to the way Heidegger sees the import of anxiety to understanding and making sense of the being of beings, the same can be said about understanding and making

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97 *Ibid* at 234.

98 *Ibid* at 235 [emphases added].

99 There is an important difference between what Heidegger means by death and what he refers to as demise (though there is a literature that tends to conflate the two). The latter speaks to the mortality of humans, in other words, what is ordinarily referred to as death. Yet, for Heidegger, the word death is the realization of the limits of Dasein, and in that sense, has nothing to do with demise, but rather a continuation of life fully aware of its limits. William Blattner uses the term "existential death" to differentiate this from demise (William Blattner, *The Cambridge Companion to Heidegger's Being and Time* (Cambridge: Cambridge University Press, 2013) at 342). In describing Heidegger's use of the term death, Iain Thompson claims that Heidegger "calls death the possibility of an impossibility" because "My projects collapse, and I no longer have a concrete self I can be, but I still *am* this inability-to-be. Heidegger calls this paradoxical condition [yet another paradox] revealed by anticipation 'the possibility of an impossibility' or *death*'" (Thompson, *supra* note 31 at 269, 271 [emphases in original]).

sense of the paradox said to constitute the fear of crime. The final section explicates this.

## III. Rethinking The Paradox Of The Fear Of Crime: Rethinking Anxiety *Vis-À-Vis* Fear

A profound challenge that fear of crime research faces is the risk-fear paradox. This paradox, however, is a problem that the social sciences, in particular criminology, have created largely because of a preoccupation with measurement. As Sandra Walklate[100] writes in a different, though related, context: "despite the inherent difficulties around what actually counts as violence, criminology, criminologists and others persist with engaging in the art of measuring it." Similarly, Ronnie Lippens writes of the "spectacular manifestations of self-righteousness" even in so-called critical criminology.[101] In many ways, the same can be said of what is transpiring with fear of crime research. The risk-fear paradox is certainly interesting – even, intriguing – but it is not a paradox. What follows explicates this and how inquiries concerning fear of crime can be advanced.

Anxiety, it has been suggested by invoking Heidegger, is a largely inexplicable mood or state of mind. More importantly, this inexplicability, it is argued, is not a problem, but rather a statement about the limits of knowledge production, which fear of crime research must come to terms with. What is now presupposed is the close and important relation between fear and anxiety and, as well, that anxiety can shed important light on the fear of crime. Theoretically engaging anxiety allows the risk-fear paradox to be addressed head-on. This is so, it should underline, not despite the paradoxes of anxiety, but precisely because of, and thus through, them; in other words, the very paradoxes of anxiety extracted from Heidegger's writings are not simply important but essential to tackling this issue, and in many ways what has hindered fear of crime research is a doggedness to acknowledge and work with these paradoxes (essentially coming to terms with the limits of knowledge production). Thus, when anxiety is brought

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100 Sandra Walklate, "Gender, Violence and the Fear of Crime: Women as Fearing Subjects?" in Murray Lee & Gabe Mythen, eds, *The Routledge International Handbook on Fear of Crime* (London: Routledge 2018) 222 at 226 [emphasis added].

101 Ronnie Lippens, "Towards Existential Hybridization: A Contemplation on the Being and Nothingness of Critical Criminology" in Ronnie Lippens & Don Crewe, eds, *Existentialist Criminology* (London: Routledge-Cavendish 2009) 249 at 271.

into a meaningful conversation with fear of crime, what hitherto has not been explained about the latter can be reconceptualized anew and the answer, then, is said to lie not necessarily or simply in fear (or fear of crime) or crime rates or disorder or some other external factor, but in anxiety itself. The revelatory aspect of this conclusion is further magnified when the paradoxes of anxiety show that anxiety itself is inexplicable. Thus, if anxiety is largely inexplicable, then, this would also mean, if the premise is developed to its logical conclusion, that fear of crime – which it is presupposed needs anxiety to be meaningful – is also not fully explicable. This suggests, then, that fear of crime research must be willing to come to terms with the fact that it might be unable to fully explicate what it has constructed as a problem. In fact, it must be willing to acknowledge that what it has constructed as a problem is not – and, never was – a problem. The problem, essentially, is the stubbornness to seek to rectify something that cannot be rectified. This is what Heidegger's probing inquiry, and engaging anxiety theoretically, illustrates.

Claiming that anxiety explains fear of crime is not novel, perhaps even interesting, but what is, is to claim that when anxiety is brought into the conversation, the need to delve further to resolve the risk-fear paradox disappears because what anxiety illuminates is that there are certain innate, inexplicable, states of mind that constitute the being of particular beings and these can range, for example, from deep-seated racialized attitudes to other prejudices that shape and drive the way people think and behave.[102] In other words, if anxiety – as an innate and ingrained mood – constitutes being and shapes thinking and behaviour, then, the risk-fear paradox ceases to exist; in fact, it never existed in the first place because what might not be explicable empirically – and, thus be statistically tenable – can be "explained" by *a priori* means. Thus, for example, A, who is among the least likely to be a victim of crime and yet has a high rate of fear, ought not to be labelled as irrational because A does not have an irrational sense of fear (even if, for example, B, C and D are also least likely to be victimized and by contrast have very low levels of fear). In other words, because A's fear may not be tied to crime rates or disorder or even the ways others think and behave, but rather to particularized innate states of mind (recall that Heidegger sees the revelatory potential in anxiety in its individualized form) that themselves are products of socially produced contingencies (e.g. place),

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[102] *Cf* Walklate, *supra* note 20 at 404; Fanghanel, *supra* note 8 at 62; McGowan, *supra* note 8 at 193; Robinson & Gadd, *supra* note 18.

the way A thinks and acts is, in fact, rational (just as the ways B, C and D do are). Thus, if anxiety is largely inexplicable, yet holds the key to understanding fear, then, the risk-fear paradox ceases to exist as does the supposed irrationality of beings who do not view "objective data" in a particular manner. This is what Mark Stafford and Omer Galle noted some three decades ago about the reductive tendencies in fear of crime research: "fear of crime should not be viewed cavalierly as irrational or unjustified" because "it would be premature at best to conclude that fear is irrational, for we know little about how objective risks are translated into fear."[103] What is claimed here is that the translation of objective data into a personalized form is largely irrelevant because a more powerful and deep-seated drive shapes the being of beings.

Thus, and returning to A, A might be highly fearful for a plethora of reasons that A him/herself might not be able to explicate and these could range from various neuroses to prejudice to racism among others – for example, in relation to hanging on to something that is still nothing and yet something, as Heidegger claims. None of these are irrational because they are extant within, as a matter of being, which means that to claim that they are irrational is to claim that the very being of A itself is nullified. The literature contains ample examples that could be read in this way, but perhaps a poignant one is provided by Robinson and Gadd[104] who discuss the explanation provided by a woman who was physically and sexually abused by her own parents during her childhood, but who nevertheless continues to view them as the most important thing in her life. What might seem irrational to most should not be viewed as such because to reduce such a way of thinking and being to irrationality is to do not only profound harm to this woman, but to all women who have suffered abuse (along with numerous other groups who have endured myriad struggles).[105] The paradoxes of anxiety – which this woman appears to "wear" daily – it is suggested here, help shed light on the rationality of what is often problematically read as irrational. What Heidegger claims is that a mood such as anxiety is far from problematic but, rather, is part and parcel of life. What he does well – and what fear of crime research and the social sciences

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103 Stafford & Galle, *supra* note 21 at 182.

104 Robinson & Gadd, *supra* note 18 at 196.

105 See Prashan Ranasinghe, "'Undoing' Gender and the Production of Insecurity and Fear" (2013) 53:5 Brit J Crim 824; Prashan Ranasinghe, "Discourse, Practice and the Production of the Polysemy of Security" (2013) 17: 1 Theoretical Criminology 89.

more generally can learn from – is to clearly explicate that such moods do not lend themselves to full explication. The problem, then, is not the admission of the inexplicable nature of something; rather, it is the pretense that even the inexplicable can be explicated that is at issue. This is the problem, in fact, danger, that fear of crime research – and the social sciences generally – has created for itself, and which it must extricate itself from.

## IV. CONCLUSION

This article has highlighted important limitations and gaps extant in the fear of crime research and heralded the import of anxiety to understanding and making sense of fear (of crime). The article theoretically engages anxiety by invoking Heidegger. What Heidegger's insightful analysis of fear and anxiety reveals are the paradoxes of anxiety: anxiety is simultaneously something and yet nothing and, as well, sited somewhere and yet is nowhere. What this means is that while anxiety is revelatory – casting light on the death of life, translated here as the limits of knowledge production – it is also, and still, concealed, so that the site of these very revelations are themselves ambiguous and, thus, inexplicable. These paradoxes, the article claims, are far from problematic, especially because they are essential to explaining the supposed risk-fear paradox that has plagued fear of crime research. The article claims that this paradox – which is, in fact, not a paradox – disappears when the paradoxes of anxiety are brought into a meaningful conversation with fear (of crime); additionally, and equally important, the belief that certain fears are irrational can also be properly placed within intellectual inquiry and, in fact, shown to be rational. Heidegger's penetrating analysis of fear and anxiety powerfully illustrates the limits of knowledge (production) and this article claims that fear of crime research and the social sciences can benefit from far more modest approaches to its inquiry than its oft seen and lauded scientific voracity that is frequently infused within a positivistic tenor.

# Cross-Over Youth and *Youth Criminal Justice Act* Evidence Law: Discourse Analysis and Reasons for Law Reform

REBECCA JAREMKO BROMWICH *

## ABSTRACT

Adolescents who are involved with child welfare systems, either in foster care or under child welfare supervision, across Canada, disproportionately "cross-over" to youth criminal justice proceedings. Virtually all have grown up in poverty; many are racialized or Indigenous; all are marginalized. As youths, and later as adults, they are proportionately more often charged, found guilty, and incarcerated relative to youth who are not or have not been "in care.". This article critically considers disadvantages "cross-over" youths face under the *YCJA*. It provides a new, theoretically engaged understanding of how dangerousness and criminality are constructed in official discourses for cross-over youths. It argues that *YCJA* evidence law compounds the disadvantage of cross-over youth, who are already socially excluded, setting them up for disproportionate criminalization and incarceration. Both with respect to their statements and to documentary records about them, cross-over youth are vulnerable under Criminal Evidence law in ways that youths who reside in their families of origin are less likely to be. Systemic change to child welfare law and policy to focus on early interventions preventing apprehensions in the first place should be promoted. Further, as an interim and partial solutions, this "cross-over" should be addressed through changes to evidence law under the *YCJA*. We need to revisit the appropriateness and implications of explicit and implicit

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assumptions -running throughout youth criminal justice processes and protections – that a youth before the Court will be able to draw upon parental support.

***Keywords:*** *y*outh justice; evidence law; child protection; children's rights; discourse analysis; Indigenous people in the criminal justice system

## I. INTRODUCTION

In Canadian prisons, we are locking up large numbers of marginalized people, and Indigenous people in particular. It is abundantly clear from Statistics Canada data that levels of adult incarceration in Canada remain high. There are massive increases, since the 1960s, in the proportional incarceration rate of Indigenous people, who make up roughly 25% of the prison population, but less than 5% of the Canadian population overall.[1] We also have overburdened criminal courts marred by delays, which can result in the dismissal of serious charges.[2] While there are well-documented problems with discrimination in the criminal justice system itself, ways in which formal legal discourses are contributing to the problem of over-incarceration of persons from Indigenous and other marginalized groups do not start and end in the criminal justice system.

A crucial entry point of marginalized individuals, and especially Indigenous children and youth, into the criminal justice system, is through the "protective" services provided by provincial and territorial child welfare systems where children are deemed at risk of harm. Relative to other countries, Canada takes proportionately higher numbers of children into protective care.[3] It is especially salient for this law journal to consider the disadvantages faced by children and youth in state care, being as it is the *Manitoba Law Journal,* and Manitoba has the highest *per capita* rate of

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1 Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54972-eng.pdf?st=NheG_hDv> [perma.cc/T3AC-U228].

2 Problems with delays in the criminal justice system were made painfully obvious after *R v Jordan*, 2016 SCC 27.

3 Brownell, Marni et al, *The Educational Outcomes of Children in Care in Manitoba*, (Manitoba Centre for Health Policy: June 2015), generally and at 1, online (pdf): <mchp-appserv.cpe.umanitoba.ca/reference/CIC_report_web.pdf> [perma.cc/VD2E-GDE5].

children and youth in care in Canada.[4] Research and attention should be paid to the glaring disproportion whereby 90% of children in state care in Manitoba are Indigenous.[5]

Statistical study of outcomes for children apprehended into Canada's provincial and territorial child welfare systems reveals that, too often, being taken into child "protection" in fact leads youth into abuse, criminalization, drug addiction, and early death. Indeed, what Indigenous Affairs Minister Jane Philpott has called a "humanitarian crisis" in the child welfare system, with a crushing disproportion of Indigenous children being taken into state care.[6] Philpott, in November 2018, announced there would be pending changes to the state care of Indigenous children, promising to hand the management of that care over to Indigenous governments.[7] However, at the time of writing, the precise nature of the coming changes, and any timeframe for their implementation, remain unclear.

Statistical research provides a damning indictment of the life chances of children taken into care. A recent BC study demonstrates that a child in the care of social services in that province is more likely to end up in jail than to finish high school.[8] Sixty percent of homeless youth become homeless by leaving foster care.[9] Worse still, a BC Coroners' Death Review Panel found that youths transitioning out of state care were five times as

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4 According to the Manitoba Department of Families, *Annual Report, 2017-2018*, online (pdf): <www.gov.mb.ca/fs/about/pubs/fsar_2017-18.pdf> [perma.cc/7LD3-HSV8], there were 10, 328 kids in care in 2018, which was 3.6% less than the prior year, the first time the numbers of youth and children in care in Manitoba had dropped in 15 years.

5 Manitoba Legislative Review Committee, *Opportunities to Improve Outcomes for Children and Youth* (September 2018), online (pdf) <www.gov.mb.ca/fs/child_welfare_reform/pubs/final_report.pdf> [perma.cc/SMM6-6SQ3] at 1, 4.

6 Katie Hyslop, "How Canada Created a Crisis in Indigenous Child Welfare", *The Tyee* (9 May 2018), online: <www.thetyee.ca> [perma.cc/X5FN-7K5M].

7 See e.g. John Paul Tasker, "Ottawa to hand over child welfare services to Indigenous governments" *CBC News* (30 November 2018), online <www.cbc.ca/news/politics/tasker-ottawa-child-welfare-services-indigenous-1.4927104> [perma.cc/GVH8-L8F9].

8 British Columbia, Representative for Children and Youth & Office of the Provincial Health Officer, *Kids, Crime and Care: Health and Well-Being of Children in Care*, by Mary Ellen Turpel-Lafond & Perry Kendall (23 February 2009) at 7, 12 [Turpel-Lafond].

9 Stephen Gaetz et al, *Without A Home: The National Youth Homelessness Survey*, (Toronto: Canadian Observatory on Homelessness Press, 2016) at 47.

likely to suffer premature death, primarily from suicide and drug overdoses, than members of the general youth population.[10]

This paper critically considers ways in which the operating logics of child welfare law produce official documents that in turn construct system-involved youths as dangerous, criminal figures. It interrogates how those documentary records, and so those constructions, intersect with the rules of evidence in youth criminal justice, thereby crucially contributing to their criminalization. It looks at how governmentality, or the intersection of power and knowledge in discourse through the organized practices of 'governmental rationality,'[11] or systems or ways of thinking about how conduct should be conducted, operates through the ways youths in care are defined and described in the official discourses of child welfare and criminal records and police charge synopses.

I look critically at a pathway through which those incarcerated in Canada frequently first arrive there. As is discussed below, a disproportionate share of people incarcerated in Canada are under the care and custody of child welfare authorities when first taken into correctional custody, in the youth or adult system. The "Cradle-to-Prison Pipeline"[12] is a major problem precipitating a disproportion of vulnerable, poor, Indigenous and racialized youths from state care into the criminal justice system, and finally into prison.

This paper combines an analysis of evidence law under the *Youth Criminal Justice Act*[13] with critical consideration of how child welfare systems, in their bureaucratic operating logics, construct "cross-over" youths as dangerous criminals in court records. This explores factors contributing to the over-representation of cross-over youth in the criminal justice and correctional systems, including fragmentation between systems, the construction in discourse of youths in care as a dangerous "type"[14] as an

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10 British Columbia, BC Coroner's Death Review Panel, *Review of MCFD-Involved Youth Transitioning to Independence January 1, 2011 – December 31, 2016*, (Victoria: British Columbia Coroners Service, 28 May 2018) at 3, 11.

11 Michel Foucault, "Governmentality" translated by Rosi Braidotti in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality*, (Chicago, IL: University of Chicago Press, 1991) 87.

12 Mary Wright Edelman, "The Cradle to Prison Pipeline: An American Health Crisis" (2007) 4:3: A43 Preventing Chronic Disease 1 at 1.

13 *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

14 An especially salient discussion of how language and discourse are important elements of how people end up being labeled and otherwise understood as criminal is provided,

incident of particular forms of bureaucratic governance, and a disconnect between the needs of youths in care for procedural protections in criminal justice processes and their ability to access practical advocates with the potential to help them realize their rights. We need to change the way we interact with vulnerable youths across many systems.

From this analysis, I ultimately argue that change to child welfare systems should be combined with changes to evidence law to remedy this situation. Evidence law, under s.146 of the *YCJA* and elsewhere within the *Act* should neither explicitly nor implicitly assume the presence of benevolent, involved parents in the lives of the youths subject to it. To deal justly with youthful accuseds, the *YCJA* should open up possibilities for meaningful justice for those already disadvantaged by their inability to access the privilege and support generally provided by a family home.

This article focuses on youthful accused who are taken into the protective care of the state and looks at current developments in the law regarding how youth in care are impacted differently from others by the way evidentiary protections are offered under the *YCJA*. I critically inquire into whether evidence law, as it pertains to youth, specifically through *the YCJA*, the *Charter of Rights and Freedoms*, the *Criminal Code*, and the *Canada Evidence Act* and its protections specifically in relation to children and youth adequately address the situations of cross-over youth. As written, the *Youth Criminal Justice Act*, Canada's law governing criminal proceedings against youths aged 12-17, not only implicitly assumes the presence of parents in the lives of youths subject to its operations throughout, it makes the assumed involvement of these parents explicit in certain sections. This assumption is troubled by the disproportionate involvement of system-involved youths in *YCJA* proceedings: while some of these youth may have parents who participate, those parents are disadvantaged if they do try to become involved in any event. It suggests that law reform should be undertaken to remedy the disproportionate over-criminalization and over-incarceration of "cross-over" youth and that the appropriate reforms should not just be made to criminal law but also to child welfare law and policy.

When adolescents under the supervision of provincial and territorial child welfare authorities come before the youth criminal justice courts as

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for example, by Heather Shore, in Heather Shore, "Reforming the Juvenile in Nineteenth and Early Twentieth Century England" (2011), 197 Prison Service Journal 4.

accused, they too often lack practical advocacy support to be able to realize their due process rights. At the same time, youths in care are, by virtue of bureaucratic systems of governance in operation in care settings, likely to be constructed in documentary records in ways that are highly prejudicial if admitted into court proceedings. This is especially true when the residential care setting is group care. This paper specifically considers a particular dimension of the ramifications of being "in care" to youth, and that is the absence of practical advocates.

This paper combines critical consideration of doctrinal law with critical discourse analysis to explore how available evidentiary protections set forth under the *YCJA*, *Youth Criminal Justice Act*, S.C. 2002, c.1 compound the disadvantage already faced by cross-over youth by relying upon the protective presence of a parent or adult in responsibility. I explore how cross-over youth frequently have no access to a parent or guardian willing to meaningfully step forward to protect their rights in a manner comparable to that of a parent. This absence, coupled with the ways they are understood, defined, and labeled, or, put another way, the presence of their construction in the discourses of official child protection and other official texts as a "type" that is dangerous and criminal, is a crucial intersecting point that produces their criminalization. In consequence, I argue that youth in care should either be afforded advocacy support through the child protective systems which have care of them or should be provided additional evidentiary protections under the *YCJA* to those afforded to others, such as an amplified right to counsel.

## II. CROSS-OVER YOUTH

"Cross-over" youth are minors who are involved with child protection and the youth criminal justice systems. They are also commonly referred to as "dually involved" youth.[15] Across Canada, under its Provincial and Territorial regimes for child protection, large numbers of children and youth are apprehended from their family homes and taken into "care" for a variety of purportedly protective reasons, on the bases of legal tests set forth under provincial and territorial laws. The "protection" they receive once

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[15] David Altschuler et al, Supporting Youth in Transition to Adulthood: Lessons Learned from Child Welfare and Juvenile Justice, (Centre for Juvenile Justice Reform, 2009) at 26.

apprehended has been cited by a great deal of research as problematics[16]. There are many issues with funding, appropriateness of placements, exploitation, neglect and abuse within the foster care and group care placements across the country. Problems with child welfare systems are underscored and compounded by the fact that youth in care are disproportionately of African-Canadian and Indigenous heritage. A 2015 study, for example, of kids in care in Toronto, found that nearly half of them were of Black heritage, while the Black population of Toronto was in the neighbourhood of 8%; while these numbers decreased to 37% in 2017, the disproportion is still staggering.[17] According to Statistics Canada, Indigenous children and youth make up roughly half of the minors who are in state care across Canada, while they comprise less than 8% of the youth population.[18]

Young people (under age 18) living under the supervision or care of a child welfare system who are also entangled in the youth justice system due to allegations they have committed criminal acts are often referred to as "crossover youth."[19] Far too many of the children who are taken into state care across Canada's provincial and territorial jurisdictions end up becoming criminalized and incarcerated, either as youths or, later in life, as adults. It is estimated that at least 40 - 50% of youth incarcerated across Canada "crossed-over" into youth custody from the child welfare systems.[20]

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16 See e.g. Mandell, D., Clouston Carlson, J., Fine, M., & Blackstock, C. (2003). "Aboriginal child welfare" (Rep., 1-64). Waterloo, ON: Wilfrid Laurier University, Partnerships for Children and Families Project; see also Sinha, V. , Kozlowski, A. (2013). The Structure of Aboriginal Child Welfare in Canada. The International Indigenous Policy Journal, 4(2). Retrieved from: https://ir.lib.uwo.ca/iipj/vol4/iss2/2

17 Laurie Monsebraaten & Sandra Contento "Drop in Black Children Placed in State Care Heralded as Good Start", Toronto Star (30 June 2017), online: <www.thestar.com/news/gta/2017/06/30/drop-in-number-of-black-children-placed-in-care-heralded-as-good-start.html> [perma.cc/A28K-P5QE].

18 Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under,* by Annie Turner, Catalogue No 75-006-X (Ottawa: Statistics Canada, 13 April 2016).

19 Nicholas Bala, Rebecca De Filippis & Katie Hunter, *Crossover Youth: Improving Ontario's Responses* (Association of Family and Conciliation Courts, 2013) at 2.

20 See Scully & Finlay, "Cross-Over Youth: Care to Custody" (2015), online (pdf): <www.CrossOverYouth.ca/wp-content/uploads/2016/03/Cross-Over-Youth_Care-to-Custody_march2015.pdf>.

Their odds of becoming criminalized and incarcerated have been found, in some studies, to be higher than their odds of graduating high school.[21]

It is well documented that youth who have in care, especially when placed in group care, have a strong chance of ending up facing charges in the youth justice system, and also of serving sentences in youth corrections. This "cross-over" is well-known amongst justice system practitioners. For example, the small number of youths in care in Ontario make up 40-50% of the accuseds in the youth system.[22] I am involved with the Cross-over Youth Evaluation Project, a multidisciplinary team of researchers, funded by the Law Foundation of Ontario. It is a pilot project which takes measures to address the criminal charging of youths in care through provision of "two-hatter" judges and lawyers (professionals who work in criminal and child welfare systems alike) in the youth justice court. The Cross-Over Youth Project is an exciting initiative bringing together professionals from the child protection and justice systems.

Taking a trauma-informed approach to youth justice means appreciating that a number of social and psychological factors affect the behaviours, perceptions, and life chances of cross-over youth. These extralegal factors compound and reinforce any impact that the operation of doctrinal law may have on them. Youth generally come to the attention of child welfare authorities as a result of their direct victimization through violence, exposure to parental neglect, or violence between parents, and often, all three, as well as experiences of poverty. The reasons youth are taken into care in themselves put youths at risk of involvement with the criminal justice system.[23] It is well established that mental health problems sourced genetically or through nurture, or in some combination of both, substance abuse, childhood maltreatment, experiencing or witnessing abuse, living through family breakdown, and experiencing attachment disruptions put youths at risk for offending behaviour.[24]

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21 Turpel-Lafond, *supra* note 8.

22 Scully & Finlay, *supra* note 20.

23 David E Barrett et al, "Delinquency and recidivism: A Multicohort, Matched-Control Study of the Role of Early Adverse Experiences, Mental Health Problems, and Disabilities" (2013) Journal of Emotional and Behavioral Disorders (2013) 22:1 J Emotional Behavioral Disorders 3.

24 For discussion, see Ray Corrado, Lauren F Freedman & Catherine Blatier, "The Over-Representation of Children in Care in the Youth Criminal Justice System in British Columbia: Theory and Policy Issues" (2011) 2:1/2 Intl J Child Youth & Family Studies 99.

Flaws in the operation of the child welfare systems in which youths are enmeshed also contribute to the likelihood that youths in care will become involved with the criminal justice system. Systemic factors in the delivery of care also combine to increase the likelihood of youths in care having contact with the justice system. Multiple placements within the child welfare system are associated with increased risk of contact with the justice system.[25] Instability or change in placements can increase feelings of anger, insecurity, and mistrust on the part of a youth.[26]

There are many factors that contribute to the disproportionate likelihood of youth in care "crossing over" to criminalization. Overwhelmingly, they have experienced marginality, and trauma, which is why they were apprehended in the first place. Systemic issues within the youth care system also contribute to their vulnerability to criminal offending behaviour and criminalization: youth in care face frequent moves, and have to settle in to different routines in different settings. They can lack a sense of "attachment" or "place," which can produce alienation and an impetus to rebel against rules. They may have diagnoses that contribute to difficulties with their capacity to comply with rules in a care setting.

While "cross-over" youth themselves present challenges, the ways in which our systems respond to them are too often not adequate to address them.[27] In addition to, and intersecting with, social and systemic factors, dimensions of the legal framework in which youth criminal justice decisions are made may detrimentally affect the chances of "cross-over" youth to receive treatment comparable to that received by adolescents with parental or other family support.

There are many points of intersection that have been identified by Scully and Finlay, as well as Bala and others,[28] at which decisions are made by relevant justice personnel that affect cross-over youth. Not only judges but also Crown Prosecutors, police officers, defense counsel, probation officers, and, not least child protection workers, make decisions in the criminal process that can either initiate involvement of youth into the formal criminal justice system or re-direct them into a less punitive pathways

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25 Office of Juvenile Justice and Delinquency Prevention, *Family disruption and delinquency*, Juvenile Justice Bulletin (Washington, DC: U.S. Department of Justice, September 1999).

26 Turpel-Lafond, *supra* note 8 at 11.

27 Nicholas Bala et al, "Child Welfare Adolescents & Youth Justice System: Failing to Respond Effectively to Crossover Youth" (2014) 19:1 Can Crim L Rev 129 at 142-143.

28 *Ibid*; Scully & Finlay, *supra* note 20.

that might respond meaningfully to the youth's context and circumstances in the child welfare system

For example, while placed in care, particularly group care, a youth may be criminally charged, for instance with assault or being unlawfully at large, if they harm or threaten to harm a group home worker, or if they run away from the facility. Assault charges are often laid even when the harm is instigated by a physical restraint imposed on the youth by the worker. Both these experiences themselves and the formalized criminal system response, are typical, mundane events for youth living in group care, and events that would be highly unusual for a youth not in care.[29] Further, these youth are often charged with offences that are based on behaviour that would not have resulted in court involvement if they lived with parents or relatives, but rather reflects an institutional response to adolescent misbehaviour.

While police have, in many instances, a discretion to impose "extrajudicial measures" pursuant to s. 4 of the *YCJA* where a young person engages in minor offending behaviour, they are under pressure not to do so, and to pursue a formalized process, when social workers and community members demand a charge be laid. When criminal charges are laid, proceedings ensue in which a youth in care must navigate two separate and discrete systems between which there is often little or no coordination, communication, or cooperation.[30] As a result, compared to youths not involved in the child welfare system, US studies have shown that cross-over youth are less likely to receive probation and more likely to receive punitive sentences, including custody.[31]

## III. CRITICAL DISCOURSE ANALYSIS – CONFIGURING THE CRIMINAL YOUTH

On a social constructivist, Foucauldian understanding of governmentality, selves and identities are constructed in and through

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29 Turpel-Lafond, *supra* note 8 at 36-37, 51.

30 Gene Siegel & Rachael Lord, "When Systems Collide: Improving Court Practices and Programs in Dual Jurisdiction Cases" (2004) Technical assistance to the Juvenile Court: Special project bulletin, (Pittsburgh: National Center for Juvenile Justice), online:<www.ncjj.org/Publication/When-Systems-Collide-Improving-Court-Practices-and-Programs-in-Dual-Jurisdiction-Cases.aspx> [perma.cc/S9X5-RM9V] at 1.

31 Denise C Herz & Anika M Fontaine, *Final report for The Crossover Youth Practice Model in King County, Washington*, (Georgetown University: Center for Juvenile Justice Reform, 2012).

governmental processes;[32] the removal of a child from his or her family home destabilizes, and threatens erasure of, their identity while it makes children and youth into subjects who are constructed in the discourses of official texts as having identities of riskiness and criminality. Rather than being defined, as children and youth often are, relationally, with respect to networks of family members, or even with reference to socioeconomic status or neighbourhood, youth in care are labeled and described in official discourses with reference to conduct and risk. To quote Joe Norris, a hereditary chief with the Halalt First Nation in the Cowichan Valley of British Columbia, "even if they manage to graduate high school and avoid jail and the streets, Indigenous kids lose something when they're removed from family, community and culture and placed — most often — with a white foster family...They lose their identity."[33] Critical discourse analysis[34] of official texts produced in relation to cross-over youth is a productive tool for social research. Close scrutiny of how youth are identified, labeled, and described in these texts, and how those definitions have governmental effects, is a way to examine the political and ideological content of texts, and how power and knowledge are deployed in those texts in ways that support or refute particular narratives. As discussed below, critical discourse analysis of official records about youths in group care, and the criminal records of cross-over youth, reveal the way they are labeled and constructed in texts that code and classifies them as dangerous in ways that do not match with the underlying situations for which their conduct was noted up.

In youth criminal justice proceedings, Courts are involved in an exercise of public sense-making. That exercise takes place on the basis of discursive records that precede the presence of the actual youth in the courtroom in many respects. In this exercise, it is clear that youth in the custody and care of the Crown, face disadvantages linked to their age and family status. These decisions are routinely made on the basis of criminal records and police charge synopses alone, in the absence of contextual information about the youth's involvement with child welfare.[35]

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[32] See Michel Foucault, *Technologies of the Self: A Seminar with Michel Foucault*, (Amherst: University of Massachusetts Press, 1988) 16–49.

[33] Katie Hyslop , "One Woman's Campaign to End Indigenous Child Apprehensions" *The Tyee* (27 November 2018), online: <www.thetyee.ca> [perma.cc/X5FN-7K5M].

[34] See Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

[35] Since child welfare and the *YCJA* systems operate separately, there is no automatic transfer of information between the systems, and, it is inconsistent and even arbitrary

It is an understatement to say that most youth court charges are resolved by guilty plea. In fact, a high percentage of youth charges (41%) are stayed or withdrawn, and fewer than 1% of youth charges are resolved by means of an acquittal.[36] In turn, most guilty plea resolutions are negotiated on the basis of formal criminal records and the police synopses of charges. In this resolution process, the Crown's discretion engages with the way these youths are described and defined in official texts before the Court well before other contextual factors in the life circumstances of the young person, or the young person's views, are considered. If a young person's situation, including being a "cross-over" youth comes to the attention of the Court at all, this will be in the context of a Pre-Sentence report, ordered after a guilty plea is entered. The facts alleged against a youth to constitute an offence that are reported in a police synopsis will not reliably or predictably make reference to the youth's placement in social services care or supervision.

Two examples of cross-over youth that I have studied using the methodology of Critical Discourse Analysis are the case of Ashley Smith, and that of Abdoul Abdi. In both Smith's case and that of Abdi, it was clear they, as youths in care, became constructed in formal legal texts as far more dangerous than they actually were.

Through the bureaucratic governance model dominant in child welfare settings, particularly in group care, youths are readily discursively constructed as dangerous criminals in ways that submerge and obfuscate the detailed facts and context through which they acquire labels of dangerous and risky. A record of multiple disciplinary infractions and consequent police interventions configures them in discourse as dangerous offenders

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whether police notes or a police synopsis of an offence will mention whether a young person was in care at the time a charge was laid. Where the facts of the allegation involve an assault in group care, the fact that the complainant and accused were in a child welfare setting together, or knew each other from the context of child welfare care, is not necessarily or mandatorily mentioned. Consider the murder of Reena Virk, for example, where, in *R v Ellard*, 2009 SCC 27, the fact that the victim and the group of teens involved in beating and killing her, were almost all in the care of British Columbia's child and family services when the offence transpired, is a little known side-note to the case that is largely unmentioned.

36 Statistics Canada reports that acquittals are infrequent in youth court cases, accounting for slightly more than 1% of cases in 2014/2015 and this proportion has remained stable since data collection began in 1991/1992. Statistics Canada, *Youth crime in Canada, 2014*, by Mary K Allen & Tamy Superle, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 17 February 2016).

when they come before criminal courts, and when decisions are made about the conditions under which they are to be held in custody. As is discussed below, this discursive transformation of youth in care into criminals took place in the Ashley Smith case; it happened in the Abdoul Abdi case: it happens routinely every day.

In my PhD thesis, 2015 book,[37] and 2017 article,[38] I looked critically at the Ashley Smith case as an instance of public sense-making about a vulnerable, system-involved youth. I critically analyzed governmental work done by discursive figures of Smith produced in that case in official texts. This critical discourse analysis (CDA) of public texts, which revealed how sense was made of Ashley Smith in the official record, demonstrated how completely she was discursively configured in legal proceedings as a carceral subject: an inmate. Smith accumulated over 75 youth charges and hundreds of disciplinary infractions while in group care, and then in custody. Through bureaucratic processes of exclusion, she was deemed a risk to others and an impediment to the efficiency of the system. Because she was unruly and resistant, logics of risk and security intersected to code and label her, as "high risk" or high needs, and therefore, dangerous, and ultimately, a "maximum security" prisoner notwithstanding the fact she had never seriously harmed anyone but herself and her index offence, for which she entered custody, was throwing apples.

The widely publicized inquest into Smith's death at age 19 in Federal Corrections custody at Grand Valley prison, which ultimately ended in the shocking verdict of homicide, focused for jurisdictional reasons, on her time in adult prison only. The four to five years she had spent crossing over between group homes and correctional custody in New Brunswick's child welfare and youth justice systems through the machinations of hundreds of charges for disciplinary infractions was not part of the conversation at the inquest. However, as I argue in my book, it was not just the 11 months she spent in adult corrections, but at least as much those years and the hundreds of youth charges, that were crucial factors contributing to her death.

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37 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).

38 Rebecca M Bromwich, "Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies" (2017) 40:3 Man LJ 193, (last accessed 28 May 2019) online: 2017 CanLIIDocs 370, <www.canlii.org/t/2c50> [perma.cc/N76E-ZUFD].

I argued in my prior work, and reiterate now, that Smith's is a case fundamentally like those of many system-involved youth, and, but for its spectacular and tragic end in her 2007 death, captured on video, and later ruled in a 2013 inquest to be a homicide,[39] was representative of routine processes that affect "cross-over" youth. While Ashley Smith's case has been understood to be an instance of the abuse of solitary confinement, it is also an example of the criminalization of cross-over youth.

Similarly, I looked at the governmental work done by discursive figures of Abdoul Abdi, produced in criminal and immigration law discourses in my expert affidavit that was tendered as evidence by counsel for Mr. Abdi in that 2018 case.[40] Abdoul Abdi was a system involved or "cross-over" youth in Nova Scotia who had family ties to Somalia but had never lived there, having been taken to Canada as a child by refugee relatives. Early in his life, he became the subject of a child welfare apprehension. More specifically, Abdi was born in Saudi Arabia to a Somali mother, then spent four years in a refugee camp in Djibouti. He landed in Canada at the age of six with his sister and two aunts. A year later, at the age of seven, Abdi had been taken into child-protective services custody. He became a permanent ward of the state shortly thereafter. Although a Crown ward, Abdi was never adopted. Instead, he was shuffled between 31 placements while "in care," most of which were group homes. As is typical of the consequences to youths of living under the bureaucratic and formalized governance models prevalent it group care, it was in those group care settings that Abdi accumulated a youth criminal record. In consequence to this record, and to the child welfare authorities' egregious inaction with respect to regularizing Abdi's immigration status, the Canadian government sought to deport Abdi to Somalia, a country where he had lived only briefly as an infant.

However, these two youths had much in common. These two youths – Ashley Smith and Abdoul Abdi - had in common their child welfare system involvement. They were "cross-over" youth who became vulnerable to criminalization in different child welfare systems (New Brunswick and Nova Scotia) and faced different kinds of marginality by virtue of their different gender and race. Their stories did not end the same way: Ashley Smith died

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39 Ontario, Office of the Chief Coroner, *Coroner's Inquest Touching the Death of Ashley Smith,* by John Carlisle, (Toronto: OCC, December 13, 2013).

40 *Abdi v Canada (Public Safety and Emergency Preparedness),* 2018 FC 733, [2018] FCJ No 774.

in prison while Abdoul Abdi's appeal of the decision to deport him was ultimately successful. They were both vulnerable, precarious, system-involved youths who acquired criminal youth records the same *YCJA* context and faced, fundamentally, the same problem: a youth criminal record preceded their arrival at criminal and other legal proceedings, a discursive representation of them that produced dangerousness from a series of incidents that would have, but for their correctional and child welfare system involvement, not have been characterized the same way. Like Smith's death, and the threat to deport Abdi, the disproportionate over incarceration of system-involved youth is a predictable outcome of the intersection of logics of risk and security: it will recur unless interrupted. It will continue. In the governing logics in operation in child welfare-run settings, particularly group care, governing logics subject system involved youths to different, and often higher, levels of official scrutiny than other young people.

The formalized, bureaucratic models of governance prevalent in group care settings, whereby adolescents in care receive a series of warnings, and, often, are criminally sanctioned as a consequence of any physical violence or theft, results in the police involvement with youth in group care in ways they would not likely be involved in a family setting. It results in the production of records, coding, and classification of youths in ways that discursively construct them as dangerous. To a large extent, the form of bureaucratic surveillance to which youths in care, particularly group care, are subject, produces their criminalization.

Questions of admissibility of records, criminal, disciplinary, and otherwise, are important when the issue of how youths are labeled and constructed through the way they are talked about in the discourses of official child welfare and criminal records is considered. Records and other information about youths before the Court are difficult to obtain prior to a guilty verdict. The child welfare system and criminal justice system are, to a large extent, opaque to one another, at least until a finding of guilt has been made.

## IV. PARENTS, EVIDENCE LAW, AND THE *YCJA*

The *YCJA* supplements the *Criminal Code of Canada*,[41] the *Canada Evidence Act*,[42] and *Charter of Rights and Freedoms*.[43] Accordingly, under the *YCJA*, youths are entitled to the presumption of innocence and various protections afforded any criminal accused under evidence law. Like any adult accused, they are entitled to the right to remain silent, the right to know the reason for their detention or arrest. They have the right to retain legal counsel and to be secure against unreasonable search and seizure, as well as against arbitrary detention.[44]

In addition to the legal rights of adults, youths are provided additional procedural protections under the *YCJA*. Many of these protections centre on the access a youth is entitled to have to a parent or responsible adult, as guide, mentor, and practical advocate, through the criminal justice process. As an evidentiary protection, youths have the right to have an adult or parent present when being questioned by the police, as will be discussed below. In the following discussion, I argue that, to remedy problems with the over-criminalization and over-incarceration of cross-over youth, the *YCJA* should be reframed with this reality in mind. More specifically, I would suggest that a helpful place for this intervention to take place would be to amend the evidentiary protections provided under s. 146 of the *YCJA*.

Consultation with, and involvement of, parents is woven through the *YCJA* as a foundational idea. The Preamble to the *YCJA* recommends that the justice system should partner with the youths' families and communities to prevent youth crime by addressing its underlying causes, responding to the needs of young persons, and providing guidance and support. It is articulated in the Declaration of Principle of the *YCJA* that "measures taken against young persons who commit offences should...where appropriate, involve parents, [and] the extended family."[45] Notice to a parent is provided for under s. 26 of the *YCJA*. This section requires police to provide a Notice to the parent about a young person's first court appearance. Section 26(4) allows for another adult to be served with the notice if no parent is locatable.

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41 *Criminal Code*, RSC 1985, c C-46.

42 *Canada Evidence Act*, RSC 1985, c C-5.

43 *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

44 For general discussion, see e.g. Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law,* 3rd ed (Toronto: Irwin, 2009).

45 YCJA, *supra* note 13, s 3(1)(c)(iii)).

Provisions for consultation with parents are especially salient under the *YCJA* because acquittals are so rare, guilty pleas so frequent, and concerns have been raised about the extent to which the right to counsel afforded in the YCJA is meaningful, as it is infrequently exercised.[46] Section 146 of the *YCJA* is the provision dealing specifically with evidence under the *Act*. It expressly states that the rules of evidence as generally applicable in adult prosecutions apply in youth criminal justice court. It provides an "enhanced" protection for youths.[47] Section 146(2) provides additional protections to youths, specifically enumerating at sub (2)(c) that the young person must be given an opportunity to communicate with counsel and a parent. Evidentiary protections set forth under the *YCJA* specifically contemplate that a parent is an important practical advocate whose role is supplementary and additional to a lawyer: affording a young accused access to legal counsel does not suffice to address the role a parent provides in evidentiary protection.

The relevant portion of s. 146(2) of the *YCJA* sets out as follows:

> (c) The young person has, before the statement was made, been given a reasonable opportunity to consult
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> (i) with counsel; and
>
> (ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and
>
> (d) If the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

Evidence law under the *YCJA* therefore contemplates and provides for the protective and supportive role of an "appropriate adult" of the young

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46 See Michele Peterson-Badali et al, "Young People's Experience of the Canadian Youth Justice System: Interacting with Police and Legal Counsel" (1999) 17:4, Behav Sci & L 455–465. See also Michele Peterson-Badali et al, "Young People's Perceptions and Experiences of the Lawyer-Client Relationship" (2007) 49:3 Can J Corr 375–401.

47 Larry C Wilson, "Enhancing the Enhancements? Section 146 of the Youth Criminal Justice Act and the Supreme Court of Canada: A Comment on R. v. L. T.H." (2009) 40:2 Ottawa L Rev 267, (last accessed 28 May 2019) online: 2009 CanLIIDocs 59, <www.canlii.org/t/28fq> [perma.cc/WQD7-A8HH].

person's choosing, or, preferentially, a parent as a practical advocate in helping ensure rights protection.

Justice Rothstein, writing in *R v L.T.H.*, made clear that the protections afforded young persons in relation to their statements are significantly broader than those provided to adults under the *Charter*. He wrote:

> Unlike an adult, a young person must be advised of the right to silence. A young person must also be warned of the potential use of any statement made to a person in authority. He or she must be advised of the right to consult with counsel and a parent, and to have those persons present while a statement is made-If any of these requirements are not satisfied, the statement will automatically be inadmissible...In contrast, an adult only has to be informed of the reason for arrest and the right to retain counsel.[48]

In fairness, it is not clear from court records that parents in fact play active roles in youth criminal justice proceedings, nor is there good data available on what the outcomes of this involvement might be.[49] In the context of a strong emphasis (placed in s. 4 of the Act) on using less formal extrajudicial measures where possible, it may be that the impact of parental involvement is felt more often at the stage of police contact or arrest, and never becomes visible in Court. More research is warranted into how parental involvement factors in to *YCJA* processing.

In any event, the focus on parental involvement is obviously problematic for cross-over youth. Coupled with their vulnerability to being labeled as dangerous in ways disproportionate to their actual offending behaviour, cross-over youth are disadvantaged by operation of the *YCJA* because the legislation specifically contemplates, throughout, the involvement of parents. The ways in which parents are to be involved in the youth criminal justice process are not always clearly articulated, and may not be effectively realized even when youths are living in their families of origin.[50] Nonetheless, it is a basic assumption woven throughout the logic of the *YCJA* that parents will be involved as supportive guides and practical advocates for a youthful accused. This assumes that parental support is available. Such an assumption is not tenable in the context of the reality,

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48 *Ibid* at 277.

49 See Michele Peterson-Badali & Julia Broeking "Parents' involvement in youth justice proceedings: perspectives of youth and parents" (2004) *Report to the Department of Justice Canada,* online (pdf): <www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/pdf/sum-som.pdf> [perma.cc/S53T-7HJB].

50 See, generally: Michele Peterson-Badali & Julia Broeking, "Parents' Involvement in the Youth Justice System: Rhetoric and Reality" (2010) 52:1 Can J Corr 1.

discussed earlier in this paper, that for a very significant portion of the population of youthful accuseds, the disadvantages of life in child welfare care are compounded by a lack of access to meaningful parental involvement

Federal funding and legislative amendment providing for practical advocates to be made available to youth not able to access parental support might go some distance to alleviating the disproportionate criminalization of cross-over youth. It may be, as Bala et al recommended as one of a series of recommendation as to how to address the needs of cross-over youths, (including reducing the reliance on group care and increasing collaboration between systems) that the most effective remedy for evidentiary issues disadvantaging youths in care, because of their lack of a parent who can meaningfully engage in proceedings, would be to increase the advocacy role of child welfare workers.[51] This could involve a reframing of the role of child welfare workers in youth criminal justice proceedings and would likely necessitate new funding streams and jobs for care workers. I would argue that it would simultaneously make sense for the YCJA itself to contemplate provision for youths to access a practical advocate in addition to a lawyer, and for Federal funding to be deployed to make this possible.

A key issue for youth is to have their rights properly explained; providing access to a parent or person in authority is supposed to assist in that but where youth are "in care" this is often not meaningfully accessible. A greater obligation should be imposed on the provincial child welfare authorities to ensure an "appropriate adult" is made available. It may be that the budgetary capacity of child welfare needs to be increased in order to facilitate this. Additionally or alternatively, s. 146 should be amended to level the playing field between cross-over youth and youth situated in families. Directly concerning the Federal legislation, amendment to s. 146 to provide for court appointment of an "appropriate adult" that is analogous to the provision allowing for appointment of counsel under ss. 25(4) and (5), might be a beneficial change.

The presence of a parent as a practical advocate, assured under s. 146 of the *YCJA*, provides an opportunity for an adult to explain the processes of the court. A practical advocate can support the youth not just legally but emotionally and developmentally. Most significantly, a practical advocate can potentially interrupt the harsh, exclusionary operating logic of the way the youths are defined and described in discourse as carceral subjects.

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[51] Bala, de Filippis & Hunter, *supra* note 19 at 38.

Parents can, potentially, mobilize different constructions of their adolescent child in the conversation taking place in courtrooms and public debate about their children.

The issue of admissibility and evidence law generally are particularly salient when youths in care are considered especially because there are likely to be significant records about those youths, because their identities outside of those official discursive constructions are made unstable by their precarious status: at a minimum, they are more likely than youths living with their families of origin to have potentially prejudicial documentary evidence available about their pasts. Cross-over youths are thus especially vulnerable and in need of the protections of evidence law at the same time that those protections are not as meaningfully available to them.

## V. ANALYSIS AND RECOMMENDATIONS

This paper has suggested a theoretical lens, through the method of critical discourse analysis, to inform discussion of the well-established problem that youths in the care or under the supervision of the child welfare systems of Canada's provinces and territories disproportionately become involved with the criminal justice system, and, in appallingly large numbers, ultimately become incarcerated adults. It is clear that cross-over youth present distinctive and different needs that are clearly not yet well addressed by either the child welfare or youth criminal justice systems. The personal, social, and financial costs to be saved by changing the ways in which the system works with cross-over youth would be difficult to overestimate. Given that these youths make up about half, and perhaps more, of our youth corrections populations, and then comprise far more than their share of the adult correctional inmate population, the potential benefit of early interventions in the process of their criminalization is immense.

There is no single quick fix for the problem of over-criminalization of "cross-over youth" in the youth criminal justice and youth corrections system. The paper has explored how Canada's criminal justice and correctional systems are complex. It is a truly federal system, with the Federal criminal law doctrine interacting with thirteen provincial and territorial systems addressing procedural aspects of setting up courts, as well as providing their own youth criminal justice systems. Further, the provincial and territorial child and family services systems are not unified internally. Manitoba, for example, has 4 child and family service

'Authorities' which oversee 27 'agencies.' In Ontario, there are over 50 'Children's Aid Societies.' Provinces and territories also provide uneven funding for community supports to criminal justice. The system is complex indeed. Because they are complicated, these systems cannot be easily fixed with one quick solution. Further, because the social and psychological circumstances of system-involved youths are also complex, doctrinal law itself cannot be looked to as a single solution to the problem of over incarceration of cross-over youth.

Collaboration amongst systems and approaches that start in a position informed by the contribution of trauma to youths' lives and behaviours, are certainly part of the solution, as Bala and colleagues have contended:

> the challenges faced by cross-over youth are multi-faceted and dependent on the social and familial context of individual youth. However, there is a theme that emerges and affects all youth in navigating the two different systems: that is there is a problem of fragmentation and lack of integration.[52]

Certainly, we need systemic child welfare law reform in principle to support families in lieu of removing kids where possible, particularly where the protection concerns are directly linked to poverty or parental experiences of victimization. At a more local level, it could be useful to go upstream from the courts to where the charges come from. Legislative and regulatory change could be made to provincial and territorial child care regimes to provide alternative mechanisms and supports for dealing with adolescents' misbehaviour while in state care in lieu of quicker recourse to police involvement than would be present in a family home. Legislative provisions could be matched and mirrored with new supports and procedures within the child welfare systems to discourage and reduce the reliance of group homes and child welfare authorities on resorting to charging youths.[53]

To remedy delays in the criminal justice system, overburdened courts, and over-filled prisons, change should be made not only to the criminal law but to our provincial and territorial regimes for child protection. Under our

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52 *Ibid* at 2.

53 Section 6(1) of the *YCJA* requires police, before starting judicial proceedings, to consider whether it would be sufficient to take no further action, to administer a caution, or to refer a youth to an appropriate community agency or program. This means that, in the *YCJA*, as already written, Court should already be a last resort. Since warnings, cautions, and referrals are not formally tracked by most police services, it is largely unknown how often police do or do not use them, and in what circumstances.

Constitutional division of powers, these regimes are fragmented and subject to the will of varying and changing governments. Especially as consistent change to provincial and territorial child protection laws is neither forthcoming nor reasonably to be expected imminently, more coherent change could potentially, at least on an interim basis, be ushered in through new Federally-crafted and funded support in the *YCJA* for kids in care.

Collaborative solutions involving multiple systems across jurisdictions would be helpful towards remedying the problem of the over incarceration of cross-over youth, but Federal action is warranted and necessary to ensure meaningful action is consistently taken. A key difficulty with seeking to remedy the situation through provincial and territorial action is that this depends upon the will of a variety of governments across the country. Governments at the provincial and territorial level across the country are not necessarily *ad idem* in their views about child protection, or justice, and they are not invariably supportive of youth in care. Prevailing political agendas across the provinces often diverge. Systemic movements towards better supporting youths in, and aging out of, care, as well as a shift away from a focus on apprehensions in the first place do not seem to be reliably or consistently forthcoming.

Attempts towards systemic changes to child welfare are being made in several jurisdictions. In 2018, British Columbia introduced Bill 26, crafted to allow Indigenous communities a more meaningful role in ensuring children remain within their societies, and to recognize the importance of enabling Indigenous children to access, practice, and learn about, their culture.[54] In 2017, Ontario's then-government enacted a new *Child Youth and Family Services Act*[55] a statute that amended the province's child welfare regime to ensure better support for youths aging out of care, and to encourage and facilitate kinship placements in more circumstances, seeking to keep children out of foster care where possible. Similarly, in a positive Manitoba development, that province's child protection legislation was amended in 2018 in an effort seeking to ensure that children and youth could not be apprehended into state care on the basis of their family's poverty alone.[56] However, the same week that Manitoba amended its law,

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54 Bill 26, *Child, Family, and Community Service Amendment Act, 2018*, 3rd Sess, 41st Parl, BC, 2018 (assented to 31 May 2018), SBC 2018, c27.

55 *Child, Youth and Family Services Act*, SO 2017, c 14.

56 After the 2018 amendments to Manitoba's *The Child and Family Services Act*, SM 1985-86, c 8, direct consequences of poverty such as a child not having a coat or sufficient

and one year into the operation of Ontario's CYFSA a newly-elected and differently oriented Conservative Ontario Government signaled a radically different direction by announcing its intention to discontinue funding the Province's Office of the Provincial Advocate for Children and Youth. This Ontario office was intended to ensure young people have a voice about things that affect their lives. Subsequently, in spring 2019, the Ontario Provincial government reduced funding for child protection by $84.5 million dollars per year.[57] While the Ontario government has committed to transfer some of the functions of the Office of the Provincial Advocate to the Ombudsman of Ontario, that government's actions illustrate the vulnerability and complexity in seeking to address the needs of youth coming before the federally constituted youth criminal justice courts by relying on the changing whims of provincial governments.

In this article. I have contended that there are multiple strategies that, together, can be employed to improve the situation. More specifically, we need to facilitate collaboration across systems (health, child welfare, education, and justice, as well as others), as is sought to be done by the Cross-over Youth Project. We need to look beyond, and more specifically upstream from, evidentiary protections and trials to understand, deal with, reform, and improve, the functioning of the youth criminal justice system in Canada. If law reform is to be used to remedy the disproportionately high numbers of "cross-over" youth sentenced and held in custody in Canada.

The unique contribution of this paper, and therefore my specific addition to offer conversations about cross-over youth, is a theoretical postulation based on an analysis of the intersection of discourse with evidence law is a part of the problem presented by the "cradle-to-incarceration pipeline," and therefore can be part of the solution. This paper has argued that evidentiary protections available to adolescents under s. 146 of the *YCJA* and through the *Act* in general, are far less meaningfully available to youth "in care" than to youth situated in families because they

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food will not themselves be considered "neglect" as a basis for apprehension of a child. Interventions in circumstances where poverty is clearly the major concern for the family are now intended to be supportive of the family unit.

57 See Contenta, Sandro, "Ontario Government Slashes Funding to Children's Aid Societies" (22 May 2019) *The Toronto Star*. See also Marv Bernstein & Birgitte Granofsky, "Eliminating the Ontario Child Advocate's Office a mistake" *The Toronto Star* (19 November 2018), online: <www.thestar.com/opinion/contributors/2018/11/19/eliminating-the-ontario-child-advocates-office-a-mistake.html> [perma.cc/LX4K-3H29].

focus on affording parental and family support to adolescents, supports that youths who are wards of the relevant provincial or territorial child welfare authorities cannot access. At the same time, evidentiary protections are especially relevant to the circumstances of cross-over youth, in light of the ways that they are constructed in the official discourses of criminal youth records. Consequently, it has suggested that the *YCJA* could be reformed to provide alternatives should to the YCJA default to "parent."

In addition to specifically suggesting a re-evaluation and amendment of s. 146, my general recommendation is that, in much the same way as consultation with, and involvement of, parents, is woven through the *YCJA* as a foundational idea, the reality is that for a very significant portion of the population of youthful accuseds, disadvantaged social position is compounded by a lack of access to meaningful parental involvement. So, the *Act* should be reframed with this reality in mind. More specifically, I would suggest that a helpful place for this intervention to take place would be with reference to evidence law under s. 146 of the *YCJA*. The *YCJA* should not assume the presence of benevolent, involved parents in the lives of the youths subject to it. Rather, the *Act* should be reformed to take an approach to evidence that opens up possibilities for meaningful justice for those already disadvantaged by their removal from, or inability to access, or lack of experience with, the privilege of a family home.

## VI. CONCLUSION AND SUGGESTIONS FOR FURTHER RESEARCH

This paper has critically explored the disproportionate criminalization and incarceration rates of "cross-over" youth. It has looked at how adolescents who are "system involved" through the child welfare systems, either in foster care or under child welfare supervision across Canada's provincial and territorial jurisdictions, are facing dire life chances, in terms of health, education, and career prospects, and are disproportionately also enmeshed in youth criminal justice proceedings. It has looked at how virtually all have grown up in poverty; many are racialized or Indigenous; all are marginalized.

This article critically considers trauma-informed perspectives on why cross-over youth are so often criminalized, taking into account their psychological and social challenges in child welfare settings, honing in on the particular disadvantages system-involved or "cross-over" youths face

when dealt with under the YCJA. I have argued that a significant portion of this over criminalization can be explained through a new, theoretically engaged understanding of the intersection of how dangerousness and criminality are constructed in official discourses for cross-over youths with *YCJA* evidence law. I have argued that *YCJA* evidence law compounds the disadvantages of cross-over youth, who are already socially excluded, setting them up for disproportionate criminalization and incarceration. Both with respect to their statements and to documentary records about them, cross-over youth are vulnerable under Criminal Evidence law in ways that youths who reside in their families of origin are less likely to be.

This article has contended that early interventions preventing apprehensions in the first place should be promoted. It also suggests ways in which this "cross-over" or "cradle-to-incarceration pipeline" can be addressed through criminal law. I specifically suggest changes to evidence law under the *YCJA* that should be combined with shifts to provincial and territorial child welfare law and policy. We need to counter explicit and implicit assumptions -running throughout youth criminal justice processes and protections – that a youth before the Court will be able to draw upon parental support.

Certainly, further research should be conducted into how the over-incarceration of cross-over youth relates with doctrinal evidence law. Research should be conducted into to what extent the disadvantage cross-over youth face under s. 146 of the *YCJA* might render the provision unconstitutional under s. 15(1) of the *Charter* as family status discrimination. Further, critical discourse analysis of a larger number of cases relating to cross-over youth that unpacks ways in which their criminal records and child welfare records are dealt with by Courts would be useful to test the theoretical position I have taken about how they are routinely configured in discourse. Finally, especially since Ontario's Cross-over Youth Evaluation Project[58] is a quantitative, mixed-methods study, and since it is

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[58] I am involved with a team of researchers in conducting a formative and summative evaluation of the Cross-Over Youth Project (COYP). Brian Scully & Judy Finlay, Cross-over youth: Care to custody, Report completed on behalf of the Cross-over Youth Committee (Toronto, 2015), online (pdf): <docplayer.net/64549375-Cross-over-youth-care-to-custody.html> [perma.cc/8TXK-E68A]. The COYP an innovative, four-year, community-based demonstration program in Ontario. (Toronto, Belleville, Thunder Bay and Chatham) The COYP aims to address the systemic factors that contribute both to the high rate of youth transitioning from one system into the other and to the poor outcomes they experience, compared to their non-child welfare

struggling to gain access to the youths who participated, the situation calls for new research using grassroots, qualitative, applied research methods that involve collaboration with youths to support the inclusion of their own views and voices in policy conversations about what should be done to address their circumstances.

counterparts. Addressing systemic factors is expected to reduce the number of youth in the child welfare system who cross-over into the youth justice system and to improve their outcomes by enhancing justice and child welfare system responses. The COYP seeks to facilitate the communication and co-ordination between the two parts of the justice system and allow youth involved in the two systems to have representation that is more effective than current practice. Working with Principal Investigator Dr. David Day, a Ryerson University psychologist, and funded by the Law Foundation of Ontario, we are assessing the Toronto site's effectiveness.

# Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications

ALANAH JOSEY*

## ABSTRACT

This paper explores the tension between Canada's three evidence law goals, the search for truth, the protection of constitutional rights, and the proper administration of justice, by reference to the utilitarian philosophy and jurisprudential theory of Jeremy Bentham. At first glance, Bentham's theory and Canadian evidence law appear incompatible. Bentham's system of evidence is concerned primarily with the search for truth and the rectitude of decision. In this system, all relevant evidence is presumptively admissible. The exclusion of relevant evidence is contrary to the greatest good for the greatest number because exclusion frustrates the search for truth and risks false acquittals. Evidence can only be excluded from trial when exclusion is necessary to avoid a preponderant injustice, such as delay, expense, or vexation. The Canadian approach to the admission of evidence is less inclusionary. While all relevant evidence is presumptively admissible under Canadian law, the Canadian evidence system contains categorical exclusionary rules, Canadian trial judges possess the residual discretion to exclude evidence, and illegally obtained evidence may be excluded from trial pursuant to the *Charter*. This approach is justified on the grounds that the search for truth must be fair, constitutional, and consistent with the proper administration of justice.

This paper uses the example of the contemporary mistrial application to establish that Bentham's theory and Canadian law can be reconciled. While a successful mistrial application will bring an immediate end to the

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search for truth, Canadian law recognizes that the mistrial remedy may be necessary to avoid a greater injustice. Analysis of the mistrial application and Canadian evidence law goals from a Benthamite perspective demonstrates that Bentham's system of evidence and Canadian evidence law are reconcilable because the philosophy which underlies them is the same.

***Keywords***: evidence law; Jeremy Bentham; utilitarianism; admissibility; exclusion; search for truth; disclosure; full answer and defence; mistrial; section 24(2) *Charter*

## I. INTRODUCTION

Few legal scholars have impacted Canadian evidence law as profoundly as Jeremy Bentham. Bentham's principle that all relevant evidence is presumptively admissible is a fundamental tenet of the law of evidence. Under Canadian law, evidence must meet two basic requirements to be received at trial. First, it must be admissible in that the evidence is both relevant and not subject to an exclusionary rule. Second, the trial judge must not exercise their discretion to exclude the evidence on the grounds that its probative value is overborne by its prejudicial effect.[1] This analysis must always begin with the question of relevance. For Bentham, however, the analysis ultimately begins and ends with relevance. Bentham maintained that there is but "one mode of searching out the truth:...see everything that is to be seen; hear every body who is likely to know any thing about the matter."[2] The search for truth mandates that the grounds on which relevant evidence is properly excluded from trial are narrow and limited. Bentham ardently rejected categorical exclusionary rules such as the privilege against self-incrimination and the incapacity of certain witnesses to testify, considering these rules to be a "frequent source of impunity and encouragement of crime."[3] For Bentham, the truth-seeking function of the

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1 Sidney N Lederman, Alan W Bryant, & Michelle K Fuerst, *Law of Evidence,* 4th edition (Markham: LexisNexis Canada Inc, 2014) at 51.

2 Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 5 (London: Hunt and Clarke, 1827) at 743 [*Rationale* vol 5].

3 Jeremy Bentham, *A Treatise on Judicial Evidence: Extracted from the Manuscripts of Jeremy Bentham*, ed by Etienne Dumont (London: J W Paget, 1825) at 240 [*Treatise on Judicial Evidence*].

law is paramount and this requires a low threshold for admissibility.[4] So long as the evidence in question is relevant, Bentham says let it in.[5]

While historically influential, Bentham's radical inclusionary approach to the admissibility of evidence does not appear to reflect the current Canadian approach. It is now accepted that the goal of evidence law is threefold: to facilitate the search for truth, to maintain fairness to the accused, and to preserve the integrity of the justice system.[6] Section 24(2) of the *Canadian Charter of Rights and Freedoms*[7] [hereinafter "*Charter*"] provides that a court of competent jurisdiction may exclude illegally obtained evidence if its admission would bring the administration of justice into disrepute.[8] The search for truth must sometimes yield to countervailing principles which mandate the exclusion of relevant evidence.

The tension between the three competing evidence law goals has its ultimate and most significant expression in the mistrial remedy. A successful mistrial application will bring an immediate end to the search for truth by depriving the trier of fact of not only one singular piece of evidence, but of the case in its entirety. This paper will explore the tension between Canadian evidence law goals through a discussion of Bentham's jurisprudential theory and the contemporary mistrial application on the grounds of late Crown disclosure and the s. 7 *Charter* right to full answer and defence. Specifically, this paper will examine Bentham's utilitarian philosophy, his system of evidence, the contemporary mistrial application, and the utilitarian nature of Canadian evidence law goals. While Bentham's inclusionary approach to evidence appears to conflict with the Canadian approach, analysis of Bentham's theory and of the contemporary mistrial application demonstrates that Bentham and Canadian evidence law can be reconciled.

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4 *Rationale* vol 5, *supra* note 2 at 303.

5 Jeremy Bentham, *Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 4 (London: Hunt and Clarke, 1827) at 482 [*Rationale* vol 4].

6 Lederman, Bryant & Fuerst, *supra* note 1 at 12-14.

7 *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*].

8 *Ibid*, s 24(2).

## II. PROBLEMS WITH ENGLISH EVIDENCE LAW: BENTHAM'S PERSPECTIVE

In order to explore the tension between competing evidence law goals from a Benthamite perspective, it is important to understand the legal context in which Bentham operated. Jeremy Bentham was born in London, England in 1748.[9] He completed much of his legal scholarship in the first decades of the nineteenth century, well before the creation of a regular police force.[10] At this time, evidence law was relatively new, highly fragmented, and full of exceptions. It was not a principled and consistent system of legislation and case law, but rather a product of *ad hoc* and often arbitrary judicial decision-making.[11] By the mid-nineteenth century, over 200 crimes were capital offences. As a result, juries were often reluctant to convict, and judges interpreted the law legalistically and developed categorical exclusionary rules to protect the accused from the severity of the substantive law.[12]

Bentham was one of the first scholars in English legal history to analyze the rules of evidence by reference to philosophy and logic.[13] He called English evidence law the 'technical fee-gathering system' whose obscure rules and formalities were repugnant to the ends of justice.[14] Evidence rules existed almost exclusively at common law, yet judges were not accountable for the decisions they rendered.[15] Bentham argued that judges and lawyers used their stations to produce expense and delay in legal proceedings in order to make better business for themselves. The augmentation of profit constituted the goal of the technical fee-gathering system, while diminution and resolution of crime was only a collateral concern.[16] For Bentham, this system was problematic because it was set up to further the financial and personal interests of a small professional class, rather than to further the

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9 Silas Porter, *Jeremy Bentham* (1899) 7 Am Law 146 at 146.

10 William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford: Stanford UP, 1985) at 2, 18.

11 *Ibid* at 2, 21.

12 *Ibid* at 21.

13 *Ibid* at 22.

14 *Rationale* vol 4, *supra* note 5 at 8.

15 *Ibid* at 5, 7.

16 *Ibid* at 16-19.

interests of society as a whole.[17] This point speaks both to Bentham's philosophy and to his solution to the technical fee-gathering system.

## III. The Principle Of Utility

In terms of Bentham's philosophy, he is first and foremost a utilitarian. Bentham maintained that man is governed by pain and pleasure, two sovereign masters which underlie the principle of utility. That principle dictates that all action and thought, as well as the extent to which action and thought are morally correct, are determined according to the desire to increase pleasure and to avoid pain.[18] In other words, the principle of utility approves or disapproves of every action according to its tendency to promote pleasure, good, and benefit, or to diminish pain, evil, and mischief.[19] Actions which result in the correct balance of pleasure and pain give rise to happiness, the ultimate end of utility. This understanding of happiness is not troubled by the mind-body dichotomy because pleasure is not limited to the physical. To achieve happiness, man must secure the optimal balance of pain and pleasure which may require foregoing immediate bodily gratification in order to obtain some later, greater benefit. While the drive to seek pleasure and to avoid pain is natural, for Bentham, it is importantly rational.[20]

Thus, the principle of utility is not solely concerned with the bodily or the immaterial: man has both a mind and a body, and the needs of each must be reconciled to the extent of their conflict in order to attain happiness. In a similar vein, man is not simply a natural being, but a civilized one. He is part of the original contract of society which provides that the community must guard the rights and interests of each individual who must in turn submit to the will of the collective.[21] This relates directly to the principle of utility. Bentham argued that an individual's action comports

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17 Twinning, *supra* note 10 at 41.

18 Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Kitchener: Batoche Books, 1999) at 14 [Principles of Morals].

19 *Ibid* at 14-15.

20 *Principles of Morals*, *supra* note 18 at 14: "The principle of utility recognizes this subjection [of man to pleasure and pain], and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law."

21 Jeremy Bentham, *A Fragment on Government*, ed by F C Montague (Oxford: Clarendon Press, 1891) at 132 [*Fragment on Government*].

with utility when its tendency to augment the happiness of the community is greater than its tendency to diminish collective happiness.[22] Insofar as happiness is the end of utility, happiness is maximized when it arises from and inheres in society as a whole in accordance with its collective will. Utility in its ultimate and most complete expression therefore lies in the greatest happiness for the greatest number. However, Bentham warned that it is "vain to talk of the interest of the community, without understanding what is the interest of the individual."[23] Just as man is comprised of both body and mind, society consists of the sum of its parts. The respective interests of each part must be reconciled. Man loses neither his agency nor his interests or rights after entering into the social contract, and so the pains and pleasures of each man must be weighed and balanced to give effect to the happiness of the whole. This means that the immediate interests of the few must be neglected if their fulfillment would give rise to disproportionately greater pain for the collective. The greatest happiness for the greatest number is only possible where the pains and pleasures of all citizens can be optimally balanced.

The principle of utility underlies not only Bentham's philosophy, but his jurisprudential theory as well. He maintained that substantive law constitutes the creation of legal rights and obligations, where the former comprehends "all that is good and agreeable, everything that belongs to enjoyment and security," while the latter comprehends "all that is painful and burdensome, everything that produces constraint and privation."[24] For Bentham, it is the object of the substantive law to produce the happiness of the greatest possible number in the highest possible degree.[25] In the case of criminal law specifically, happiness is linked directly to the protection of society.[26] Where the application of substantive law is incapable of achieving this goal, the substantive law is repugnant to justice. Procedural law, including the law of evidence, accords with the principle of utility only to the extent that it facilitates the proper execution of the substantive law. For Bentham, this means that procedural rules must have reference to one of four ends: rectitude of decision, celerity, cheapness, or freedom from

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22 *Principles of Morals, supra* note 18 at 15.

23 *Ibid.*

24 *Treatise on Judicial Evidence, supra* note 3 at 1.

25 *Ibid.*

26 *Ibid* at 244.

unnecessary impediments.[27] Where procedural rules obstruct the proper execution of the substantive law by hindering the correct decision or by causing expense or delay, those rules are false, repugnant to justice, and therefore inconsistent with utility.

The principle of utility establishes that the technical fee-gathering system is repugnant to justice. The *ad hoc* development of exclusionary rules designed both to shield the accused from the substantive law and to create delay and expense in favour of judges and lawyers is directly counter to the principle of utility. The technical fee-gathering system represents the very antithesis of the greatest happiness for the greatest number. As a solution, Bentham proposed a system of evidence law grounded firmly in utilitarianism and based on two fundamental principles: the law of evidence must originate in legislation, and the threshold for the admissibility of evidence is relevance.

## IV. Utilitarian Solution To The Technical Fee-Gathering System

### A. The Enactment of an Evidence Code

For Bentham, a major concern with English common law exclusionary rules resided in their ostensible inconsistency with the will of the collective. As mentioned above, the social contract is constituted where men unite for the sake of convenience and protection, and agree in return to submit to a collective, uniform will. The responsibility of representing the collective will inheres in government, and it is both the right and the duty of that authority to make laws.[28] Insofar as legitimate government is the mouthpiece of the citizens, legislation is an expression of the collective will. On this basis, judge-made evidence law constitutes a usurpation of exclusive legislative authority.[29] For Bentham, the power of the legislature is paramount, and all other institutions should be curtailed and controlled. The proper role of the judiciary is to act as the cooperative agent of the legislature; judges are not to make the law, but to implement it in accordance with the collective will as expressed by statute.[30]

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27 *Ibid* at 1-3.

28 *Fragment on Government*, *supra* note 21 at 201.

29 *Rationale* vol 5, *supra* note 2 at 741.

30 Twining, *supra* note 10 at 24-25.

Thus, to be fully consistent with utility, both substantive and procedural law must originate in legislation as a manifestation of the collective will. This would remedy the severity of the English criminal law as well as limit the ability of lawyers and judges to develop false evidence rules for their own personal benefit. Bentham was adamant that the lenient administration of severe law must be replaced with strict enforcement of less stringent legislation.[31] However, to state that Bentham favoured an evidence code containing bright-line rules for the reception of evidence is to misrepresent him fundamentally. Bentham abhorred categorical exclusionary rules not simply because they are judge-made, but also because overly formal rules are inherently repugnant to justice. For example, Bentham maintained that "the path of precedent is the path of constant error...the decision pronounced will be almost always wrong and mischievous."[32] Categorical rules and precedent which dictate preordained legal outcomes are too rigid to accord with utility.

To ensure that procedural law is capable of fulfilling its objective, Bentham called for the abolition of common law evidence rules and for the enactment of flexible guidelines to govern the reception of evidence at trial. Rather than imposing binding rules, Bentham argued that the legislature should provide instructions of a general nature to trial judges for the resolution of evidentiary issues on a case-by-case basis.[33] Bentham stated that:

> [I]t is incumbent on legislative authority to leave, or rather to place, in the hands of the judicial, such a latitude of discretionary power, as shall enable it to form the estimate on both sides, and thence to draw the balance in each individual instance, on the occasion of each individual suit.[34]

Bentham perceived a risk in providing judges with too much discretion to determine the admissibility of evidence in individual cases. The English common law of evidence was itself a testament to the abuses attendant on broad judicial authority to admit or to exclude evidence. However, Bentham distinguished between arbitrary abuses of power and judicial discretion properly exercised, stating that the real danger lies in powers which judges "usurp in opposition rather than those which they receive from the law and

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31 *Ibid* at 21.

32 *Rationale* vol 4, *supra* note 5 at 513.

33 Twining, *supra* note 10 at 34.

34 *Rationale* vol 4, *supra* note 5 at 512.

which they can exercise under the eyes of the public."[35] So long as judicial discretion is delegated by the legislature and exercised to fulfil the objective of the substantive law, that discretion accords with utility. Thus, the first matter to which the legislature must attend in terms of enacting an evidence code is to furnish judges with the requisite discretion to consider evidentiary issues according to the facts of each individual case.

Bentham conceived of this evidence code not as the beginning of a new system of procedure, but as a return to a natural system. For Bentham, the proper system of evidence law is not some unachievable utopian ideal of what evidence law should be. He noted that much of his proposed system existed independently from his own pen and paper, directly within "every man's observation and experience: within the range of every man's view; within the circle of every private man's family."[36] Bentham conceived of his system of evidence as a reflection of the domestic model of adjudication. Similar to the judge, the patriarch regulates and decides the disputes which arise between his family members.[37] To do so, the patriarch must hear evidence, but he pays no regard to rules and formalities respecting admissibility. For example, the privilege against self-incrimination has no place in this system. The silence of a child who is suspected of wrongdoing is tantamount to a confession; if he were innocent, he would naturally be inclined to offer relevant facts and information so as to establish his innocence.[38] The patriarch understands that allowing the child to remain silent and declining to treat his silence as evidence against him will yield an unreasonable decision as to the child's guilt. For Bentham, this logic clearly extends to the criminal justice system. Reason dictates that guilt is the only inference which can be drawn from the accused's silence. Both the domestic model of adjudication and Bentham's system of procedure are based on utility, empiricism, and common-sense reasoning.[39] In order to arrive at the correct decision, the decision-maker must be provided with all relevant evidence on the matter to find out the truth. If there is to be one rule in Bentham's natural system of procedure, other than the proposition that

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35 *Treatise on Judicial Evidence, supra* note 3 at 237.

36 *Rationale* vol 5, *supra* note 2 at 740.

37 *Treatise on Judicial Evidence, supra* note 3 at 6.

38 Jeremy Bentham, Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham, Vol 3 (London: Hunt and Clarke, 1827) at 85-86 [Rationale vol 3].

39 Twining, supra note 10 at 3.

there are to be no rules at all, it is a rule which provides that all relevant evidence is presumptively admissible.

## B. Relevance: The Threshold of Admissibility

The maxim that all relevant evidence is presumptively admissible is the crux of the system of procedure for which Bentham advocated. Bentham maintained that relevant evidence should not be excluded from consideration at trial because evidence is the basis of justice; to exclude evidence is to exclude justice itself.[40] The presiding judge or jury must be presented with all relevant information in order to arrive at a correct decision. When evidence is excluded from trial, the rectitude of decision is put at risk because the likelihood of a false decision increases substantially. Excluding evidence may render a conviction impossible even where a conviction is the correct outcome in fact.

For Bentham, the inherent risk of false acquittals demonstrates that exclusionary rules ultimately provide a license for the commission of crime. This is contrary to the principle of utility insofar as the goal of the substantive criminal law is to protect society. The technical fee-gathering system categorically excluded the testimony of women and children, although a woman's testimony could be heard if it was corroborated by another person.[41] Bentham asserted that excluding whole classes of witnesses amounts to allowing "every species of transgression in the presence of a witness of this class…[and] to require two witnesses for conviction is to allow every species of transgression in the presence of only one."[42] Exclusionary rules are therefore repugnant to justice because they frustrate rather than facilitate the proper execution of the substantive criminal law. This renders the substantive criminal law incapable of fulfilling its mandate to protect society whenever exclusionary rules apply.

Like Bentham's philosophy, his system of procedure is both rationalist and utilitarian. Justice for Bentham hinges on the rectitude of decision. A decision is only just to the extent that it is factually correct and therefore true. If exclusion of evidence perverts the rectitude of decision, a rule which mandates exclusion is a false rule. From a utilitarian perspective, evidence

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40 Jeremy Bentham, Rationale of Judicial Evidence: Specifically applied to English Practice: from the manuscripts of Jeremy Bentham, Vol 1 (London: Hunt and Clarke, 1827) at 1 [Rationale vol 1]; Rationale vol 4, supra note 5 at 490.

41 *Treatise on Judicial Evidence, supra* note 3 at 228.

42 *Ibid.*

which is relevant to the issues to be decided at trial must be admitted so as to give effect to the substantive criminal law and its mandate. Only then is the greatest happiness for the greatest number possible. As a general rule, reason and utility demand that all of the available evidence relating to a case be admitted at trial. However, insofar as formal and rigid rules are inconsistent with utility, that rule must be sufficiently flexible. Bentham acknowledged that even relevant evidence may be properly excluded from trial when its admission would give rise to preponderant inconvenience which outweighs the benefits provided by its admission.[43] Exclusion is always an evil because it is contrary to the rectitude of decision and the search for truth, but it may constitute an evil that is inferior to another evil which should be avoided for the sake of utility.[44] If the mischief arising from the admission of evidence outweighs the injustice caused by a lack of evidence, the evidence in question should be excluded.[45]

## C. When Relevant Evidence is Properly Excluded

Bentham recommended a number of guidelines on exclusion to include in an evidence code. First and foremost, exclusion is always proper when the evidence is irrelevant or superfluous.[46] The admission of such evidence provides no benefit because it cannot facilitate the search for truth and only misleads or distracts. Thus, nothing is lost by its exclusion while time and expense are saved.[47] Where the proffered evidence is relevant to an issue to be decided at trial, it should only be excluded where its admission causes preponderant delay, expense, or vexation. The injustice which arises from any one of those three grounds must be sufficiently prejudicial so as to outweigh the risk of a false decision.[48]

Where delay is the evil to be avoided, Bentham noted that the presiding judge should consider whether evidence which has not yet been delivered is forthcoming such that it will be available for admission at trial within a reasonable amount of time. If the evidence is important to the accused's case, the presiding judge should endeavor to wait for its delivery.[49] On the

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43 *Rationale* vol 4, *supra* note 5 at 482.

44 *Treatise on Judicial Evidence*, *supra* note 3 at 229.

45 *Rationale* vol 1, *supra* note 40 at 31.

46 *Treatise on Judicial Evidence*, *supra* note 3 at 230.

47 *Rationale* vol 4, *supra* note 5 at 571-572.

48 *Ibid* at 482.

49 *Ibid* at 568.

other hand, if delay will cause other pieces of evidence to be lost or put beyond the reach of the court in the interim, the forthcoming evidence should be excluded so that the trial may proceed. This is especially important where the evidence which stands to be lost is essential to an issue to be decided.[50]

Expense will justify exclusion in two cases only: (1) where the expense attendant on the delivery of evidence is not defrayed by the proffering party, but must fall without compensation on some third person, or (2) where the expense falls upon the defendant but the expense associated with delivery is "too great to be defensible on the score of punishment."[51] Expense is a narrow ground for exclusion because the mischief it causes may be easily remedied where the party who proffers the evidence takes the expense of its delivery upon themselves.[52] Thus, evidence should generally be admitted where the proffering party is able to pay for any of the associated costs.

The third ground for exclusion, vexation, constitutes "useless fatigue and trouble which may be inflicted on different persons...who may occasionally be called to take active part in the judicial investigation."[53] In terms of the vexation inflicted on the presiding judge or jury, evidence is properly excluded where it could produce hesitation or perplexity because this risks a false decision.[54] Evidence should also be excluded where its admission is prejudicial to the public interest or the interests of individuals who have no connection with the case, although this guideline is relaxed if the evidence is absolutely necessary to the case.[55] In terms of vexation inflicted on witnesses, minor inconveniences such as embarrassment are insufficient to warrant the exclusion of a witness' testimony.[56] Even major inconveniences, such as testimony which incriminates the declarant or subjects them to a legal obligation will generally not constitute grounds for exclusion. In the case of legal obligations, Bentham maintained that the vexation inflicted on the witness is more than counterbalanced by the good that flows from the fulfilment of the substantive law which imposed the obligation.[57] While the presiding judge should be wary of testimony which

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50 *Ibid* at 552, 555.

51 *Rationale* vol 4, *supra* note 5 at 543.

52 *Ibid* at 544.

53 *Treatise on Judicial Evidence*, *supra* note 3 at 232.

54 *Ibid.*

55 *Ibid* at 234.

56 *Ibid* at 233.

57 *Rationale* vol 4, *supra* note 5 at 488.

incriminates the witness, the testimony may be admitted if it is necessary to the case. This is because the eventual condemnation of a criminal is directly within the purview of the law, and penal condemnation produces far more good than evil.[58] It seems that the inconvenience of travel constitutes one of the only types of vexation which readily warrants the exclusion of a witness' testimony. This is because the injustice caused by exclusion may be easily remedied by the delivery of affidavit evidence so that nothing is lost by the absence of *viva voce* evidence.[59]

Bentham's recommendations for the proper exclusion of evidence ultimately amount to a balancing test. Just as man must attempt to balance pleasurable and painful actions, the presiding judge must attempt to strike a balance between the inconveniences and advantages attendant on both admission and exclusion.[60] Where the balance lies depends entirely on the facts of the case. This exercise is similar in nature to the residual discretion of a trial judge at common law in Canada to exclude evidence where its probative value is outweighed by its prejudicial effect. Bentham's balancing test is also similar to the test adopted by the Supreme Court of Canada in *R v Grant*[61] [hereinafter "*Grant*"] for excluding illegally obtained evidence under s. 24(2) of the *Charter*. Both of these balancing tests consider the public interest, prejudice, and necessity, where the latter constitutes the importance of the evidence to a determination of the case on its merits. An important difference between Bentham's test and the *Grant* test lies in the focus of the prejudice in question. The *Grant* test is concerned with the severity of the breach of the accused's rights, while Bentham's test is concerned with the vexation that the admission of evidence may inflict on the judge, jury, or witness.[62] Given Bentham's position on the vexation which arises from subjecting a witness or the accused to legal obligations or self-incrimination, he may not support the exclusion of evidence under s. 24(2) of the *Charter*. Bentham is largely unsympathetic to those who have committed wrongdoing because their breaches of the substantive law are contrary to the principle of utility, while conviction, punishment, and deterrence are aimed at protecting society which accords with utility. For Bentham, the vexation caused by a breach of a criminal offender's rights

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58 *Treatise on Judicial Evidence*, *supra* note 3 at 234.

59 *Ibid* at 233.

60 *Ibid* at 229.

61 *R v Grant*, 2009 SCC 32 [*Grant*].

62 *Ibid* at paras 70, 76, 79, 83.

would be counterbalanced by a conviction because this enhances the greatest happiness of the greatest number.

However, this does not necessarily mean that the principles contained in Bentham's system are irrelevant in contemporary times. As discussed above, Bentham maintained that the judicial discretion to exclude evidence is consistent with utility when that power is delegated from government. From a utilitarian perspective, Canada's Constitution represents the will of the collective which has chosen to recognize certain rights as fundamental. Affirming those rights accords with utility because, following the enactment of the *Charter*, substantive and procedural law are not exclusively concerned with the rectitude of decision and the protection of society. Together, the three goals of Canadian evidence law provide that the purpose of the law of evidence "is to promote the search for truth in a fair and constitutional manner."[63] Bentham acknowledged that the search for truth and the rectitude of decision might have to be sacrificed at times to avoid a greater injustice. Given the flexibility of Bentham's system and the utilitarian nature of Canadian evidence law, Bentham's system and Canadian law can be reconciled.

The remainder of this paper is dedicated to exploring the tension between Canadian evidence law goals from a Benthamite perspective. The analogy between Bentham's system of procedure and s. 24(2) of the *Charter* will not be pursued further. Bentham's jurisprudential theory on the exclusion of evidence mirrors more closely the contemporary mistrial application under s. 24(1) of the *Charter*. While Bentham's test for exclusion is flexible, the threshold is far more stringent than the *Grant* test. Bentham maintained that even if exclusion is justified based on delay, expense, or vexation, the presiding judge must find that all milder remedies are insufficient to cure the prejudice in question before the evidence may be properly excluded.[64] Bentham viewed the exclusion of evidence as wholly destructive to the search for truth and the rectitude of decision. Similarly, the contemporary mistrial application constitutes an abrupt and an

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63 David Tanovich, "*R v Hart:* A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 CR (7th) 298 at 298.

64 *Rationale* vol 4, *supra* note 5 at 594. For example, the testimony of a witness who must travel long distances may be excluded so long as affidavit evidence can be tendered (see *Treatise on Judicial Evidence*, *supra* note 3 at 233). The inconvenience arising from delay caused by forthcoming evidence can be remedied by granting the accused bail (see *Rationale* vol 4, *supra* note 5 at 571).

immediate end to the search for truth which prevents the case from being tried on its merits. An analysis of the contemporary mistrial application on the grounds of late Crown disclosure will demonstrate that Canadian evidence law is philosophically consistent with Bentham's jurisprudential theory.

## V. Mistrial Applications: The Duty To Disclose And The Right To Full Answer And Defence

The importance that the *Charter* gives to the accused's rights and to the integrity of the justice system has had significant implications for the law of evidence. In *R v Stinchcombe*[65] [hereinafter "*Stinchcombe*"], the Supreme Court of Canada formally recognized the duty of the Crown to disclose to the accused all relevant, non-privileged evidence within its control. Information is relevant and subject to disclosure if it could reasonably be used by the accused to meet the Crown's case, to advance a defense, or otherwise to make a tactical decision which might affect the way in which the defence is conducted.[66] Evidence which meets the *Stinchcombe* standard must be disclosed regardless of whether it is inculpatory or exculpatory, even if the Crown does not intend to call the evidence at trial.[67] Unlike the privilege against self-incrimination, which may be seen as benefiting the accused while frustrating the search for truth, the Crown's duty to disclose safeguards both the accused's rights and the proper administration of justice in addition to facilitating the search for truth. Pre-trial disclosure ensures that the case can be adjudicated on its merits. It saves time and resources because both the Crown and the defence will be prepared to address the relevant issues. This prevents the need for adjournment and increases the number of guilty pleas, withdrawal of charges, and waiver of preliminary inquiries.[68] Crown disclosure also supports the accused's s. 7 *Charter* right to make full answer and defence which constitutes a pillar of criminal justice because it helps to ensure that the innocent are not convicted.[69]

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65 *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CarswellAlta 192 [*Stinchcombe* cited to CarswellAlta].

66 *R v Egger* [1993] 2 SCR 451, 141 AR 81 at para 20.

67 *Stinchcombe*, *supra* note 65 at paras 29-33.

68 *Ibid* at paras 10, 13.

69 *Ibid* at para 17.

Insofar as the Crown's duty to disclose is capable of satisfying all three evidence law goals, Crown disclosure accords with the principle of utility because it gives rise to the greatest happiness of the greatest number. When the Crown fails to disclose evidence that meets the *Stinchcombe* standard, the search for truth, the proper administration of justice, and the accused's rights are all negatively affected. For example, if the Crown withholds exculpatory evidence, the accused's ability to make full answer and defence may be greatly frustrated. The integrity of the justice system is tarnished by the lack of trial fairness, and the case cannot be tried on its merits which risks a false decision. Non-disclosure by the Crown is therefore repugnant to justice and to utility. The implications of Crown disclosure for the three evidence law goals becomes more complicated when the Crown withholds pre-trial disclosure from the accused or discovers new evidence and then calls that evidence at trial. The court in *Stinchcombe* found that disclosure should occur before the accused is called upon to elect the trial mode or to plead as these are crucial steps in the criminal trial process which impact upon the accused's rights.[70] Discovering the strengths and weaknesses of the Crown's case through timely disclosure allows the accused to exercise their rights in a meaningful way. While late disclosure ensures that the case is tried on its merits, it forces the accused to develop new strategies and tactics *ad hoc* during the course of the trial. In other words, while late Crown disclosure still facilitates the search for truth, it may hinder trial fairness and the accused's ability to make full answer and defence.

The tension between the goals of evidence law which is occasioned by late Crown disclosure can be settled by the provision of a remedy pursuant to s. 24(1) of the *Charter*. Section 24(1) provides that anyone whose *Charter* rights 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."[71] Similar to the exclusion of evidence in Bentham's system of evidence, a remedy that is properly granted under s. 24(1) will be discretionary and rendered on a case-by-case basis. When an appellate court is called upon to review Crown non-disclosure, it may order a new trial where it finds that the withheld information, if disclosed, could have affected the outcome at the court of first instance.[72] Where the Crown makes late disclosure and a remedy is sought at trial, it is open to the trial

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70 *Ibid* at para 28.

71 *Charter*, *supra* note 7, s 24(1).

72 *Stinchcombe*, *supra* note 65 at para 45.

judge to grant an adjournment, to call witnesses, to recall witnesses for further cross-examination, or to grant a mistrial. The remedies of adjournment and calling or recalling witnesses will reconcile the tension between the competing evidence law goals. While the accused is entitled to receive a fair trial, the Supreme Court of Canada in *R v Bjelland*[73] held that the trial must be seen as fair from both the perspective of the accused and from the perspective of society.[74] This conception of fairness is fundamentally utilitarian. Fairness requires the satisfaction of the public interest in the search for truth while mandating the preservation of basic procedural fairness for the accused.[75] This comports with the proper administration of justice. Adjournment and calling or recalling witnesses, if sufficient to remedy the prejudice occasioned by the late Crown disclosure, are therefore consistent with utility insofar as these remedies maximize the happiness of the greatest number.

The mistrial remedy, however, is incapable of reconciling the tension between evidence law's competing goals. By its very nature, the mistrial remedy represents the triumph of constitutional rights and the integrity of the justice system over the search for truth. This imbalance may suggest that a successful mistrial application violates the principle of utility. However, the mistrial remedy may still accord with utility despite the fact that it can be viewed as furthering the interests of a few rather than the collective. The principle of utility is prospective and forward looking; its focus is on long-term happiness. This is why man must at times sacrifice immediate gratification in order to obtain a greater benefit at a later time. Society's interest in a determination of the case on its merits and the accused's interest in the protection of their *Charter* rights are usually focused on the instant case. This is a relatively narrow focus. The proper administration of justice, which contemplates both the search for truth and fairness to the accused, has a far broader focus which transcends the outcome of a particular case. The proper administration of justice must necessarily concern itself with the continuing, long-term integrity of the justice system. Happiness for society as a whole, including all future generations and all accused persons, is maximized when the justice system is beyond reproach. Thus, the principle of utility acknowledges that the search for truth may have to give way to the protection of constitutional rights and the proper

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73 *R v Bjelland*, 2009 SCC 38.

74 *Ibid* at para 22.

75 *Ibid*.

administration of justice in order for society to achieve ultimate happiness. A successful mistrial application cannot reconcile the competing goals of evidence law, but if it is properly granted, it is consistent with utility.

## VI. THE TEST FOR MISTRIAL ON THE GROUNDS OF LATE CROWN DISCLOSURE

This raises the question: when is the mistrial remedy properly granted? First and foremost, a mistrial is not automatically warranted whenever the Crown makes late disclosure. Insofar as the Crown's duty to disclose is relatively broad in scope, evidence which is relevant and therefore subject to disclosure may only have a marginal value in relation to the ultimate issues to be decided at trial. The Crown may fail to disclose evidence which meets the *Stinchcombe* standard, yet timely disclosure of that evidence may have been incapable of affecting the overall fairness of the trial process.[76] To ground a successful mistrial application, the accused must establish that the late disclosure gave rise to a breach of the accused's right to full answer and defence under s. 7 of the *Charter* by proving unfairness or prejudice. Specifically, the accused must demonstrate that the late Crown disclosure substantially reduced their ability to meet the Crown's case, to advance a defence, or otherwise to make a decision which could have affected how the defence conducted their case.[77] It is insufficient for the accused to raise prejudice generally. The accused must outline in detail the specific prejudice inflicted on the defence's trial strategy, including what defence counsel would have done differently in terms of strategy if disclosure had been timely.[78] If the defence strategy would not have significantly differed but-for the late disclosure, a mistrial is not warranted because it cannot be said that substantial unfairness or prejudice was inflicted on the accused.

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76 *R v Dixon* [1998] 1 SCR 244, 166 NSR (2d) 241 at para 23.

77 *R v Selvanayagampillai* 2010 ONCJ 278 at para 8 [*Selvanayagampillai*]. This includes the decision to hold a preliminary inquiry, to choose an alternate trial mode or plea, to examine additional witnesses, or to examine existing witnesses differently.

78 The British Columbia Court of Appeal in *R v Muller* 2013 BCCA 528 at para 54 found that it was not enough for defence counsel to submit that he would have shifted his defence strategy if he had received timely disclosure. Defence counsel should have articulated in detail the way in which his strategy would have shifted by establishing how his cross-examination of witnesses would have differed or if he would have recalled any Crown witnesses.

The principle of utility mandates that the remedy which is ordered to cure any prejudice inflicted on the accused be proportionate to the actual prejudice itself. Given the drastic nature of the mistrial remedy, substantial unfairness or prejudice is required for a successful mistrial application. Less substantial prejudice calls for less drastic remedies. The timeline of the late Crown disclosure can be helpful for evaluating the nature of the prejudice in question. For example, it is generally less prejudicial for late disclosure to take place before the trial commences or during the early stage of the prosecution's case. Late disclosure occurring after the defence has closed its case or otherwise near the end of the trial can be far more prejudicial.[79] If the prejudice in question relates to timing concerns such as the need for adequate time to prepare to address an important issue, an adjournment is the suitable remedy and a mistrial cannot be ordered. Similar to Bentham's test for the exclusion of evidence, less drastic remedies must always be considered before a mistrial can be properly granted. The Ontario Court of Appeal has held that the mistrial remedy can only be granted as a remedy of last resort and in the clearest of cases where no remedy short of that relief will adequately cure the actual prejudice occasioned.[80] As such, the presiding judge must consider and dismiss all alternative, reasonable methods of redressing the prejudice that has arisen due to the late Crown disclosure. If there are viable alternatives which allow for the trial to continue, a mistrial cannot be granted.[81]

In terms of the ultimate question to be answered, the Supreme Court of Canada has held that the trial judge must determine whether trial fairness or the right to full answer and defence has been impaired to such a degree that there is a real danger of substantial prejudice or a miscarriage of justice.[82] In making this determination, the trial judge must balance "injustice to the accused…against other relevant factors, such as the seriousness of the offence, protection of the public and bringing the guilty to justice."[83] Similar to Bentham's test for the exclusion of evidence, the contemporary mistrial test amounts to a balancing act. The costs associated with a successful mistrial application (the frustration of the search for truth) must be weighed against the benefits (protecting and affirming the accused's

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79 *Selvanayagampillai*, *supra* note 77 at para 12.

80 *R v Toutisanni* 2007 ONCA 773 at para 9.

81 *Selvanayagampillai*, supra note 77 at para 17.

82 *R v Burke*, 2002 SCC 55 at 75.

83 *Ibid*.

rights as well as maintaining the integrity of the justice system). The presiding judge must determine where the balance lies, and this depends entirely on the facts of the case.[84]

Through the *Charter,* the collective will maintain that a person who is deprived of the ability to make full answer and defence is deprived of fundamental justice. They are entitled to a remedy. However, the collective will has only guaranteed a fair hearing; it has not guaranteed the most favourable procedures and remedies imaginable.[85] The proper remedy to be granted on a mistrial application must be proportional. It must adequately cure the prejudice in question, but it can do no more because such a windfall is repugnant to justice and to utility. What is fair and just is not evaluated from the perspective of the accused alone. Society has a substantial interest in obtaining a determination of guilt or innocence on the merits of the case. As Bentham would put it, this is because society has an interest in its own protection through the execution of the substantive criminal law. Accordingly, the threshold for a successful mistrial application must be high because the mistrial remedy prevents society from having its interest in the search for truth fulfilled. Unlike less drastic remedies, the mistrial remedy cannot reconcile the competing goals of Canadian evidence law. This does not mean that a mistrial runs afoul of the principle of utility. Indeed, a properly granted mistrial is fully consistent with utility. The principle of utility acknowledges that the search for truth must sometimes yield to competing evidence law goals in order to avoid greater injustice. The test for mistrial as espoused by the Supreme Court of Canada requires the trial judge to balance carefully the goals of Canadian evidence law as they relate to the instant case in order to determine which goal must prevail. This accords with the principle of utility because the ultimate objective of this balancing act is to secure the greatest happiness of the greatest number.

## VII. CONCLUSION

Bentham's principle of utility is not simply a metaphysical doctrine without practical application. It is also far more than an account of human

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84 The approach described in this paper to mistrial applications on the grounds of late Crown disclosure and a breach of the right to full answer and defence has been followed consistently across Canadian jurisdictions. For recent examples, see *R v Sandeson* 2017 NSSC 196; *R v Folker* 2016 NLCA 1; *R v Akumu* 2017 BCSC 384.

85 *R v O'Connor* [1995] 4 SCR 411, 103 CCC (3d) 1 at para 109.

behavior or sociology. The principle of utility transcends the boundary between disciplines and practices, relating to philosophy, psychology, political science, and law. This paper has explored the principle of utility as it relates to Bentham's system of evidence and the tension between Canada's evidence law goals. This has revealed the utilitarian underpinnings of evidence law in Canada. Together, the three goals of evidence law establish that the law's truth-seeking function must operate in a manner that is fair to the accused while preserving the integrity of the justice system. This is a fundamentally utilitarian idea. In accordance with its collective will, Canada has provided for the acknowledgment and protection of certain rights and freedoms. Following the enactment of the *Charter*, the rectitude of decision and the protection of society are not the only objectives of the law. The search for truth still bears fundamental importance for the law of evidence, but the law is concerned with more than the outcome of the instant case. The law also seeks to maintain the proper administration of justice. Legal decisions must respect the accused's rights and foster the public's long-term confidence in the justice system. These are the considerations which the presiding judge must keep in mind when faced with an evidentiary issue. The presiding judge must attempt to reconcile the competing evidence law goals to the extent of their conflict, although full reconciliation may not be possible, and one goal must necessarily yield to another. Striking the optimal balance will give rise to the greatest happiness for the greatest number.

This is the objective of the mistrial remedy. The mistrial remedy will be properly awarded on the grounds of late Crown disclosure where the prejudice inflicted on the accused's rights is so extreme that the proper administration of justice finds that the trial cannot proceed. This is fully consistent with utility and constitutes exactly what Bentham intended in his jurisprudential theory when he addressed the exclusion of relevant evidence. Bentham stated:

> Let not in the light of evidence: not in every case, more than the light of heaven. Even evidence, even justice itself, like gold, may be bought too dear. It is always bought too dear, if bought at the expense of a preponderant injustice. Grant even that the dictates of justice were paramount to those of utility in its most comprehensive shape, – that the sacrifice of ends to means were an eligible sacrifice – and that the aphorism, *fiat justitia, ruat caelum*, instead of a rhetorical flourish, were an axiom of moral wisdom: even thus, supposing the choice to be between

> injustice and injustice, the preferability of the less injustice to the greater would scarcely be contested.[86]

Under both Bentham's system of evidence and Canadian law, the frustration of the search for truth is always an evil. However, the principle of utility maintains that some evils may have to be tolerated in order to forego greater injustice. This justifies both the exclusion of evidence for Bentham and the mistrial remedy in Canadian law. Justice cannot be pursued at any and all costs. This is contrary to utility and therefore destructive to the greatest happiness of the greatest number.

The utilitarian philosophy which underpins both Bentham's system of evidence and Canadian evidence law highlights the substantial similarities between the two. While the specific rules and guidelines may differ, Bentham's system and Canadian law are philosophically far more similar than they are different. The differences arise largely from the time and space which separates Bentham from contemporary Canadian law. Bentham envisioned preponderant injustice as delay, expense, and vexation. He abhorred categorical exclusionary rules such as the privilege against self-incrimination and had little empathy for individuals accused of criminal wrongdoing. The Canadian legal and social context is crucially different from Bentham's era. Canada has both a *Charter* of rights and militarized police forces. The common law in Canada has long recognized the reliability dangers inherent in coerced police statements.[87] Canadian law is clear that compelling an individual to incriminate themselves at trial or at the police station is repugnant to the rectitude of decision and to justice and fairness.[88] It is beyond the scope of this paper to explore specifically and in detail the privilege against self-incrimination from a Benthamite perspective.[89]

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86 *Rationale* vol 4, *supra* note 5 at 482.

87 See e.g. *Prosko v R* (1922), 63 SCR 226, 66 DLR 340, which adopted the rule in *Ibrahim v R* [1914] All ER Rep 874, [1914] AC 599.

88 See e.g. *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1; *R v Oickle* 2000 SCC 38.

89 Bentham could likely tolerate the privilege against self-incrimination and the voluntary confession rule/the right to silence on a case-by-case basis. The privilege against self-incrimination, while an overriding maxim of Canadian criminal law, is also found in legislation and the *Charter* under the name 'principle against self-incrimination' (see *Canada Evidence Act,* RSC 1985, c C-5, s 5(2); and s 13 of the *Charter*). Under legislation and under the *Charter,* the principle against self-incrimination is far narrower than the general overriding privilege (see *R v Nedelcu* 2012 SCC 59). The right to silence enshrined under s. 7 of the *Charter* is functionally equivalent to the voluntary confessions rule, the former of which has been given a very narrow interpretation (see *R v Singh* 2007 SCC 48). The voluntary confessions rule is concerned with reliability,

Regardless of whether Bentham and Canadian law could agree on the utility of this privilege, it is clear that Bentham's system of evidence and Canadian evidence law can be reconciled to a substantial degree. The philosophic similarities between these systems are remarkable. Bentham's influence on Canadian evidence law therefore extends far beyond the principle that all relevant evidence is presumptively admissible. His utilitarian ideas permeate the philosophical principles which underlie Canadian evidence law and the three goals which it always seeks to fulfill. Like Bentham's system, Canadian evidence law earnestly pursues the greatest happiness for the greatest number. Canadian evidence law is therefore philosophically consistent with Bentham because it is consistent with the principle of utility.

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and by extension, with the rectitude of decision. This suggests that Bentham could accept the principle against self-incrimination and the right to silence/the voluntary confession rule.

# Confronting Animal Cruelty: Understanding Evidence of Harm Towards Animals

JAMES GACEK [*]

## ABSTRACT

As society evolves, so too does the values and views of its citizens. While changing social values have allowed lawmakers to pass new laws and amend existing ones, our laws on animal abuse have changed very little. Sections 444 to 447 of the *Criminal Code* constitute Canada's primary federal animal protection legislation, and all provinces and territories have laws in respect to animal welfare. However, recent debate involving socio-legal and animal scholars alike agree that Canada's animal cruelty laws are considered the worst in the Western world. Drawing upon a litany of socio-legal and green criminological literature, this Paper examines the current understanding of 'animal cruelty' in Canadian federal legislation, the justifications for and against advancing progressive animal welfare reforms, and the necessary steps to be taken to further protect animals from harm and hold animal abusers accountable.

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**Acknowledgements:** Thank you to the editors for extending this invitation to submit to the special issue, and my deepest thanks to Richard Jochelson and Rob White, both of whom provided helpful and guiding commentary on earlier drafts.

***Keywords***: animal cruelty; criminal law; criminology; abuse; harm; ecocentrism; evidence; *Criminal Code*; Canada

## I. INTRODUCTION

As society evolves, so too does the values and views of its citizens. While changing social values have allowed lawmakers to pass new laws and amend existing ones, our laws on animal cruelty have changed very little. Socio-legal and criminological scholars are often asked to reflect upon abstract conceptions of justice and the criminal justice system yet for too long has a greater focus on animal cruelty and harms towards animals[1] remained ignored or received scarce attention.[2] One could presume that this is because mainstream criminological and legal analyses, respectively, view the general study of animal abuse, cruelty, and neglect to have little to no relevance of understanding and solving "the pressing interhuman problems of the day ("real" crime)."[3] However, if this presumption is correct, then it can no longer be the reality; opportunities and contemporary developments offer hope that positive action around issues of animal cruelty is possible, and must be adopted in proactive measures going forward.

Therefore, the aim of this Paper is to explore the concept of 'animal cruelty' within Canadian animal protection legislation and to see how

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1 While I will refer to animals in this Paper, I am are referring to nonhuman animals.

2 With notable, international exceptions; see Piers Beirne, "Criminology and Animal Studies: A Sociological View" (2002) 10:4 Society & Animals 381 [Beirne 2002]; Piers Beirne, "From Animal Abuse to Interhuman Violence? A Critical Review of the Progression Thesis" (2004) 12:1 Society & Animals 39 [Beirne 2004]; Piers Beirne, *Confronting Animal Abuse: Law, Criminology, and Human-animal Relationships* (New York: Rowan & Littlefield Publishers, 2009) [Beirne 2009]; Piers Beirne, "Animal Abuse and criminology: introduction to a special issue" (2011) 55:5 Crime, L & Soc Change 349 [Beirne 2011]. See also James Gacek & Richard Jochelson, "Placing 'Bestial' Acts in Canada: Legal Meanings of 'Bestiality' and Judicial Engagements with Sociality" (2017) 6 Annual Rev Interdisciplinary Studies 236 [Gacek & Jochelson 2017a]; James Gacek & Richard Jochelson, "'Animal Justice' and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40:3 Man LJ 337 [Gacek & Jochelson 2017b]; Richard Jochelson & James Gacek, "'Ruff' Justice: Canine Cases and Judicial Law-Making as an Instrument of Change" (2018) 24:1 Animal L 171 [Jochelson & Gacek 2018].

3 Beirne 2002, *supra* note 2 at 383 [emphasis added].

alternative courses of action to redress animal abuse and harms in Canada can translate into concrete application. While evidence of harm towards animals is abound within academically empirical research, translating this evidence into a legal case to secure a criminal conviction is a different situation. In Canada there remains a lack of resources to investigate and enforce animal cruelty legislation,[4] even though there have been several judicial decisions in the past decade to suggest animal justice will be an issue with mounting prominence and support.[5]

The limits of Canadian criminal justice are standard fare within legal and criminological literature. What is less discussed, however, are the justifications for and against advancing progressive animal welfare reforms, and the necessary steps to be taken to further protect animals from harm and hold animal abusers accountable. Drawing upon a litany of literature from the disciplines of green criminology, socio-legal studies, and critical animal studies, this Paper suggests that a consideration of 'ecocentric' values and principles can be implemented within the legislative and criminal justice arenas,[6] among others. As discussed below, such a focus on ecocentrism contrasts the current anthropocentric logics at play within the criminal justice system, and would assist in the envisioning of legislation that better safeguards animals from unreasonable stress, injury, harm and cruelty in Canada.

This Paper begins by first reviewing current animal cruelty legislation in Canada, particularly focusing on the animal cruelty provisions within the *Criminal Code*. Concerns regarding these provisions and the challenges facing the definition of 'animal cruelty' in Canada are discussed. Building upon considerable green criminological and legal scholarship, I then discuss whether a green criminological and legal intersection, comprised of 'ecocentric' values can work to bolster support for alternative justice initiatives and progressive animal welfare reform. Such support is essential to proceeding animal justice forward, given the array of interdisciplinary literature highlighting the links between interpersonal violence and abuse

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4 Holly Caruk "Animal cruelty laws rarely result in jail time: lawyer", *CBC News* (30 March 2017), online: <www.cbc.ca/news/canada/manitoba/animal-cruelty-laws-lawyer-1.4046654> [perma.cc/8BX7-P64U] [Caruk].

5 For example, see generally Gacek & Jochelson 2017a, *supra* note 2; Gacek & Jochelson 2017b, *supra* note 2; Jochelson & Gacek 2018, *supra* note 2.

6 Rob White, "Ecocentrism and criminal justice" (2018) 22:3 *Theoretical Criminology* 342 [White 2018].

towards animals, a focus of which I turn to in the third section of this Paper. Fourth, after drawing attention to the current state of animal cruelty legislation, I discuss potentials for ecocentric justice; more must be done to confront anthropocentric logics occurring both within and beyond the Canadian criminal justice system, such as encouraging multi-agency collaboration in the proper recording and collecting of evidence of animal cruelty harms; incorporating ecocentric principles into creating new crimes or case adjudication to hold animal abusers accountable for harms toward their nonhuman counterparts; and finally, investing time and resources in the education of Canadian citizens in the proper and humane treatment of animals. I conclude with reflections on the meaning of animal cruelty for Canadian society and the role interdisciplinary inquiry can provide in ameliorating these harms for animals.

## II. ANIMAL CRUELTY AND THE *CRIMINAL CODE*

The use and treatment of animals in Canada is presently regulated across the federal, provincial/territorial, and municipal governments.[7] Generally speaking, sections 444 to 447 of the *Criminal Code* constitute Canada's primary federal animal protection legislation, and all provinces and territories have laws in respect to animal welfare.[8] However, recent debate involving socio-legal and animal scholars alike agree that Canada's animal cruelty laws are considered the worst in the Western world. Animals are categorized and utilized by humans in many different ways, ranging from domesticated or companion animals, to service animals, laboratory animals, animals for factory farming (and eventual slaughter) to animals in the

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7 Courtney Holdron, *The Case for Legal Personhood for Nonhuman Animals and the Elimination of their Status as Property in Canada* (LLM Thesis, University of Toronto Faculty of Law, 2013) [unpublished] [Holdron]. See also Lesli Bisgould, "Gay Penguins and Other Inmates in the Canadian Legal System" in John Sorenson, ed, *Critical Animal Studies: Thinking the Unthinkable* (Toronto: Canadian Scholars' Press Inc, 2014) 154 [Bisgould].

8 The task of this Paper is to focus on federal animal cruelty legislation, however it is important to note that provinces and territories have enacted their own animal welfare legislation. While it is beyond the scope of the Paper, some provinces have enacted legislation that establishes humane societies or societies for the prevention of cruelty to animals, limiting their authority to cases of nonhuman animals in distress or have been abandoned, and for offences related to animal welfare. See Holdron, *supra* note 7 at 15-16; see generally Bisgould, *supra* note 7.

entertainment industry (i.e. aquariums and zoos, etc.).[9] In terms of the current Canadian justice system, especially its legal system, there exists an underlying assumption of human superiority and scant consideration of animal interests.[10] However, this assumption is problematic as it is supported on the claim that in order to determine what constitutes 'humane' treatment *supra* cruelty, the law generally looks to those who engage in nonhuman animal use for guidance, which presumes that these individuals would not impose more pain and suffering than is required for particular use.[11] As Holdron suggests, this approach is inconsistent with research that provides evidence that not only can nonhuman animals experience pain and pleasure, but that such animals can lead emotionally rich lives.[12] Furthermore, the approach is also inconsistent "with developments in legislation and policies…which recognize that nonhuman animals at the minimum have a morally significant interest in not suffering" at the hands of their human counterparts.[13]

In general terms, animal cruelty is defined depending on the jurisdiction, but in many cases animal cruelty is described through a list of acts of omission or commission instead of a specific legal definition of cruelty.[14] In Canada there exists a system of categorical protection for nonhuman animals in welfare legislation, which means that there are different standards of regulation for a companion animal versus wildlife in captivity, for example.[15] Since 1822, every province and territory has enacted some form of animal welfare legislation, with Quebec as the last province to enact its own legislation in 2015.[16] The *Criminal Code* (herein the *Code*)[17] is

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9 See generally Karen M Morin, *Carceral Space, Prisoners and Animals* (New York: Routledge, 2018) [Morin].

10 Holdron, *supra* note 7 at 13.

11 *Ibid*; see also Gary Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (New York: Columbia University Press, 2008) at 8 [Francione 2008].

12 Holdron, *supra* note 7 at 13.

13 *Ibid*; see also Francione 2008, *supra* note 11 at 61.

14 Rob White, "Inter-Species Violence: Humans and the Harming of Animals" in J Stubbs & S Tomsen, eds, *Australian Violence: Crime, Criminal Justice and Beyond* (Sydney: The Federation Press, 2016) at 179 [White 2016].

15 Holdron, *supra* note 7 at 14; see also Bisgould, *supra* note 7.

16 Holdron, *supra* note 7 at 14; see also The Canadian Press "Quebec passes animal protection law", *The Star* (4 December 2015), online: <www.thestar.com/news/canada/2015/12/04/quebec-passes-animal-protection-law.html> [perma.cc/VV6H-B4MM].

17 *Criminal Code*, RSC 1985, c. C-46 [*Criminal Code*].

the main legal instrument for the protection of animals at the federal level, and its scope is not generally limited to specific categories of animals. By creating a list of offences that attempt to either limit or eliminate a nonhuman animal's exposure to pain and suffering, the *Code* sets out the minimum standard of permissible behaviour required concerning animals.[18] One could argue that the fact that we have animal cruelty legislation in Canada is an implicit indication that the law treats nonhuman animals as something to be protected, with a duty imposed upon humans to care about their nonhuman counterparts (especially as Canada's federal animal cruelty laws set out the country's concern for animal wellbeing). Unfortunately, such an argument is certainly not well-founded within the Canadian context. Canadian anti-cruelty legislation merely maintains the animal's existence as 'living property' which allows humans to treat their animals in ways that they are legally able to treat other forms of property.[19] There is no explicit recognition in the legislation that animal interests could reach beyond the property interests of humans, and therefore one must discern whether the law is doing enough to ensure that it no longer administers animals as mechanistic property to be oppressed, exploited or devalued. Indeed, the concern for animal wellbeing in the legislation "remains secondary and qualified in accordance with the interests of humans who own and have a financial interest in them as evidenced by the fact that anticruelty provisions were enacted in the part of the *Code* concerning property offences."[20]

It is significant to note that while the *Code* currently contains provisions in four separate sections (445.1, 446, 447, and 447.1)[21] that address cruelty

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18 Holdron, *supra* note 7 at 15; see also Bisgould, *supra* note 7.

19 Antonio Verbora, "The political landscape surrounding anti-cruelty legislation in Canada" (2015) 23:1 *Society & Animals* 45 at 62-63. [Verbora].

20 Holdron, *supra* note 7 at 15; see also Bisgould, *supra* note 7. Like federal legislation, the concept of cruelty is the focus of the majority of provincial and territorial legislation. However, provincial and territorial legislation is problematic as there is a wide array of disparity currently existing across provinces and territories in terms of safeguarding nonhuman animals from harm. For examples, see Holdron, *supra* note 7 at 17-18.

21 As outlined in the *Criminal Code*:

> **Injuring or endangering other animals**
> 445 **(1)** Every one commits an offence who, wilfully and without lawful excuse,
> *(a)* kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose; or

(*b*) places poison in such a position that it may easily be consumed by dogs, birds or animals that are not cattle and are kept for a lawful purpose.

**Causing unnecessary suffering**

445.1 (1) Every one commits an offence who

(*a*) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;

(*b*) in any manner encourages, aids or assists at the fighting or baiting of animals or birds;

(*c*) wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it;

(*d*) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or

(*e*) being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (*d*).

**Causing damage or injury**

446. (1) Every one commits an offence who

(*a*) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or

(*b*) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

**Keeping cockpit**

**447.** (1) Every one commits an offence who builds, makes, maintains or keeps a cockpit on premises that he or she owns or occupies, or allows a cockpit to be built, made, maintained or kept on such premises.

**Order of prohibition or restitution**

**447.1** (1) The court may, in addition to any other sentence that it may impose under subsection 444(2), 445(2), 445.1(2), 446(2) or 447(2),

(*a*) make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years; and

(*b*) on application of the Attorney General or on its own motion, order that the accused pay to a person or an organization that has taken care of an animal or a bird as a result of the commission of the offence the reasonable costs that the person or organization incurred in respect of the animal or bird, if the costs are readily ascertainable.

towards nonhuman animals, the *Code* itself does not provide a definition of cruelty.[22] Unfortunately, this leads to uncertainty in the judicial and legislative application of the relevant provisions. Such an issue can be witnessed in section 445 which prohibits the killing or injuring of animals, such as cattle for lawful purposes. Section 445 does not apply to stray nonhuman animals since "kept for a lawful purpose" contemplates a keeper of the nonhuman animal as well as a measure of control exercised by that person.[23] Not only does this leave nonhuman animals who are not owned without the benefit of the prohibition in the provision,[24] but it leaves open a relatively fluid quantum of control that may surreptitiously border cruelty. Section 445.1 is also problematic, as it requires the pain, suffering or injury of the animal to be "wilfull" and "unnecessary".[25] As Holdron suggests, 'unnecessary' is generally interpreted as meaning "a person in pursuit of his or her legitimate purpose is obliged not to inflict pain, suffering or injury which is not inevitable but the purpose sought and the circumstances of the particular case are taken into account[,]"[26] which provides a low threshold for the determination of what is considered 'unnecessary.' Furthermore, Holdron, drawing upon the research and evidence of Bisgould, Humane Society International, and Animal Legal Defense Fund, outlines six main deficiencies with using the *Code* as a means of safeguarding nonhuman animals:

> First, the term, [animal] cruelty, connotes a malevolent intention that creates a high threshold to pass in order to prove a significant element of the offence. Second, the application and scope of the current laws remain ineffective. Third, it is difficult to prosecute acts of cruelty under these provisions. Fourth, nonhuman animals do not receive equal protection under the *Code* as protections are given according to membership of an identified species of nonhuman animals. As previously shown, the *Code* offers virtually no protection for wild and stray animals. Fifth, the *Code* does not provide protection for nonhuman animals who are being trained to fight one another as it is not an offence to train nonhuman animals to fight. Last, the two most commonly applicable provisions are problematic as the

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22 Holdron, *supra* note 7 at 15.

23 *Ibid*; see also *Criminal Code*, *supra* note 17 at s 445.

24 Holdron, *supra* note 7 at 15..

25 *Criminal Code*, *supra* note 17 at s 445.1.

26 Holdron, *supra* note 7 at 15; see also Edward Greenspan & Marc Rosenberg, annotated, *Martin's Annual Criminal Code 2010* (Aurora: Canada Law Book, 2009) at 775 [Greenspan & Rosenberg].

term "wilful infliction of unnecessary suffering" in section 445.1(a) and "wilful neglect" in section 446(1)(b) require a high level of mens rea.[27]

Moreover, per Sankoff, the cruelty provisions in the *Code* were last reformed in 1955, maintaining "some of the archaic, outmoded language of that time, wording that trips up prosecutions on a fairly regular basis."[28] However, on October 18th, 2018 the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould introduced Bill C-84, *An Act to Amend the Criminal Code (Bestiality and Animal Fighting)* in an attempt to both recognize and ameliorate gaps in the criminal law regarding bestiality as well as strengthen law around animal fighting.[29] At the time of writing, Bill C-84

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27 Holdron, *supra* note 7 at 16; see also Bisgould, *supra* note 7; Humane Society International, "Canada's Criminal Code" (30 November 2012), online: *Humane Society International* <www.hsi.org/world/canada/work/puppy_mills/facts/criminal_code.html> [perma.cc/Y6TY-G2BV] [Humane Society International]; Animal Legal Defense Fund, "2017 Canadian Animal Protection Laws Ranking"(2017) at ***x***, online (pdf) : *Animal Legal Defense Fund* <aldf.org/wp-content/uploads/2018/06/2017-Canadian-Rankings-Report-1.pdf> [perma.cc/BP3W-FMSH].

28 Peter Sankoff, "Canada still an animal welfare laggard", *Policy Options* (13 October 2016) online: <policyoptions.irpp.org/magazines/october-2016/canada-still-an-animal-welfare-laggard/> [perma.cc/T3VR-A5W5] [Sankoff].

29 Bill C-84, *An Act to amend the Criminal Code (bestiality and animal fighting)*, 1st Sess, 42 Parl, 2018 (first reading 18 October 2018) [Bill C-84]. As indicated in Bill C-84, proposed changes to the Criminal Code are as follows:

> **"Section 160 (Bestiality)**
> The Criminal Code prohibits, but does not define, bestiality. In 2016, the Supreme Court of Canada held in *R v DLW* that Canada's bestiality offences did not prohibit non-penetrative sex acts with animals. The proposed amendments would add a definition of bestiality to clarify that it involves **any contact** for a sexual purpose between a person and an animal. Bestiality offences and their associated penalties, would not change.
>
> These amendments will increase protections for children and other vulnerable individuals who may be compelled by another person to commit or witness sexual acts with animals. They will also better protect animals from violence and cruelty.
>
> **Section 445.1(1)(b) and 447 (Cruelty to Animals)**
> The Criminal Code includes a number of offences to address animal cruelty, particularly in the context of animal fighting. The proposed amendments will expand the existing provisions in order to protect all animals and capture all activities related to animal fighting. The changes will also prohibit:

had passed second reading and was to be referred to the Standing Committee in the House of Commons. While the introduction of this legislation is a formidable step in the right direction of fully protecting vulnerable populations "from all forms of abuse and violence", [30] it remains to be seen whether Bill C-84 will be successful in passing into law in the near future. In the past, private members' bills have been defeated in Parliament, and studies that have examined attempts to propose changes to anti-cruelty legislation demonstrate that industry groups and politicians within major political parties routinely resist these amendments.[31]

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- promoting, arranging, assisting, taking part in, or receiving money for the fighting or baiting of animals
- breeding, training or transporting an animal to fight another animal
- building or maintaining any arena for animal fighting, as current prohibitions are limited to building or maintaining a cockpit, which is a place used for cockfighting

Bill C-84 represents a common ground approach to ensuring the protection of children and animals from cruelty and abuse, while ensuring the law does not interfere with legitimate and traditional farming, hunting, and trapping practices, including Indigenous harvesting rights."

30 Department of Justice Canada, "Government announces measures to strengthen legal protections for children, vulnerable individuals, and animals.", *Government of Canada* (October 18th, 2018), online: <www.canada.ca/en/department-justice/news/2018/10/government-of-canada-announces-measures-to-strengthen-legal-protections-for-children-vulnerable-individuals-and-animals.html> [perma.cc/F9PD-Z2NQ]. Currently Bill C-84 is in second reading of the senate stage, and passed successfully through the House of Commons, online: <openparliament.ca/bills/42-1/C-84/> [perma.cc/6R8G-4TAX].

31 See Lyne Létourneau, "Toward Animal Liberation? The New Anti-Cruelty Provisions in Canada and Their Impact on the Status of Animals" (2003) 40 Alta L Rev 1041 at 1046 (discussing parliamentary debates on enacting anti-cruelty legislation) [Letourneau]; John Sorenson, "'Some Strange Things Happening in Our Country': Opposing Proposed Changes in Anti-Cruelty Laws in Canada" (2003) 12 Soc & Leg Studies 377 at 388-89 [Sorenson 2003] (discussing the reception of anti-cruelty laws in Canada generally); Verbora, *supra* note 19 at 62 (discussing the failure of the Canadian legislature to update their animal-related criminal laws). See for e.g. Kasia Kieloch, "Bestiality! Loophole Closing Long Overdue" (22 May 2018), online (blog): *Robson Crim Legal Blog* <www.robsoncrim.com/single-post/2018/05/22/Bestiality-Loophole-Closing-Long-Overdue> [perma.cc/DB9B-PAZC]. "Bill C-388 adds only one provision to s. 160 of the *Criminal Code* and is a line long. The provision states that bestiality means 'any contract by a person, for a sexual purpose, with an animal'" (In December 2017, Conservative Member of Parliament Michelle Rempel introduced a private member's bill titled Bill C-388, *An Act to Amend the Criminal Code (bestiality)*: Bill C-388, *An Act to Amend the Criminal Code (bestiality)*, 1st Sess, 42nd Parl, 2017 (first reading 13

Furthermore, Bill C-84 does not call into question the normalized relations between humans and animals, as it continues to permit "traditional farming, hunting, and trapping practices" (all of which could be construed as cruel) and the animal's current status as property (i.e. as captive for humans' desire for agricultural goals or for sport).[32]

In effect, Gacek and Jochelson indicate that unfortunately, "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."[33] This has resulted in the interests of animals being given little to no legal consideration since at law they remain mere property.[34] Uses of animals span private purposes or commercial purposes, or are considered owned by the state and held in trust by the people (as in the case of 'wildlife' animals),[35] and the construction of 'the animal' in question "is always a pet or a laboratory animal, or a game animal… or some other form of animal property that exists solely for our use and has no value except that which we give it."[36]

Indeed, the ontological status of nonhuman animals as defined and determined by humans has significant implications for the understanding of harm and prevention of violence against animals.[37] While legal definitions of animals vary greatly,[38] defining animals has generally started from a human-centred basis "even where the intent of the discussion is to

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December 2018)). Additionally, recall the defeat of Bill C-246, *Modernizing Animal Protections Act*. Among several proposed amendments included to acts dealing with shark finning, banning cat and dog fur, and requiring textiles made from animals to be labelled, the main proposition was to amend the *Criminal Code* to consolidate and modernize various offenses. However, this bill was defeated in Parliament. See Jochelson & Gacek 2018, *supra* note 2 at 180-181.

32 Bill C-84, *supra* note 29. For a critical reconsideration of normalized human-animal relations, see also Morin *supra* note 9.

33 Gacek & Jochelson 2017b, *supra* note 2 at 339; see generally Morin *supra* note 9.

34 See generally Holdron, *supra* note 7. See also Gacek & Jochelson 2017a, *supra* note 2; Gacek & Jochelson 2017b, *supra* note 2; Bisgould, *supra* note 7; Lesli Bisgould & Peter Sankoff, "The Canadian Seal Hunt as Seen in Fraser's Mirror" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc, 2015) [Bisgould & Sankoff].

35 White 2016, *supra* note 14 at 177.

36 Gary Francione, "Law and Animals" in Marc Bekoff, ed, *Encyclopedia of Animal Rights and Animal Welfare*, vol 2 (California: Greenwood Press, 2010) 353 at 355 [Francione 2010].

37 White 2016, *supra* note 14 at 177.

38 For example, see Beirne 2009, *supra* note 2.

address issues of speciesism and animal rights."[39] Even inanimate constructs such as churches and corporations have become legal persons able to assert their interests in courtrooms and legal settings,[40] yet animals remain the only sentient beings concretized as property in the law. While the fundamental premises of property law have not changed much since the seventeenth century, animals continue to be categorized as unfeeling chattels, insentient, and morally inferior, contrary to socio-legal and animal welfare evidence suggesting otherwise.[41]

There continues to be a growing amount of evidence demonstrating the "fundamental biological kinship between human beings and nonhuman animals" as well as the complex and sophisticated lives of nonhuman animals living within our ecosystems and communities.[42] Concomitantly we are witnessing a rise in evidence proving the intelligence and emotional complexity of nonhuman animals, which taken together suggests that humans must continue to reconsider their relationships with their nonhuman counterparts.[43] Indeed, a key part of animal welfare is the recognition and prevention of animal suffering, and acknowledging animal sentience demands a certain 'duty of care' on the part of humans to reinforce a conception of animals as having feelings that matter.[44] Such an acknowledgment also requires us to reconsider how we construct, record, and detail acts of animal cruelty and intention harm towards animals, and whether the accumulation of this evidence can shift our understandings of how to better protect and safeguard animals. Holdron has gone so far as to suggest that now is the time to form a new legal relationship between humans and other sentient life forms in order to remedy the significant concerns within Canadian animal welfare legislation at large.[45] Humans

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39 White 2016, *supra* note 14 at 177.

40 Gacek & Jochelson 2017b, *supra* note 2 at 337.

41 See generally Gacek & Jochelson 2017a, *supra* note 2; see also Bisgould, *supra* note 7; Maneesha Deckha, "Critical Animal Studies and Animal Law" (2012) 18 Animal L Rev 207 [Deckha 2012]; Peter Sankoff, Vaughn Black, & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Sankoff et al.].

42 Holdron, *supra* note 7 at 2; see also Bisgould, *supra* note 7.

43 For example, see Chris Berdik "Should Chimpanzees have legal rights?", *The Boston Globe* (14 July 2013) online: <www.bostonglobe.com/ideas/2013/07/13/should-chimpanzees-have-legal-rights/Mv8iDDGYUFGNmWNLOWPRFM/story.html> [perma.cc/DP5Q-DLP9] [Berdik].

44 White 2016, *supra* note 14 at 180.

45 See generally Holdron, *supra* note 7.

have a moral imperative to change the legal classifications of nonhuman animals when post-Darwinian science challenges current ethical and legal treatment of animals, transforming knowledge from categorical distinctions between human and nonhuman animals to sliding scales of sentient, rights-bearing subjects.[46] Furthermore, "the common law can be said to have the liberty and duty to migrate to higher ground when facts and moral awareness dictate,"[47] suggesting that changes in the legal relationship between humans and animals are justified insofar as knowledge reflects their interests and inherent value. Perhaps now is the time to embark on this migration, and to transgress beyond humans' current legal relationship with their nonhuman counterparts. As discussed below, green criminology and law can respectively and collaboratively bolster support for a moral imperative which favours progressive animal welfare reforms. With the growth of public interest in the matter of animal issues, such reforms remain paramount.

## III. The Role Of Green Criminology And Law: Towards Ecocentric Justice

Historically, criminology has afforded scant attention to environmental and animal-abuse issues, and when mainstream criminology has considered nonhuman animals it has been in relation to the needs of their human counterparts or reified as inferior, insentient property to own and control.[48] Concern for animals, and ecosystems comprised of animals, are inherently linked to environmental concerns. Green criminology fills this research lacunae by providing inter- and multidisciplinary engagements and approaches to environmental crimes and environmental harms that are often ignored by mainstream criminology. In so doing, green criminology redefines mainstream criminology "as not just being concerned with crime

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46 See generally Bisgould, *supra* note 7.

47 Holdron, *supra* note 7 at 5; see also Thomas G Kelch, "Toward a Non-Property Status for Animals" (1997-1998) 6 NYU Envtl LJ 531 at 535 [Kelch].

48 James Gacek, "Species Justice for Police Eagles: Critiquing the Dutch 'Flying Squad' and Animal-Human Relations" (2017) 21:1 Contemporary Justice Rev 2 [Gacek]; see also Dale C Spencer & Amy Fitzgerald, "Criminology and animality: stupidity and the anthropological machine" (2015) 18:4 Contemporary Justice Rev 407 [Spencer & Fitzgerald].

or social harm falling within the remit of criminal justice systems."[49] Indeed, as Brisman indicates, green criminological scholarship spans a wide variety of 'green' crimes, including but not limited to:

> research on local, regional, international and transnational dimensions of: air pollution and water issues (access, pollution, scarcity); animal abuse, animal rights, and animal welfare; environmental justice and injustice (e.g., the disproportionate impact of environmental harms on marginalized populations); food and agricultural crimes; harm stemming from global warming and climate change; harm caused by the hazardous transport of e-waste; illegal disposal of toxic waste; the legal and illegal trade of flora and fauna; and violations of workplace health and safety regulations that have environmentally-damaging consequences.[50]

One could postulate that, rather than there being one distinct green criminology, green criminology is an umbrella term for a criminology concerned with the incorporation of green perspectives into mainstream criminology, as well as a growing concern with mainstream criminology's general neglect of ecological issues.[51]

Furthermore, green criminology's blossoming as a key area of debate was supplemented by legal scholarship turning towards environmental harms and the collateral damages such harms would have on ecosystems and neighbouring communities.[52] While there are times where green criminology will look beyond strict legalist/criminal law conceptions to examine questions of justice, rights, morals, and victimization, this is not to say that a green criminological and legal intersection cannot work together to progress interdisciplinarity forward and produce workable solutions. As indicated on an earlier occasion, "when paired together, green criminology and law have the potential to reconstitute the animal as something more than mere property within law; shed light upon the anthropocentric logics

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49 Angus Nurse, "Comment: Green Criminology: shining a critical lens on environmental harm" (2017) 3:10 Palgrave Communications 1 at 2 [Nurse].

50 Avi Brisman, "Tensions for Green Criminology" (2017) 25:2 Crit Criminol 311 at 319-320 [Brisman].

51 See generally Michael J Lynch & Paul B Stretesky, "Exploring green criminology: Towards a green criminological revolution" (2015) 27:2 J Envtl L 368 [Lynch & Stretesky].

52 See generally Matthew Hall, "The role and use of law in green criminology" (2014) 3:2 Intl J for Crime, Justice & Soc Democracy 96 [Hall 2014].

at play within the criminal justice system; and promote positive changes to animal cruelty legislation."[53]

Public interest in animal issues is on the rise; socio-legal and animal scholars and activists, propelled by growing concerns for animal welfare, continue to mount pressure against social institutions in society.[54] These groups continue to issue calls for progressive animal welfare reforms, especially as the law is acutely relevant for constituting the animal and goes hand in glove with how humanness and animality are deeply imbedded in the construction of law and society—a consideration which green criminology brings to the fore.[55] There is nothing inherently natural or historically constant about our relationships with animals; such relationships are a social construction, comprising complex sets of rules, norms, behaviours, and controls that are aimed at inundating the human subject within their regulated social world.[56] For example, animals feature prominently in the belief and practices of Indigenous Canadians, yet there is wide variation in how animals participate in the human-animal relationship.[57] As Legge and Robinson suggest, Indigenous epistemologies

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53 James Gacek & Richard Jochelson, "Animals as Something More Than Mere Property: Interweaving Green Criminology and Law Together" (forthcoming) Submitted to Soc Sciences [Gacek & Jochelson forthcoming].

54 For examples, see Bisgould, *supra* note 7; Bisgould & Sankoff, *supra* note 34; Gacek & Jochelson 2017a, *supra* note 2; Gacek & Jochelson 2017b, *supra* note 2; Jochelson & Gacek 2018, *supra* note 2; Katie Sykes, "Rethinking the Application of Canadian Criminal Law to Factory Farming" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc, 2015) 33 [Sykes]; Verbora, *supra* note 19.

55 See generally Gacek, *supra* note 48.

56 *Ibid*; see also Gacek & Jochelson forthcoming, *supra* note 53; John Sorenson, *About Canada: Animal Rights*, (Halifax and Winnipeg: Fernwood Publishing, 2010) [Sorenson 2010].

57 Melissa Marie Legge & Margaret Robinson, "Animals in Indigenous Spiritualities: Implications for Critical Social Work" (2017) 6:1 J Indigenous Soc Development at 3 [Legge & Robinson]. For further examples of Indigenous perspectives on human-animal relations, see Anne-Christine Hornborg, *Mi'kmaq Landscapes: From Animism to Sacred Ecology* (Hampshire: Ashgate, 2013) [Hornborg]; Raven Sinclair, "Bridging the Past and the Future: An Introduction to Indigenous Social Work Issues" in Raven Sinclair, Michael Hart, & Gord Bruyere, eds, *Wicihitowin: Aboriginal Social Work in Canada* (Halifax: Fernwood Publishing, 2009) 19 [Sinclair]; Michael Anthony Hart, "Anti-Colonial Indigenous Social Work," in Raven Sinclair, Michael Hart, & Gord Bruyere, eds, *Wicihitowin: Aboriginal Social Work in Canada* (Halifax: Fernwood Publishing, 2009) 25 [Hart] .

view animals as significant for the emotionally rich kinships animals provide humans (with Indigenous people living 'shoulder to shoulder' with animals); as sources of wisdom and protection; as significant to Indigenous ceremonies and rituals; and as historically important to contemporary Indigenous peoples.[58] Taken together, unique relationships with animals feature centrally in many Indigenous spiritualities, and lessons derived from the interconnectedness of humans and animals can lead the focus and tactics of efforts for both present-day environmental and decolonization activism.[59]

Furthermore, privileging humans and human interests over and above those of their nonhuman counterparts is an essential premise of anthropocentrism.[60] Within the framework of green criminology, law's assumptions are laid bare as apprised of anthropocentric logics. Unfortunately, traditional criminal justice systems are often inadequate to redress the impact of environmental and animal abuse harm. Indeed, such logics can be cruel and coercive; however, green criminologists like Hall,[61] have made a significant case for the wider utilization of restorative justice and mediation-based approaches for redress and remediation, as a means of "providing alternative or parallel justice mechanisms for both human and nonhuman victims of environmental crimes and broader environmental harms."[62] Considerations of alternative justice initiatives are integral to green criminology's critical approach. To supplement this discussion, a green criminological and legal intersection, comprised of ecocentric values (discussed below) can work to bolster support for alternative justice initiatives and progressive animal welfare reform, and shines a critical lens upon the anthropocentric logics at play in the criminal justice system.

Per White, ecocentrism refers to the view that the environment ought to be valued for its own sake apart from any instrumental or utilitarian value to humans, and "include notions of the intrinsic value of nature, the precautionary principle, the primacy of environmental well-being and

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58 Legge & Robinson, *supra* note 57 at 3.

59 *Ibid*; see also Sinclair, *supra* note 57; Hart, *supra* note 57.

60 See generally Vito De Lucia, "Competing narratives and complex genealogies: The ecosystem approach in international environmental law" (2015) 27:1 J Envtl L 91 [De Lucia].

61 Matthew Hall, "Exploring the cultural dimensions of environmental victimization" (8 Aug 2017), online (pdf): Palgrave Communications <www.nature.com/articles/palcomms201776.pdf> [perma.cc/9GEW-RDLR] [Hall 2017].

62 Nurse, *supra* note 49 at 3.

remediation for any harms done."[63] Anthropocentrism, too, involves a range of philosophies and practices, "from disregard for the environment to stewardship models of environmental care. Nonetheless, the defining characteristic of anthropocentrism is that humans are ends-in-themselves, while other entities are only *means* to attain the goals of humans."[64] In terms of animal cruelty, harms towards nonhuman animals is thus only of consequence when it is measured by reference to human interests and values. In relation to species justice, the kinds of questions we are forced to ask ourselves include which species are threatened and why, as well as why some species are favoured by human communities and some are non-valued.[65] Depending on human use, animal welfare and rights are protected differently, depending on species and circumstance, yet the underlining thread connecting these protections relate back to *human* interests at large.

In terms of manifesting ecocentrism within the criminal justice institutional sphere, White provides insightful commentary into how conceptions of ecocentric values can be translated into practical contexts.[66] Drawing upon the New South Wales Land and Environment Court (NSWLEC) in Australia—one of the oldest specialist environment courts in the world—White contends that the NSWLEC refers to five key indicators of ecocentrism (see Table 1.1). As part of its proceedings, the NSWLEC has the ability to carry out assessments of environmental harm, as well as sentencing offenders for criminal offences pertaining to environmental laws.[67]

Recognizing that there exists complexities and conundrums associated with ecocentrism, White goes on to state that, rightly, there still is merit in ecocentric evaluations based upon these indicators, because:

> At the heart of this evaluation is ecology, involving a holistic understanding of the natural world. For judicial officers—and by extension others working in the criminal justice arena (such as police and correctional officers)—this requires a modicum of specialist expertise on environmental matters and an appreciation of the importance of ecological integrity. Fundamentally, it requires the elevation of

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63 White 2018, *supra* note 6 at 343-344; see also Claire Williams, "Wild law in Australia: Practice and possibilities" (2013) 30 Environmental Planning & LJ 259 [Williams].

64 *Ibid* at 345 [emphasis in original].

65 See generally White 2016, *supra* note 14; see also Gacek, *supra* note 48.

66 See White 2018, *supra* note 6; see also Rob White, *The sentencing of environmental offences involving non-human environmental entities in the NSW Land and Environment Court* (LLM Thesis, University of Tasmania, 2017) [unpublished].

67 White 2018, *supra* note 6 at 348.

> the intrinsic worth of nature (and its various component parts) to the level of first principles.[68]

A focus on animal cruelty, both in the legislative and criminal justice arenas, can include these ecocentric principles. As Gacek and Jochelson indicate, harms to animals "which are detrimental yet legal provides not only necessary attention to a contentious aspect of law but supplements a greater consideration for 'green' issues at large."[69] For example, by recognizing the inherent worth of the nonhuman animal, the gravity or severity of the cruelty towards it, and the measures taken to restore and preserve its moral, legal and ecological integrity, we begin to acknowledge the animal's right to live free from harm in the natural world. Indeed, the case can be made that further law reform, apprised of ecocentric principles, "has the potential to propagate societal understandings of human-animal relations and galvanize the discussion about appropriate and just treatment of animals in Western, liberal democracies."[70]

As green criminological scholarship continues to study and investigate "those harms against humanity, against the environment (including space) and against nonhuman animals committed both by powerful institutions (e.g. governments, transnational corporations, military apparatuses) and also by ordinary people."[71] Brisman, in a similar vein to White, rightly contends that all citizens "can play a role in how we *respond* to those harms through existing appendages of and new features within the criminal justice system."[72] In this spirit, green criminological and legal studies apprised of ecocentric logics can not only take a modest step forward in interdisciplinarity, but develop workable outcomes for animal law, rights, and justice. By redressing evidence which attends to the linkages between animal abuse and interpersonal violence through an ecocentric lens, we

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68 *Ibid* at 349.

69 Gacek & Jochelson forthcoming, *supra* note 53.

70 *Ibid.*

71 Piers Beirne & Nigel South,"Introduction: approaching green criminology" In Piers Beirne & Nigel South, eds, *Issues in green criminology: Confronting harms against environments, humanity and other animals* (Willan: Cullompton, 2007) at xiii [Beirne & South].

72 Avi Brisman, "Of Theory and Meaning in Green Criminology" (2014) 3:2 Intl J for Crime, Justice & Soc Democracy 21 at 29 [emphasis in original] [Brisman 2014]; see also Rob White, ed, *Environmental Crime: A Reader* (Willan: Cullompton, 2009) [White 2009]; Rob White, *Transnational Environmental Crime: Toward an Eco-Global Criminology* (Abingdon: Routledge, 2011) [White 2011].

begin to acknowledge alternative constructions of 'the animal' while providing a more effective response to animal cruelty, a discussion of which I turn to next.

## IV. Reconsidering The Cruelty Connection: Linking Interpersonal Violence With Animal Abuse

Animal cruelty is a widespread phenomenon with serious implications for animal welfare, individual and societal wellbeing. Within veterinary pathological literature, "extensive research has identified acts of animal cruelty, abuse and neglect as crimes that may be indicators and/or predictors of crimes of interpersonal violence and public health problems."[73] Such a consideration has also been a growing concern and gaining traction within disciplines like sociology, criminology, and critical animal studies.[74] Renewed interest in considering animal cruelty, not only as a crime against the welfare of animals, but also "as a bellwether and a gateway to possible acts of interpersonal violence has coincided with societal demand for increased prosecution and punishment of cruel acts against animals".[75]

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73 Randall Lockwood & Phil Arkow, "Animal Abuse and Interpersonal Violence: The Cruelty Connection and Its Implications for Veterinary Pathology" (2016) 53:5 Veterinary Pathology 910 at 910 [Lockwood & Arkow].

74 For examples, see Beirne 2002, *supra* note 2; Beirne 2004, *supra* note 2; Beirne 2011, *supra* note 2; Cheryl L Currie, "Animal Cruelty by Children Exposed to Domestic Violence" (2006) 30:4 Child Abuse & Neglect: Intl J 425 [Currie]; Deckha 2012, *supra* note 41; Eleonora Gullone, "An Evaluative Review of Theories Related to Animal Cruelty" (2014) 4:1 J Animal Ethics 37 [Gullone]. In relation to green criminological scholarship contributions, see Nik Taylor & Amy Fitzgerald, "Understanding animal (ab)use: Green criminological contributions, missed opportunities and a way forward" (2018) 22:3 Theoretical Criminology 402 [Taylor & Fitzgerald].

75 Lockwood & Arkow, *supra* note 73 at 911; for Canadian examples, see also Cara Melbye "Canada's animal cruelty shame", *NOWToronto* (31 August 2016) online: <nowtoronto.com/news/canada-s-animal-cruelty-shame/> [perma.cc/XV99-CPN2] [Melbye]; Sankoff, *supra* note 28; Camille Labchuk "Our animal cruelty laws need to catch up in 2018", *The Globe and Mail* (25 February 2018) online: <www.theglobeandmail.com/opinion/our-animal-cruelty-laws-need-to-catch-up-in-2018/article38109498/> [perma.cc/K5CB-S6JM] [Labchuk].

Kellert and Felthous outline a preliminary classification of nine distinct motives for animal cruelty, [76] which as Lockwood and Arkow suggest, can be helpful for medical professionals to be aware of so that they can better generate questions to ask or scenarios to evaluate when reviewing the available evidence of animal cruelty at hand.[77] The nine motives are as follows:

(1) To control an animal – to control or shape an animal's behaviour or eliminate presumably undesirable characteristics of an animal;
(2) To retaliate against an animal – extreme punishment or revenge for a presumed wrong on the part of the animal;
(3) To satisfy a prejudice against a species or breed – may be associated with cultural values;
(4) To express aggression through an animal – instilling violence tendencies in the animal in order to express violent, aggressive behaviours toward other people or animals;
(5) To enhance one's own aggressiveness – to improve one's aggressive skills or to impress others with a capacity for violence;
(6) To shock people for entertainment – to 'entertain' friends;
(7) To retaliate against another person – exacting revenge;
(8) Displacement of hostility from a person to an animal – displaced aggression against authority figures; and
(9) Nonspecific sadism – absence of any particular provocation or especially hostile feelings toward an animal.[78]

Does this mean that companion animals are more likely to be abused in a household experiencing interpersonal violence? Unfortunately, the answer is not that simple, as this question cannot be addressed in a similar manner that studies of other crimes are, namely, through qualitative and quantitative analyses of data. Currently in Canada there are no small- or large-scale studies of animal cruelty which have collected evidence to answer this question (as discussed below). While a good social scientist remains mindful that correlation does not equal causation (and so the cruelty

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76 See generally Stephen R Kellert & Alan R Felthous, "Childhood Cruelty toward Animals among Criminals and Noncriminals" (1985) 38:12 Human Relations 1113 [Kellert & Felthous].

77 Lockwood & Arkow, *supra* note 73 at 912.

78 *Ibid* at 913.

'connection' is not concrete as such), this does not mean a focus on the cruelty connection is all for naught. What is known about the link between animal abuse and interhuman violence is that clearly, "family violence, including animal abuse, is a multifaceted phenomenon in which various forms of abuse often occur together and in which the presence of one form might signify the existence of others. It is likely, too, that some of the key sociological dimensions of animal abuse mirror those of interhuman violence."[79] In many cases, acts of violence against animals "are modeled on the same dynamics of power and control that frequently mark the trajectory of intimate partner violence, sexual assault, child abuse, and other violent antisocial behaviour."[80]

Taking into consideration the values of ecocentrism, an awareness of the cruelty connection has many significant benefits for the overall welfare of animals and for the further safeguarding of animals from future cruelty, abuse and neglect. For example, animal maltreatment, per Lockwood and Arkow, is one of most challenging diagnoses in clinical work, "requiring time, experience, emotional energy, sensitivity, tact, and not a small measure of courage" to grapple with the realities of animal suffering medical professionals witness.[81] According to the authors, awareness of the connection can assist attending veterinarians "make the strongest possible case for investing time and resources" needed to be able to tell the victim's full story (whether human or nonhuman) in a court of law, and can provide valuable insights "into the possible risks the offender may pose to other animals or society in general" should the animal abuser not be held accountable for his or her actions.[82] By recognizing the inherent worth of the nonhuman animal, medical professionals provide further contextualization of the distinct harm the animal has suffered, of which may assist the judiciary in their adjudication and sentencing. Furthermore, such insights can be instrumental in aiding the court and mental health professionals "in determining the most appropriate intervention for those found guilty of animal cruelty",[83] as well as what remediation is necessary to

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79 Beirne 2004, *supra* note 2 at 42.

80 Lockwood & Arkow, *supra* note 73 at 910.

81 *Ibid* at 911; see also Phil R Arkow, "Recognizing and responding to cases of suspected animal cruelty, abuse, and neglect: what the veterinarians need to know" (2015) 6 Veterinary Medicine: Research & Reports 349 [Arkow].

82 *Ibid* at 910.

83 *Ibid.*

restore and repair the ecological integrity of the victim (whether human or nonhuman) within their living environment and community.

Furthermore, research on the cruelty connection will likely proceed apace, in part "because it is a reliable vehicle for criminologists to pierce the general veil of social inaction…The principal site of investigation of the link probably will continue to be family violence."[84] While this research is timely, it is not the sole area criminological and legal studies should consider. As I discuss below, there are additional sites for social action to occur. These sites not only attempt to directly redress animal cruelty legislation in Canada, but extend beyond the legislative arena to illuminate potential recourse for progressive change in how humans understand nonhuman animals in our world.

## V. DISCUSSION: POTENTIALS FOR ECOCENTRIC JUSTICE?

As this Paper demonstrates, discussions concerning the further safeguarding of nonhuman animals from cruelty is by no means a simple discussion, nor is this Paper an exhaustive understanding for one to comprehensively understand the social construction of animal cruelty. Notwithstanding, an overarching theme which transcends these discussions continues to be how federal animal welfare legislation, specifically the cruelty provisions of the *Code*, require a serious reconsideration (if not radical overhaul) of reform to bring it up to the same level of progress as witnessed in other Western countries.[85] Ecocentrism can be a viable alternative to the current anthropocentric logics at play in the legislative and criminal justice arenas, and I address several potential implications for research, theory, and policy below.

First, encouraging multi-agency collaboration in the proper recording and collecting of evidence of animal cruelty harms would be a solid step in the right direction. Recognizing the inherent value of nonhuman animals and their interests to be safeguarded from harm, agencies like the Royal Canadian Mounted Police (RCMP), Statistics Canada and the provincial Societies for the Prevention and Cruelty to Animals (SPCAs) can draw upon ecocentric values and principles and work together to document instances of animal cruelty in a more comprehensive manner. Doing so will not only create comprehensive databases of animal cruelty evidence, but it will

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84 Beirne 2002, *supra* note 2 at 384.

85 See generally Sankoff, *supra* note 28; see also Jochelson & Gacek 2018, *supra* note 2.

encourage researchers and agencies like the RCMP, Statistics Canada, and SPCAs to use the data and evidence collected in relation to their own understandings of ecocentrism.

Furthermore, researchers examining and investigating animal cruelty must also pay urgent attention to data collection and methodological issues of collecting evidence of animal cruelty. For example, in both Canada and the United States, data on animal cruelty is scant, and when it is available it is thoroughly unreliable and difficult to standardize across jurisdictions.[86] There are few self-report studies of animal cruelty and there continues to be no large-scale victimization surveys that include questions on incidence, frequency, and severity of animal cruelty. As Beirne suggests, much existing empirical data "are compromised by the use of control groups of nonrandom composition and the uncritical constitution and haphazard analytical employment of such categories as 'abuse' or 'cruelty.'"[87] Moreover, we know very little of the relationships between animal cruelty and key variables like gender, age, race, class, sexual orientation, political affiliation, and religiosity. All of these factors must be taken into consideration if we are to appropriately address the evidence drought.

Second, the creation of new crimes and harsher sentences in cases of animal cruelty has the potential to redress the necessity of holding animal abusers accountable for the cruel acts they commit against animals. For example, Davies contends that, given the linkages between animal cruelty and domestic violence, a new crime called 'aggravated animal cruelty' should be included in the *Code*. In terms of this crime, it recognizes that animal abuse and neglect often exist as part of a cycle of domestic violence, and so an offence is deemed aggravated animal cruelty when it is (1) performed in the presence of a minor; or (2) performed with the purpose of intimidating, coercing, or threatening another person, in which the penalty is an indictable offence upon conviction.[88]

Another shift in criminalization would be to engage in a more nuanced understanding of 'willful neglect' than what is currently provided in the *Code*. As Sankoff contends:

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86 See generally Beirne 2002, *supra* note 2; see also Chris Davies, "Animal Cruelty Legislation Canada" (2013), online (pdf): <www.terryslaw.ca/wp-content/uploads/2013/12/Animal-Welfare-Bill-Canada-V11.pdf> [perma.cc/36YS-2ANJ].

87 Beirne 2002, *supra* note 2 at 384; see also Beirne 2011, *supra* note 2.

88 Davies, *supra* note 86 at 23.

> If you're having trouble conceptualizing what "willful neglect" could possibly mean, you're not alone. The courts struggle with it too. Every other negligence provision in the Code recognizes that the point of punishing neglect is to sanction people who don't mean to inflict harm, but who are acting so poorly compared to the "reasonable person" that they deserve to be held responsible anyway. But negligence in the animal cruelty context can only be committed when a person *intentionally* neglects an animal. So if you're simply an absent-minded oaf who doesn't feed your cat for three weeks, you're free to go. In Canada, you have to be *trying* to neglect your cat in order to run into problems with our criminal law.
>
> It's no wonder that prosecutors have stopped bringing charges for neglect, most likely because they're embarrassed to have to explain this stupidity to judges.[89]

Sankoff goes on to state that in order to fix the shortcomings of 'wilful neglect', the *Code* could adopt the standard test for criminal negligence used in the rest of the *Code*. I concur with Sankoff in part, and would add that, given "the majority of cases that are reported to humane law enforcement agencies represent instances of neglect[,]"[90] it might be beneficial for the *Code* to distinguish neglect as incidental, short term, and easily resolved through educational or social service interventions from 'gross neglect,'[91] the latter referring to long term, large scale, and chronic neglect. While Sankoff indicates that by adopting the criminal negligence standard, criminal liability "would only flow in extreme circumstances where the person's conduct towards an animal was *dramatically* worse than what a reasonable person would have done[,]"[92] a clear and objective distinction between neglect and gross neglect could serve to be more easily communicable to judges in a criminal case.

A word of caution is necessary in this second potential implication, however; while new crimes and harsher sentences in animal cruelty laws may have a deterrent effect on would-be or repeat offenders,[93] Deckha contends that laws against animal cruelty "create proximity in the social constructedness of various forms of difference."[94] Put differently, while there may exist genuine concerns about animal suffering in the motivations

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89 Sankoff, *supra* note 28 [emphasis in original].

90 Lockwood & Arkow, *supra* note 73 at 914.

91 *Ibid.*

92 Sankoff, *supra* note 28 [emphasis in original].

93 Haydn Watters "Animal Cruelty: Is jail a reasonable punishment?", *CBC News* (30 October 2016), online: <www.cbc.ca/news/canada/nova-scotia/animal-cruelty-punishments-1.3823941> [perma.cc/UYU7-MDC8] [Watters].

94 Maneesha Deckha, "Welfarist and Imperial: The Contributions of Anticruelty laws to Civilizational Discourse" (2013) 65:3 American Quarterly 515 at 516.

of legislators to vote on bills to amend animal cruelty laws (as demonstrated above, Bill C-84 is an example of this), the mandates of such laws continue to regulate animal exploitation rather than prevent it. Anticruelty laws which only reaffirm anthropocentrism (such as Davies' creation of aggravated animal cruelty) instead of ecocentrism "do not affect customary practices that are part of the social fabric or part of accepted institutional use of animals."[95] Therefore, in casting scrutiny on the efficacy of such laws we must task ourselves with the responsibility of calling into question institutionalized social practices where animal cruelty specifically and animal abuse at large "is routine, ubiquitous, and often defined as socially acceptable."[96]

In sum, criminalizing a behaviour such as animal cruelty should not be the only way to reduce the occurrence of the offence.[97] Although not always the case, criminalization can be seen as a 'back-end' process, whereby animals are either considered an afterthought to the law (i.e., 'add animals and stir'), or are considered significant only after the criminal act has occurred, when in fact there is more work to be accomplished (and can be achieved) through 'front-end' processes and issues. Indeed, as the third and final implication, I believe in the age-old adage that the pen is mightier than the sword; educating democrats on the humane treatment of animals has the potential to viably shift the winds of human-animal affairs away from the anthropocentric logics in legislation and criminal justice we have come to know. For example, the way we prescribe animal cruelty needs further context; a legal definition of animal cruelty would certainly clarify an already muddled area of legislation demonstrating a profundity of discursive and ancillary effects. Furthermore, citizens must no longer be treated as a befuddled herd of passive fools and hysterical hotheads;[98] instead, they must be accorded a window of opportunity to struggle with the complex trade-offs that animate decisions about how we continue to socially construct animal cruelty. Indeed, rhetoric matters to this education, and playing to criminology's self-image as a 'dismal science,' the strengths this discipline has for both animal welfare reforms specifically and reforming criminal

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95 *Ibid* at 519.

96 Beirne 2002, *supra* note 2 at 385; see also Morin, *supra* note 9.

97 See generally Mark Halsey, "Against 'Green' Criminology" (2004) 44:6 Brit J Crim 833 [Halsey]; see also Brisman 2014, *supra* note 72.

98 James Gacek & Richard Sparks, "The Carceral State and the Interpenetration of Interests: Commercial, Governmental, and Civil Society Interests in Criminal Justice" (forthcoming).

justice generally is profound. As Gacek and Sparks suggest, criminology's most powerful and compelling stories of change are narratives of decline and disaster, for it is within them that we document, warn, alert, and critique the social world as it is and reimagine what it could be for all of its citizens—where 'better' has the potential to mean more moderate, milder, rights-respecting, liberal, or principled reforms.[99] In this spirit, a green criminological and legal intersection, comprised of ecocentric principles and values, can draw upon these narratives to further educate the demos about the realities of animal cruelty our nonhuman counterparts face. Education is an invaluable asset to reconsidering animal cruelty in society, and time and resources must be invested to progress this cause and reach this distinct prize.

## VI. CONCLUSION

This Paper was an attempt to galvanize further attention towards Canada's federal animal cruelty legislation and confront the challenges facing amendments in favour of respectful and progressive reforms. Drawing upon green criminological insight, in particular ecocentrism, law has the potential to recognize the socio-political and anthropocentric machinations of the criminal justice system. There is significant purchase in ecocentric justice, as it allows us to reconsider the safeguards necessary to recognize the inherent value of animals in society and secure their safety from further abuse, cruelty, and neglect.

Conceptions of the animal in law are beginning to change. Some jurisdictions throughout the world are beginning to understand that animals are sentient beings, and through their laws they are imposing "a correlative duty…to deal with animals in ways that limit undue suffering. The passing of these laws suggest that even legal traditions that see animals as property can change as social conditions change."[100] As Gacek and Jochelson contend, whether laws alter, bend, break or inure:

> there is constant reflection and refraction of the social in its compositions, and it is the tethering of the social and law that provides potentialities for progressive (and at times regressive) change. These tethering points provide ample

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99 *Ibid.*

100 Jochelson & Gacek, *supra* note 2 at 172; see also 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 Rev 281 at 302.

> opportunity for animal welfare and cruelty legislation, and perhaps more progressive instruments of animal entitlements, to present opportunities for green criminological perspectives to inform the reconstitution and reform of these, at times, antediluvian strictures of law.[101]

Therefore, cognitive commitments towards progressive animal welfare reforms must be made a chief concern in Canadian society. The evidence and moral awareness outlined in this Paper suggest that now is the time for our common law system to migrate to higher moral ground. Taking green criminology and law together, it becomes clear that a continued lack of concern for animal cruelty and its subsequent harms in Canada will have serious ramifications for nonhuman animals. However, an ecocentric justice approach attempts to render animal cruelty more transparent, and supplements efforts to remediate the harms caused by humans.

Unless appropriate measures are put into place to grapple with the realities of the exploitive relationships between humans and their nonhuman counterparts, animal cruelty will continue. Canada remains an animal welfare laggard. There remain serious issues with the cruelty provisions in the *Code.* We can no longer accept this. As Lockwood and Arkow contend, "[t]here is overwhelming evidence that when animals are abused, people are at risk; when people are abused, animals are at risk."[102] In effect, we must challenge ourselves to think about sites and institutions in society where epistemologies of harm towards animals is naturalized and made possible. We must continue to ask sharper questions about how animals are put at risk in the first place, and what steps we need to take as a society to ameliorate their current tragic circumstances. Finally, we must confront how animal cruelty legislation impacts citizens' participation in harmful acts towards animals, and whether particular combinations of ecocentric values and principles can undergird shifts in legislative and criminal justice thinking. Evidence that showcases the realities of animal cruelty helps move and reposition the legal dial towards animal justice, and the associational life of impacted communities and ecosystems. For the sake of our nonhuman friends, this evidence can no longer be suppressed or evaded.

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101 Gacek & Jochelson forthcoming, *supra* note 53.

102 Lockwood & Arkow, *supra* note 73 at 916.

| **Table 1.1** Indicators of Ecocentrism[103] | |
|---|---|
| **Indicator** | **Example** |
| The extent to which the intrinsic value or worth of the non-human environmental entity is taken into consideration | Laws and judgements which acknowledge the rights of nature |
| The use of ecological perspectives to estimate the degree of harm to non-human environmental entities | References to ecological criteria by courts in assessing the degree and nature of environmental harm |
| The kinds of expertise mobilized within and demonstrated by a court to capture adequately the nature and complexities of the environmental harm | Expert knowledge of judicial officers in regards to ecological integrity, environmental health and sustainability |
| The gravity of the offence against the non-human entity as reflected in the penalties given | The quantum and type of penalty, as well as the judicial rationales for the penalty given |
| The measures taken to ensure the maintenance, restoration or preservation of ecological integrity | The imposition of orders that involve remediation activities |

[103] White, *supra* note 6 at 349 [drawing from White (2017). Reproduced with permission by author].

# The Constitutional Elephant in the Room: Section 8 *Charter* Issues with *The Animal Care Act*

RYAN ZIEGLER *

## ABSTRACT

*The Animal Care Act* (Manitoba) is touted as one of the most comprehensive animal protection statutes in Canada. Its strength derives largely from the unparalleled entry and search powers that it confers upon animal protection officers appointed under the statute. Sections 8(5) and 10.3(1) of *The Animal Care Act* respectively permit warrantless entries and searches of non-commercial non-residential premises and dwellings.

This article examines whether ss. 8(5) and 10.3(1) of *The Animal Care Act* can withstand s. 8 *Charter* scrutiny, and, if not, whether these sections are justifiable under s. 1 of the *Charter*. This article contends that although *The Animal Care Act* provides for regulatory search powers, that fact alone does not diminish one's expectation of privacy as a matter of course. Rather, the extent of the privacy expectation with respect to a regulated activity depends on context. This article suggests that a fulsome appraisal of context with respect to *The Animal Care Act* must consider (1) the stigma, publicity and consequences that attach to animal cruelty charges; (2) the extraordinary scope of the ss. 8(5) and 10.3(1) entry and inspection powers; and (3) the inadequate or non-existent safeguards provided for by *The Animal Care Act*. As such, the system of prior authorized searches that the Supreme Court of Canada outlined in *Hunter v Southam* should apply to *The*

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*Animal Care Act*. This article further questions whether, given the availability of tele-warrants under *The Provincial Offences Act*, this overreaching is necessary.

***Keywords***: Section 8; search; seizure; animal welfare; animal cruelty; animal protection; criminal law; regulatory search; Manitoba; *Charter*; *Oakes*; stigma; *Hunter v Southam*

## I. INTRODUCTION

In 1996, the Legislature of Manitoba enacted *The Animal Care Act* ("the ACA").[1] The ACA is considered to be amongst the most stringent animal protection statutes in Canada.[2] Much of this strength flows from a catalogue of entry and search powers conferred upon animal protection officers ("APOs") appointed under the ACA. In particular, ss. 8(5) and 10.3(1) of the ACA provide broad warrantless entry and search powers to APOs under certain conditions into non-residential non-commercial private premises, as well as, dwellings.[3]

Canadian courts have consistently shielded the sanctity of one's dwelling, and on occasion private premises, from warrantless searches by state agents.[4] In 1984, the Supreme Court of Canada ("the SCC") outlined a system of prior authorization for searches in *Hunter v Southam* ("*Hunter*").[5] This system requires a neutral and impartial judicial figure to issue a warrant based on information sworn under oath.[6] No challenges to ss. 8(5) and

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1 *The Animal Care Act*, SM 1996, c 69 [ACA].

2 Animal Legal Defence Fund, "Prince Edward Island Jumps to Top Spot as Canada's Best Province for Animal Protection Laws" (17 July 2017), online: <aldf.org/article/prince-edward-island-jumps-to-top-spot-as-canadas-best-province-for-animal-protection-laws/> [perma.cc/EY7B-UG2Q]; Animal Legal Defence Fund, "2016 Canadian Animal Protection Law Rankings" (21 July 2016), online: <aldf.org/article/2016-canadian-animal-protection-laws-rankings/> [perma.cc/5F4L-36SU]; Animal Legal Defence Fund, "2015 Canadian Animal Protection Law Rankings" (7 July 2015), online: <aldf.org/article/2015-canadian-animal-protection-laws-rankings/> [perma.cc/S3Q2-S3S9].

3 This article refers to ss. 8(5) and 10.3(1) of the ACA simply as ss. 8(5) and 10.3(1) to avoid cumbersome phrasing.

4 *R v Evans*, [1996] 1 SCR 8, [1996] SCJ No 1 (QL).

5 *Hunter v Southam*, [1984] 2 SCR 145, 1984 CarswellAlta 121 [cited to CarswellAlta] [*Hunter*].

6 *Ibid.*

10.3(1) of the ACA have been reported to date though each provision appears to be *prima facie* constitutionally impermissible in relation to s. 8 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").[7]

This article will begin by briefly outlining the ACA's legislative history, and the developments of ss. 8(5) and 10.3(1). Next, this article will review *Hunter*, and several SCC decisions on regulatory searches. Subsequently, this article will explore what expectation of privacy one ought to reasonably expect in relation to the ss. 8(5) and 10.3(1). In defining one's reasonable expectation of privacy ("REP") in relation to the ACA, I will contend that a contextual, rather than bright-line, approach is the proper analytical basis. By adopting this contextual approach, this article will argue that (1) stigma, publicity and statutory consequences; (2) the extraordinary scope and application of ss. 8(5) and 10.3(1); and (3) the inadequacy of statutory safeguards under the ACA, must be considered when determining REP in

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7 Manitoba appears to have only three reported decisions involving independent constitutional analyses in the context of ACA searches and regulatory prosecutions. Results were found by searching for "'animal care act' manitoba" on LexisNexis QuickLaw, and then narrowing results to include only decisions relating to "Constitutional Law" in "Manitoba". The exact same decisions are found on WestLawNext when using the same search terms and by applying the same filters. These results were cross-referenced with the results yielded by using the same search terms in each legal database, but by filtering the results to include only "Criminal Law" decisions.

There are actually four reported decisions in Manitoba that touch on ACA searches and regulatory prosecutions and the *Charter*. A review of these decisions reveals, however, that only three (listed below) of these four decisions contain original constitutional analyses. The remaining reported decision, an appeal decision, mentions, and endorses, only in passing the s. 24(2) analysis performed in earlier proceedings, but does not undertake an analysis of its own.

The three decisions with independent constitutional analyses are: *R v Bernier*, 2012 MBPC 36 [*Bernier*]; *R v Nikkel*, 2013 MBQB 207 [*Nikkel*]; *R v Taylor*, 2015 MBQB 193 [*Taylor*]. The remaining decision is *R v Ragnanan*, 2014 MBCA 1.

These decisions' respective engagements with the ACA are circumscribed to s. 24(2) *Charter* applications to exclude evidence based on alleged s. 8 *Charter* breaches. The depth of analysis across these decisions varies considerably. For example, the Manitoba Provincial Court in *Bernier* dedicates two lines in a 362 paragraph decision to the issue of s. 8 *Charter* breaches and s. 24(2) exclusion analysis. By contrast, the Manitoba Court of Queen's Bench spends 32 paragraphs in 57 paragraph decision conducting ss. 8 and 24(2) *Charter* analyses. Further, none of these three decisions examine ss. 8(5) and 10.3(1) of the ACA but rather actively discuss either s. 8(1) of the ACA or consent searches as they relate to the ACA. Only *R v Taylor*, which is discussed throughout below, involves a consideration of ACA searches as they relate to the dwelling.

relation to the *ACA*. From these analyses, this article argues that the s. 8 *Charter* safeguards outlined in *Hunter* ought to apply to ss. 8(5) and 10.3(1). This article then concludes that ss. 8(5) and 10.3(1) cannot be justified under s. 1 of the *Charter*.

## II. A BRIEF LEGISLATIVE HISTORY OF THE *ACA*

One could be forgiven for mistakenly assuming that the *ACA* is long-standing legislative artifact. In reality, Manitoba enacted the *ACA* in 1996; moreover, many of the *ACA*'s entry and search powers were enacted by way of amendment in 2009.[8] Prior to its enactment, the seeds of the *ACA* germinated in related but separate provincial statutes: *The Animal Diseases Act*, *The Animal Husbandry Act*, *The Highway Traffic Act*, and *The Wildlife Act*.[9] Further protection was, and continues to be, afforded by federal legislation: the *Criminal Code*, the *Health of Animals Act*, and the *Meat Inspection Act*.[10]

*The Animal Disease Act* related primarily to preventing and controlling diseases amongst commercial animals, *viz.* livestock.[11] In contrast, *The Animal Husbandry Act* focused solely on animal mistreatment.[12] Both statutes prescribed minimal standards of treatment to animals, definitions for "deprivation," and powers for agents appointed under these respective statutes.[13] As the Law Reform Commission of Manitoba pointed out, however:

> An analysis of these legislative provisions suggests that they suffer from a lack of coordination and clarity with the result that those individuals responsible for enforcing and administering these statutes are hampered as much as assisted by them. The first and most obvious problem with the current law is that it is confusing...There are no less than seven categories of enforcing agents mentioned in the three acts...[D]ifferent provisions of the Act[s] have grouped them differently...As a result of this haphazard approach to animal protection provisions, they are difficult to locate. Not only are they divided into four statutes

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8 *ACA*, *supra* note 1; *The Animal Care Amendment Act*, SM 2009, c 4 [*ACAA*].

9 Manitoba, Manitoba Law Reform Commission, *Animal Protection*, Report #93 (Manitoba: Law Reform Commission, 1996) at 8-11 [Manitoba Law Reform Commission].

10 *Ibid* at 4-5.

11 *Ibid* at 5-6.

12 *Ibid* at 6-8.

13 *Ibid* at 5-8.

> but none of the statutes in question readily identify themselves to a searcher for these provisions.[14]

The proliferation of "puppy mills" throughout rural Manitoba in the mid-1990s provided the Legislature with the impetus to resolve these issues.[15]

In drafting the ACA, the Legislature pulled and modified provisions from *The Animal Husbandry Act* and *The Animal Diseases Act*, introduced new legislative measures, and combined them. The ACA increased penalties for falling below minimal standards of care, and, more significantly, established animal cruelty as a provincial regulatory concern, rather than a federal criminal concern.[16] Additionally, the ACA drew explicit distinctions between commercial animals and companion animals that were codified, in part, in s. 8(5):

> [A]t any reasonable time and where reasonably required to determine compliance with this Act...enter and inspect any facility, premises or other place that is not a dwelling place...in which the animal protection officer believes on reasonable grounds there is a companion animal in distress...[17]

In 2009, the Legislature significantly amended the ACA, which included the introduction of s. 10.3(1). Section 10.3(1) signified a remarkable departure from previous iterations of the ACA. Section 10.3(1)(a) provides that:

> An animal protection officer may, at any reasonable time and where reasonably required to determine compliance with an order made under subsection 10.1(1)...enter and inspect any place in which the animal protection officer believes on reasonable grounds there is or should be an animal, structure, supply of food or water, shelter, enclosure, area, document, record or other thing to which the order applies.[18]

Section 10.1(1) of the ACA provides that where a director under the ACA has reasonable grounds to believe that an animal "is in distress or an animal's owner is not carrying out his or her duties toward the animals as set out in section 2; the director may order the owner to take any action that

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14 *Ibid* at 8-10.

15 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3864 (Rosann Wowchuk).

16 *Ibid* at 3858 (Stan Struthers).

17 ACA, *supra* note 1, s 8(5) [emphasis added].

18 *Ibid*, s 10.3(1)(a) [emphasis added].

the director believes is necessary."[19] In effect, a s. 10.1(1) director's order compels an animal owner, including private pet owners, to either undertake or cease specific actions with respect to the pet owner's duties under s. 2(1) of the *ACA*.

The addition, in 2009, of director's orders amendments dramatically broadened the availability of entry and search powers under the *ACA*, housing a scheme whereby an individual (the director), charged with significant investigatory functions, could also authorize warrantless entries and searches of places, including dwellings.

Section 10.3(1) is unprecedented not only in Manitoba but throughout Canada, other than Ontario. Aside from a few qualified exceptions, ss. 8(5) and 10.3(1) do not represent the legislative norm throughout Canada's other provinces with respect to animal protection legislation.[20] Where other provincial animal welfare statutes authorize warrantless entries to private premises, these private premises are commercial and non-residential in nature since the inspection powers clearly relate to commercial practices.[21] The vast majority of provincial animal protection legislation in Canada either expressly requires a warrant to enter a dwelling or declines to empower APOs to enter dwellings without a warrant, aside from codifications of exigent search powers.[22] Moreover, federal regulatory

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19 *Ibid*, s 10.1(1).

20 In general, it appears that no provincial animal welfare statutes, other than ss 13(1) and 13(6) of the *Ontario Society for the Prevention of Cruelty to Animals Act*, permit agents/inspectors to repeatedly enter and inspect someone's home without a warrant on the basis of a director's order or a comparable legislative instrument. Section 23(4) of the *Animal Protection Act* of Nova Scotia permits warrantless searches of non-residential non-commercial property; as is explored below though, this provision was found to be unconstitutional.

21 See: *Preventions of Cruelty to Animals Act*, RSBC 1996, c 372, ss 14(1), 14(2), 15, 15.1, 15.2 (British Columbia); *Animal Protection Act*, RSA 2000, c A-41, ss 4(1), 10(1) (Alberta); *The Animal Protection Act, 2018*, SS 2018, c A-21.2, s 12(1) (Saskatchewan); *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, ss 11.4(1), 12(6) (Ontario); *Animal Welfare and Safety Act*, CQLR, c B-3.1, s 39 (Quebec); *Animal Health and Protection Act*, SNL 2010, c A-9.1, s 10(1) (Newfoundland and Labrador); *Society for the Prevention of Cruelty to Animals Act*, RSNB 2014, c 132, s 8(1) (New Brunswick); NB Reg 2010-299, s 2 (New Brunswick); *Animal Welfare Act*, RSPEI 1988, c A-11.1, ss 19, 31(1), 31(2), 32(1) (Prince Edward Island); *Animal Protection Act*, SNS 2008, c 33, s 23(4) (Nova Scotia).

22 *Ibid.* It is worth noting, that s. 22(2) of *The Tax Administration and Miscellaneous Taxes Act* of Manitoba does allow tax officers appointed under the act a statutory right of warrantless entry into any premises or place, but not a right of inspection of that

statutes touching on animal welfare, such as the *Food and Drugs Act*, and the *Health of Animals Act*, all require warrants to enter and search a dwelling.[23]

## III. Tensions Between Section 8 Of The *Charter*, *Hunter*, And Regulatory Inspections

Section 8 provides that "Everyone has the right to be secure from unreasonable search and seizure."[24] The SCC in *Hunter*—a case involving searches under the *Combines Investigation Act*, a regulatory statute—explained the obligation to obtain judicial authorization prior to conducting a search:

> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.[25]

*Hunter* outlined two broad preconditions for meaningful prior authorization: (1) the "[person providing authorization] must at a minimum be capable of acting judicially," meaning she cannot be assigned concurrent prosecutorial or investigatory functions or duties; and (2) reasonable grounds, established under oath, "to believe that an offence has been committed and that there is evidence to be found at the place of the search."[26] These are the minimum standards for authorizing a search under s. 8.[27]

*Hunter* is the starting point for s. 8 cases, but not the final word. Outside criminal prosecutions, the *Hunter*-criteria may be inapplicable. The SCC has struggled mightily to provide conceptual clarity for s. 8 as it relates to

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premises or place, where there are "reasonable grounds to believe records relevant to the administration or enforcement of a tax Act are kept": RSM 1987, c R150.

23 *Food and Drugs Act*, RSC 1985, c F-27, s 23(1.1); *Health of Animals Act*, SC 1990, c 21, s 39(1); *Meat Inspection Act*, RSC 1985, c 25 (1st Supp), s 13(3).

24 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 8 [*Charter*].

25 *Hunter*, *supra* note 5 at para 32.

26 *Ibid* at paras 32, 43.

27 *Ibid.*

administrative searches and regulatory inspections, opting instead for something of a piecemeal approach.[28] As Professor Don Stuart commented:

> [W]hether the *Hunter* standards will be applied [outside of *Criminal Code* and drug offence prosecutions] will not often depend on the uncertain vagaries of classification or administrative or a contextual analysis of the particular power and the particular form of regulation.[29]

This commentary is borne out by the case law. For example, in *Comité paritaire de l'industrie de la chemise v Potash*; *Comité paritaire de l'industrie de la chemise v Selection Milton*, the SCC found it "neither useful nor prudent to introduce into Canadian law a prior system of authorization" for administrative warrants, and declined to apply the safeguards in *Hunter*.[30] In some sense, *Comité* attempted to immunize regulatory inspections from *Hunter* requirements on the basis that many administrative inspections are conducted "before it is even possible to establish the existence of reasonable grounds to believe that a breach of the law has occurred."[31]

Eight years later, the SCC adopted a more characteristically contextual approach to regulatory inspections (and informational privacy) under the *Income Tax Act* ("the *ITA*") in *R v Jarvis*.[32] The issue in *Jarvis* was determining when the predominant purpose of an inquiry under the *ITA* went to penal liability or was a mere audit. Where the predominant purpose is a penal investigation, full *Hunter* protections apply since an adversarial relationship arises between the taxpayer and the state. Since an audit is a tool by which to determine a taxpayer's regulatory compliance with self-reporting requirement, rather than penal liability, accordingly the safeguards in *Hunter* are inapplicable.

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28 RTH Stone, "The Inadequacy of Privacy: *Hunter v Southam* and the Meaning of 'Unreasonable' in Section 8 of the *Charter*" (1989) 34 McGill LJ 686 at 698.

29 Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 356-357.

30 *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Selection Milton*, [1994] 2 SCR 406, [1994] SCJ No 7 (QL) at para 90 [*Comité*]

31 *Ibid* at para 92.

32 *R v Jarvis*, 2002 SCC 73 at paras 59-65, 69-98.

## IV. Reasonable Expectations Of Privacy, Context, And The *ACA*

In light of the above, one could argue that since entries and inspections under ss. 8(5) and 10.3(1) may be classified as regulatory or administrative, there should be accorded either no or a diminished expectation of privacy as a matter of course. This line of argument would conclude that (1) the safeguards outlined in *Hunter* are not strictly required for *Charter* compliance with respect to ss. 8(5) and 10.3(1), and (2) the safeguards in place under the *ACA* are sufficient under the circumstances.

It is difficult, however, to bootstrap the reasoning in *Comité* to analyses of ss. 8(5) and 10.3(1). *Comité* essentially justifies warrantless administrative searches on the absence of reasonable grounds as a practical policy consideration. In other words, regulatory inspection powers exist to uncover evidence of reasonable grounds of an offence— as such, it would be circular, and pointless, to require reasonable grounds to inspect. Sections 8(5) and 10.3(1), however, are operable only where reasonable grounds of an animal in distress already exist. In that sense, neither section bears much similarity to regulatory inspections as they are discussed in *Comité.*

Further, I would argue that this statutory fact also complicates the predominant purpose test outlined in *Jarvis*. For example, s. 10.3(1) is meant to determine compliance with a s. 10.1(1) director's order, which can only be made where there are reasonable probable grounds that an animal is in distress or an animal owner is failing to carry out her duties under s. 2 of the *ACA*. I would suggest that there will be few practical situations in which a determination of non-compliance with s. 2 of the *ACA* is readily separate from a determination of penal liability. *ACA* offences, unlike tax evasion, are strict liability offences so an inquiry of non-compliance with s. 2 of the *ACA* is necessarily a finding on penal liability as well. The same cannot be said for a taxpayer failing to comply with self-reporting requirements under the *ITA* whereby a parallel criminal investigation may be necessary, practically speaking, to establish mental culpability only.

Notwithstanding these tensions, it seems manifestly clear from *Jarvis*, and earlier SCC decisions, that one must look to the entire context when determining a person's expectation of privacy in relation to regulatory searches:

> The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy

> interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.[33]
>
> As La Forest J. stated in *Wholesale Travel* "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context". In this connection, differing levels of Charter protection may obtain under the same statute, depending on the circumstances. Compare Hunter v. Southam Inc. and Thomson Newspapers: each dealt with the former Combines Investigation Act, which, although it created penal offences, was recognized on the whole to embody "a complex scheme of economic regulation". The provisions impugned in Hunter v. Southam authorized entry onto private premises and hence attracted a much greater expectation of privacy than the provision ordering the production of documents in Thomson Newspapers. In this measure, the ITA presents no different consideration. Wilson J. acknowledged as much in McKinlay Transport, where she suggested that greater s. 8 protection would obtain under the ITA if tax officials were to enter onto private property in order to conduct a search or seizure for the purposes of the Act, rather than to compel the same documentation by way of requirement letters...[C]ontext will determine the expectation of privacy that one can reasonably expect...[s. 8] to protect.[34]

Indeed, the Manitoba Court of Queen's Bench ("MBQB") held as much in *R v Taylor*. *Taylor* dealt with consent searches vis-à-vis regulatory animal control inspections under the *ACA*, but not specifically ss. 8(5) and 10.3(1). In *Taylor*, an anonymous caller tipped off the Chief Veterinarian's Office ("the CVO") and the RCMP that Ms. Taylor was keeping her dogs in unsanitary conditions, and with insufficient food, water, and shelter. The anonymous caller further advised that Ms. Taylor might have been maintaining a cannabis grow operation. APO Daniel Fryer, accompanied by RCMP officers, attended Ms. Taylor's dwelling to check on the welfare of her dogs. APO Fryer observed several dogs outside that were properly kept. He advised Ms. Taylor at her door of who he was, and that there had been a complaint about her animals although he withheld that the complaint had also mentioned that Ms. Taylor might have a grow operation in her dwelling. APO Fryer asked Ms. Taylor if he could come into her house to check on her animals. APO Fryer declined to advise Ms. Taylor that she did

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33 *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627, [1990] SCJ No 25 at para 34 [emphasis added] [*McKinlay Transport*].

34 *Jarvis*, *supra* note 32 at paras 61-62, 64 [footnotes omitted].

not have to allow him to enter, and could simply bring her animals to the door for inspection. It was APO Fryer's practice to deliberately not tell pet owners that they could choose to bring their animals to the door for inspection unless they objected to his entry into their dwelling or were otherwise reluctant. APO Fryer knew he could not enter Ms. Taylor's dwelling without a warrant unless she consented to the entry.[35]

Ms. Taylor allowed APO Fryer and the two RCMP officers accompanying him to enter her house. APO Fryer found that the dogs on the main floor of the house were properly cared for. He asked Ms. Taylor whether she had more animals in her house, and she indicated that she had some cats in the basement. Without asking permission, APO Fryer went to her basement, accompanied by Constable Lagace, and found several cats. Although the cats' living conditions were not ideal, they appeared to be healthy. At this point, APO Fryer moved a board that was blocking a corridor. He went down the corridor with Cst. Lagace and opened a door to find more cats. They instead found a cannabis grow operation. APO Fryer opened a second door, and found more cannabis plants. Cst. Lagace returned upstairs and arrested Ms. Taylor. Subsequently, a search warrant was obtained, and the RCMP seized 97 cannabis plants.[36]

During a *Charter voir dire* on the matter, the Crown argued that the officers never triggered s. 8 since they had conducted a regulatory inspection under the *ACA*. The Crown further argued that a person has no reasonable expectation of privacy in her own when regulatory inspections are undertaken. The Crown's position, in other words, was one's own home automatically becomes a *Charter*-free zone as soon as pet ownership is undertaken.[37]

Although the key issue in *Taylor* was the validity of Ms. Taylor's consent, the MBQB, in disposing of the Crown's arguments, underwent an analysis of the common law on regulatory inspections. *Taylor* holds that regulatory inspections under the *ACA* are not beyond s. 8 scrutiny since "the extent to which a person has an expectation of privacy with respect to regulated activity depends on the context," and "[a]s explained in *Jarvis*, the application of the *Charter* in any case is not determined simply by whether the search was regulatory or criminal. One must look to the entire

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35 *Taylor*, *supra* note 7 at paras 2-6, 54.

36 *Ibid* at paras 6-11.

37 *Ibid* at paras 17-20.

context."[38] At least in Manitoba, the fact that a search is regulatory in character is but one factor when determining REP; the fact that the *ACA* provides for regulatory searches does not automatically lower one's REP.[39]

The natural question is, then, what else ought to inform context? I will argue below that context, and in turn REP, should be established in connection to the stigma, publicity and consequences attendant to animal cruelty charges; the scope and application of the ss. 8(5) and 10.3(1) entry and inspection powers; and the absence of meaningful privacy safeguards in the *ACA*.

## A. Stigma and Publicity, and Consequences of Animal Cruelty Charges

As discussed above, the SCC in *Comité* took the view that one's REP will be lower in relation to regulatory investigations. Part of this decision, however, was justified on the premise that regulatory charges typically result in relatively low penalties and little, if any, stigma:

> The exercise of the powers of inspection set out in the second paragraph of s. 22(*e*) [of the *Act respecting Collective Agreement Decrees*] does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian.[40]

Indeed, stigma is something of a leitmotif in SCC s. 8 analyses of regulatory inspections:

> The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence

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38 *Ibid* at paras 25, 30.

39 In *R v Bogaerts*, 2019 ONSC 41, the ONSC took the view that identical search provisions under Ontario's animal protection legislation did not violate s. 8. The ONSC's ruling on this point centred on the "juristic character" of the legislation. For the purposes of this paper, I would assert without arguing that this particular ruling is inconsistent with *Taylor*, and that the ONSC decided wrongly on this point.

40 *Comité*, *supra* note 30 at para 13.

> has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.[41]

An absence of stigma is relied upon, to some extent, to justify the inapplicability of *Hunter* in regulatory contexts.[42] Naturally, then, the stigma and consequences associated with an investigation should be a logical starting point in determining one's expectation of privacy in a regulatory context.

If we accept (1) that the stigma inherent in an investigation "requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search…by those responsible" for enforcement, (2) the requirement of a warrant on reasonable grounds that an offence has been committed, amongst other things, provides this protection, and (3) that animal welfare inspections, including those under the *ACA*, are sufficiently stigmatizing, it follows that some *ACA* searches should be subject to warrant requirements.[43]

Arguably, it is not the fact alone of a criminal investigation that entitles a person to a greater expectation of privacy but, rather, the suspicion and stigma that inheres to criminal investigations. As such, one should consider whether an investigation at issue would tend to seriously lower the community standing of a person subject to the search, not merely whether the search is classifiable as criminal or administrative. As such, where certain charges, regulatory or criminal, and an associated exercise of powers of entry and search carry the stigma and consequences associated with criminal investigations, an affected individual ought to have a higher expectation of privacy.

Arguably, animal cruelty offences carry more stigma than most, if not all, regulatory offences, and many offences under the *Criminal Code*. It is worth noting some of the language and tone used by Members of the Legislative Assembly of Manitoba while debating the enactment of the *ACA* in 1995 and 1996:

> In the community in which I live, and the communities of which I have lived in the past in rural Manitoba, there is hardly a crime taken so seriously as the animal owner who does not feed his animals and leaves them in pens to the point at which they become emaciated, the point in which they become ill, and sometimes to the

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41 *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, [1990] SCJ No 23 (QL) at para 124 [*Thomson*].

42 See also *Goebel v Robertson*, 2015 ONSC 4454 at para 41.

43 *Thomson*, *supra* note 41 at para 124.

> point at which they actually die. I know that the cases that have come before us in rural Manitoba that deal with the predominantly larger animals, the people who have been convicted and penalized for these kind of atrocities against animals have been certainly ostracized in our communities and their standing in the community is knocked down significantly by the way they have treated their animals.[44]
>
> As the minister indicated, this issue [the discovery of puppy mills and their concomitant conditions in rural Manitoba in 1995] probably brought more phone calls than some more serious issues, although this was a serious situation, but people have very serious concerns when animals are being abused.[45]
>
> There is a clear understanding that in the agriculture that has always been there, that mankind has availed him or herself with the use of animals for many different purposes. There is no excuse, never has been an excuse, to do that in a way that is unnecessary, unmindful of the animals' welfare.[46]

Moreover, Canadian case law recognizes the stigma, or at least conceptions of society's relationships to animals that is logically and practically suggestive of stigma, attached to animal cruelty offences (albeit in the context of *Criminal Code* offences).[47] In *R v Way*, the Ontario Court of Justice noted the stigma and social and professional consequences of animal welfare charges and convictions even where there was no finding of cruel intentions:

> Ms. Way's crime is one of negligence and I am persuaded that Ms. Way has suffered extreme collateral consequences from being tried and found guilty of these offences. She has suffered tremendous personal embarrassment and loss of reputation in both her social and professional communities.
>
> This case received significant attention in the media. The media held her up a "crazy cat lady". And whether the shoe fits or not, the stigma of that offensive characterization has stung her deeply. Part of the tragic irony of this case is that Ms. Way loved these cats and yet her neglect lead to the need to euthanize all but one of the over 100 animals seized by the authorities. This has not rested lightly on her shoulders.
>
> ...Ms. Way is both a lawyer and a teacher. She has not practiced law in years but the Law Society has documented an express interest in the outcome of this

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44 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (4 June 1996) at 3858 (Stan Struthers).

45 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-1, No 10(B) (5 June 1995) at 744 (Rosann Wowchuk) [emphasis added].

46 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (4 June 1996) at 3188 (Harry Enns) [emphasis added].

47 *R v Brown*, 2004 ABPC 17 at para 31; *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 117; *R v Munroe*, 2010 ONCJ 226 at para 23; *R v White*, 326 Nfld & PEIR 225, [2012] NJ No 263 at para 9; *R v Zeller,* 1998 ABPC 19 at para 35 citing *R v Michelin*, 1995 [no citation provided].

> case. Ms. Way's teaching contracts came to an abrupt end expressly as a result of these charges being laid against her.[48]

Similar judicial attitudes have been also expressed in purely regulatory settings like agriculture or zookeeping.[49]

Whether animals are treated poorly as a matter of intention or neglect, a high degree of censure ensues. The Legislature, various academic literature, and *obiter dicta* in the case law have all described animal abuse, whether criminal or regulatory in classification, as immoral, unethical, uncivilized, unenlightened, without excuse, and reflective of untrustworthiness, a lack of humanity, and "palpable evil."[50] In many cases, an accused individual may be at risk of social, professional, or political ostracization. Mistreatment of animals is not some incidental regulatory consideration but a fraught and loaded moral and social issue where nonfeasance has far-reaching ramifications.

Inspections for animal welfare, by extension, naturally carry tremendous stigma as well. To be investigated for whether an animal is in distress, sends a message to the community that the subject of the inspection may be or is abusing animals or inflicting some type of cruelty whether affirmatively or through neglect. Such a message would almost certainly tarnish one's standing in the community especially if inspections gave rise to charges. The SCC has recognized that the lesser the departure from the realm of the criminal law, the less "flexible… the approach to the standard of reasonableness."[51] Stigma is a hallmark of the criminal law, which, in this case, has been transposed to a regulatory setting.[52] It is hardly appropriate, then, for APOs, who are charged in part with investigating and uncovering stigmatizing subject matter, to also assume the role of detached and neutral arbiter and authorize their own searches, and bypass the balancing process altogether.

This observation is thrown into stark relief when one considers that animal welfare charges and convictions are highly publicized in Manitoba

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48 *R v Way*, 2016 ONCJ 514 at paras 10-11, 14.

49 *R v Maple Lodge Farms* 2014 ONCJ 212 at para 1; *Reece v Edmonton (City)* 2011 ABCA 238 at paras 57-58.

50 *Ibid*;; Katie Sykes, "Rethinking the Application of Canadian Criminal Law in Factory Farming" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 33 at 34-35, 37.

51 *BC (Securities Commission) v Branch*, [1995] 2 SCR 3, [1995] SCJ No 32 at para 52 [*Branch*].

52 *R v Beatty*, 2008 SCC 5 at para 70; *R v Roy*, 2012 SCC 26 at para 2.

and Canada at large. These stories detail the sordid circumstances of a given case, and in some instances name the parties involved, and provide photographs of the abused animals. Just as often, these animal welfare stories are circulated in national newspapers of record and regional newspapers, as well as other news sources.[53]

Furthermore, the consequences for contravening a provision of the ACA, as laid out by s. 34 of the ACA, are significant. A first offence under

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[53] See e.g. Amber McGuckin, "Manitoba dog rescued after being shot multiple times with pellet gun", *Global News* (24 February 2018), online: <globalnews.ca/news/4045821/manitoba-dog-rescued-after-being-shot-multiple-times-with-pellet-gun/> [perma.cc/45PY-ZGSF]; Aviva Jacob, "'What are we doing wrong?' 2017 worst year in past decade for animal welfare complaints in Manitoba", *CBC News* (16 April 2018), online: <www.cbc.ca/news/canada/manitoba/manitoba-animal-welfare-complaints-2017-1.4619667> [perma.cc/MVP4-DXRW]; Brittany Greenslade, "Burned dog rescued from northern Manitoba making 'miraculous' recovery", *Global News* (29 May 2018), online: <globalnews.ca/news/4231469/burned-dog-rescued-northern-manitoba-miraculous-recovery/> [perma.cc/4RZN-NCGJ]; Bryce Hoye, "After years of complaints, neighbours vent frustration over ramshackle city farm", *CBC News* (19 July 2018), online: <www.cbc.ca/news/canada/manitoba/st-marys-road-farm-animal-welfare-complaints-1.4750009> [perma.cc/46F4-ZAT3]; The Canadian Press, "Manitoba Mountie finds starving horse, owners charged with animal neglect", *CBC News* (2 May 2018), online: <www.cbc.ca/news/canada/manitoba/rcmp-melita-starving-horse-1.4644938> [perma.cc/ED8A-V9KC]; CBC News, "Foul odour, barking for years at home of Winnipeg dog seizure: neighbours", *CBC News* (10 August 2016), online: <www.cbc.ca/news/canada/manitoba/dogs-winnipeg-rescue-neighbours-1.3715855> [perma.cc/7WEE-TVCD]; Dana Hatherly, "Winnipeg police investigating officer shown on video mocking women reporting animal abuse", *CBC News* (18 June 2017), online: <www.cbc.ca/news/canada/manitoba/winnipeg-police-humane-society-dog-abuse-1.4711661> [perma.cc/B98K-N7FB]; Holly Caruk, "Animal rights organization PETA offers provincial vet $10K to enforce regulations", *CBC News* (12 August 2016), online: <www.cbc.ca/news/canada/manitoba/animal-rights-peta-offers-provincial-vet-1.3719336> [perma.cc/TPJ8-CQ3K]; John Lehmann, "Authorities seize 120 cats from Winnipeg house", *The Globe and Mail* (13 December 2013), online: <www.theglobeandmail.com/news/national/authorities-seize-120-cats-from-winnipeg-house/article15970964/> [perma.cc/BRW6-RQ6F]; Josh Crabb, "Investigation launched after one dog found dead, four seized in East Kildonan home", *CTV News Winnipeg* (10 August 2016), online: <winnipeg.ctvnews.ca/investigation-launched-after-one-dog-found-dead-four-seized-in-east-kildonan-home-1.3023422> [perma.cc/C866-BB66]; Lorraine Nickel, "Elderly couple could be jailed for dog hoarding", *Global News* (4 December 2013), online: <globalnews.ca/news/1006202/elderly-couple-could-be-jailed-for-dog-hoarding/> [perma.cc/5TZM-BH8H]; Sharon Pfeifer, "Owner of dog and puppies abandoned in northern Manitoba arrested", *Global News* (23 February 2018), online: <globalnews.ca/news/4042432/owner-of-dog-and-puppies-abandoned-in-northern-manitoba-arrested/> [perma.cc/A5QT-HKEB].

the ACA can include a maximum fine of $10,000 or imprisonment for up to six months, or both; a second offence can include a maximum fine of $20,000 or imprisonment for up to 12 months, or both. Indeed, the fact of potential jail time should, by itself, inform consideration of one's expectation of privacy.[54] By contrast, the maximum consequence for a contravening a provision under the act that the SCC was considering in *Comité* is $5000.

Consequences under s. 34 of the ACA, then, seem to more closely resemble criminal sanctions than typical regulatory fines. It is clear from the legislative debates that they were designed that way:

> Currently, fines must be applied through the Criminal Code of Canada proceedings, taking many months in court. Under this bill [Bill 70, which became *The Animal Care Act*], if it proceeds, it should take no more than two months and would much speed up the process, but certainly the fines should curtail people from activities that are considered an unfair treatment of animals.[55]

> Section 34 is another part of The Animal Care Act that I think is a legitimate part of Bill 70 in which it talks about an increase in fines and moves the cases from the criminal courts to the civil courts. That suggests to me, and I am no Philadelphia lawyer, that it would speed up the process, which is something that I am certain would get support in the province and within this Legislature as well.[56]

> We like very much that there are stiff fines, that the fines have been increased in some cases tenfold. We feel that this is important to act as a deterrent, hopefully, for people from mistreating animals, both agriculturally and in personal ownership and in organizations for animals for sale. We also hope that it will act not only as a deterrent but that it will send a message to people who are convicted under this legislation that this is a very negative thing to do and that they will be punished severely for transgressing the elements of Bill 70.[57]

Clearly, the consequences under s. 34 of the ACA cannot be characterized as less draconian than those associated with criminal investigations. The Legislature appears to have intended to widen the scope of liability using regulatory law, and approximate criminal consequences using the same regulatory law.

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54 *R v Grant*, [1993] 3 SCR 223, [1993] SCJ No 98 (QL) at para 24 [*Grant*].

55 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3856 (Rosann Wowchuk).

56 *Ibid* at 3858 (Stan Struthers) [emphasis added].

57 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 61 (8 October 1996) at 4080 (Becky Barrett).

In light of the above, animal welfare cases implicate a moral element neither contemplated by the SCC in cases such as *Comité* or *Jarvis* nor generally associated with most regulatory searches. It is difficult to think of another regulatory offence that invites significant financial support from activist organizations, invokes universal public revulsion, commands the headlines, and sparks near-instant legislative responses to the extent that animal welfare cases do. Whether they are criminal or regulatory in origin, animal welfare charges are clearly an inherently sensitive social and moral issue that carry, understandably, a high degree of opprobrium. With that in mind, it should not be left to APOs or the CVO to delicately balance social and privacy interests while simultaneously launching investigations, which themselves may be stigmatizing. Thus, the stigma of animal welfare charges, and concomitant inspections, as well as the consequences for convictions under the *ACA*, should significantly inform the context in which one's reasonable expectation of privacy under s. 8 of the *Charter* is determined.

## B. The Extraordinary Scopes of Sections 8(5) and 10.3(1) of the *ACA*

### *1. Section 10.3(1) of the ACA*

In considering REP, the context, in this case, must also be informed by the fact that s. 10.3(1) allows APOs to enter and search people's homes without a warrant, at any "reasonable" time and where "reasonably required", and for, conceivably, an unlimited duration by way of s. 10.1(5) of the *ACA*. Moreover, s. 8.1 of the *ACA* allows an APO to use reasonable force in executing a s. 10.3(1) entry and inspection. An APO may force her way into one's dwelling to ensure compliance with a s. 10.1 director's order. By contrast, the statute under consideration in *Comité* does "not permit inspectors to use force to gain access to the workplace. "In the event of a refusal by the employer, the inspectors can only lay charges under s. 33 *ACAD* for obstruction of an inspection, as was done in the present case."[58]

To be clear, the robustness of the s. 10.3(1) power is not necessarily problematic. The unique difficulties in enforcing animal protection legislation, particularly since animal abuse generally occurs out of public view, and animals are unable to make abuse complaints of their own accord,

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[58] *Comité*, *supra* note 30 at para 75.

likely warrants the scope of s. 10.3(1). Section 10.3(1) is problematic because it provides for warrantless searches notwithstanding its extraordinary scope, a lack of appropriate legislative safeguards, and the ability to enter and inspect dwellings using reasonable force by way of s. 8.1 of the *ACA*.

Section 10.3(1) empowers an investigator to search any place at any reasonable time (which is left undefined), and where reasonably required (which is also left undefined) to determine compliance with a s. 10.1(1) director's order. The director under the *ACA* is charged with and exercises investigatory functions.[59] In other words, insofar as s. 10.1(1) of the *ACA* is a precondition for s. 10.3(1) entries and inspections, an individual with a significant investigatory role authorizes general entries and inspections.

Moreover, given the inherent breadth of the word "any," the absence of any language in s. 10.3 excepting a subject's home from a s. 10.3(1) inspection, and the presence of language elsewhere in the *ACA* excepting one's private dwelling from warrantless searches, "any place" as referred to in s. 10.3(1) necessarily includes a subject's home, as well as any other private property such as outbuildings or sheds.

Individuals have a very high expectation of privacy in their own homes, and a relatively high expectations of privacy in the rest of their private property, depending on the circumstances.[60] What is paramount, then, is not simply whether a search is administrative but the level of expectation of privacy individuals have in their dwellings, and, as will be explored in greater detail below, other areas of their private property. That some activity occurring within the home may be illegal, for example, keeping animals that are in distress or falling below minimum standards of care, is irrelevant for s. 8 purposes.[61]

One's expectation of privacy in one's home cannot and should not be displaced simply by the fact that a search is regulatory. While the SCC in *Jarvis*, for example, found that "an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities [in his place of work]," the same cannot necessarily be said of private pet owners in their own respective homes or on their own respective private properties. The SCC has

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[59] Manitoba Agriculture, "Animal Welfare Program" (last visited 10 June 2019), online: <www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/humane-inspection.html> [perma.cc/4SQ4-D3Y2].

[60] *Grant*, *supra* note 54 at paras 24, 29.

[61] *R v Wong*, [1990] 3 SCR 36, [1990] SCJ No 118 (QL).

recognized the significant privacy interest one has in one's own home even with respect to regulatory searches. [62] Moreover, the MBQB in *Taylor* rejected the notion that s. 8 *Charter* protections do not apply to one's home as a consequence of owning animals.[63] As such, the fact of a director's order under s. 10.1(1) of the *ACA* should not disentitle one from normal s. 8 *Charter* protections with respect to one's own home.

It is worth noting that "any reasonable time" as per s. 10.3(1) of the *ACA* is undefined in that section and elsewhere in the *ACA*. Section 37(1) *The Provincial Offences Act* ("the *POA*") requires that a warrant be executed between 8 a.m. and 8 p.m. unless the warrant specifically provides otherwise. Other provincial animal welfare statutes stipulate that inspections must be undertaken during regular business hours. However, no clear requirement exists for the execution of inspections pursuant to a director's order under ss. 10.1(1) and 10.3(1). It is unclear when is a "reasonable time," what makes that time "reasonable," and for whom that time is "reasonable."

Presumably, an APO's ability under s. 10.3(1) to enter and inspect at any time unannounced is based on the common-sense assumption that the threat of an unannounced inspection may be the most effective way to induce compliance with the director's order. While such a practice may be permissible in other settings, it should not be countenanced with respect to one's home without *Hunter* safeguards in place.

Additionally, the *ACA* provides no guidance as to when determining compliance is "reasonably required" under s. 10.3(1). A generalized belief or suspicion of non-compliance with the order may be the basis for when an inspection is "reasonably required" but the *ACA* is not that specific. Naturally, a s. 10.1(1) director's order will require some kind of follow-up inspection since the legal basis for the s. 10.1(1) director's order is reasonable grounds that an animal is in distress. However, nothing in the *ACA* suggests when subsequent inspections are "reasonably required," In the absence of clear statutory guidelines, follow-up inspections under s. 10.3(1) are a function of an individual APO's discretion. Indeed, the word "reasonable" often imputes discretion.

Finally, s. 10.1(5)(b) of the *ACA* stipulates that "[a]n order expires one year after the date it is given, unless it is…extended by the director for a

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62 *McKinlay Transport*, *supra* note 33 at para 34.

63 *Taylor*, *supra* note 7 at paras 20-21.

further period that must not exceed one year." By contrast, a search warrant under s 35(2) of the *POA* must expire 15 days after it is issued. Moreover, the *ACA* is silent as to the circumstances in which the director may extend the order. While, arguably, an inference could be drawn that a director's order under s. 10.1(1) of the *ACA* would and should be extended only where, on reasonable grounds, an animal continues to be in distress, the *ACA* does not explicitly say so. Further, the *ACA* does not appear to expressly preclude the director from making multiple extensions. Since s. 10.3(1) of the *ACA* authorizes an APO to inspect any place to determine compliance with a director's order under s. 10.1(1) of the *ACA*, s. 10.1(5)(b) of the *ACA* conceivably provides for limitless warrantless entries and inspections under s. 10.3(1) of the *ACA* following service of a s. 10.1(1) director's order.

As such, s. 10.3(1) of the *ACA*, to borrow language from *Hunter*, "is tantamount to a licence to roam at large." Given the high level of expectation of privacy in an individual's own homes, the open-ended and "breathtaking sweep" of s. 10.3(1) of the *ACA*, and the s. 8.1 power to use force, one's expectation of privacy ought to remain high notwithstanding the fact that s. 10.3(1) entries and inspections are technically regulatory. As such, the s. 10.3(1) power to enter and inspect ought to be authorized by a neutral and impartial judicial arbiter, especially in light of the stigma and consequences that can subsequently attach to inspections that determine an individual has failed to comply with a s. 10.1(1) director's order.

### *2. Section 8(5) of the ACA*

To be clear at the outset, s. 8(5) applies to companion animals, as opposed to commercial animals:

> [A]t any reasonable time and where reasonably required to determine compliance with this Act [...] enter and inspect any facility, premises or other place that is not a dwelling place [...] in which the animal protection officer believes on reasonable grounds there is a companion animal in distress...[64]

Section 8(5) does not include a person's home, but it still permits warrantless entries, and, in conjunction with s 9(1)(b) of the *ACA*, seizures of companion animals on private property where homes are located. Places where companion animals may be kept outside of the home may be not open to the public, so the expectation of privacy can be very high.

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64 *ACA*, *supra* note 1, s 8(5) [emphasis added].

Similar to s. 10.3(1), the APO's inspection powers under s. 8(5) are largely unbounded. Although s. 8(5) expressly excepts the dwelling house from entries and inspections, an APO under this section is still empowered to enter and inspect at any reasonable time in non-urgent circumstances. Similar to s. 10.3(1), "reasonable time" is undefined.

The fact that s. 8(5) applies directly to companion animals is significant insofar as it empowers APOs, in some instances, to enter non-commercial non-residential private premises in addition to commercial non-residential private premises. The potential exists that outbuildings an APO enters and inspects under s. 8(5) would properly be considered an extension of the house and, therefore, subject to the same, or similar, high degree of privacy. Outbuildings on private property may be subject to a reasonable expectation of privacy depending on the context.[65] Numerous lower courts throughout Canada have recognized the expectation of privacy one holds in private premises located on private property where homes are also located. Further, in many instances, private premises that are not the literal dwelling house may be considered curtilage in which a person has a very high expectation of privacy.[66]

Not all non-residential private premises owned by a private pet owner or on a private pet owner's private property will attract a uniformly high expectation of privacy. In many instances, however, the location and normal use of an outbuilding or private premise, other than a dwelling house, will provide for a high expectation of privacy. These are the sort of factors that an impartial and neutral judicial figure, but not an APO, is perfectly situated to consider.

## C. Inadequate or Non-Existent Safeguards Under the *ACA*

### *1. Section 10.3(1) of the ACA*

The ACA provides a number of measures that function as minimal safeguards for the privacy interest of individuals subject to s. 10.3(1) entries and inspections:

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65 *R v Moran* (1987), 36 CCC (3d) 225, 1987 CarswellOnt 1116 (Ont CA) at paras 47, 49; *R v Robertson*, 2010 BCPC 2 at para 48; *R v Rodriguez*, 2014 ABPC 44 at paras 75-76.

66 *R v Le*, 2005 BCPC 47 at paras 14-16; *R v NNM*, 223 CCC (3d) 417, [2007] OJ No 3022 (QL) at paras 369-370.

(1) A private pet owner may appeal the order within seven days of receiving the s. 10.1(1) director's order under s. 10.1(6) of the *ACA*;

(2) A s. 10.1(1) director's order must be based on reasonable grounds that an animal is in distress; and

(3) Pursuant to s. 10.3(1), an APO can enter and inspect any place only where:

(a) it is reasonably required to determine compliance with the director's order, and

(b) an APO has reasonable grounds that there is or should be animal or other related thing to which the order applies in the place to be inspected.

With respect to the appeal mechanism under s. 10.1(6) of the *ACA*, unjustified searches are meant to be prevented before they happen, rather than determining, after the fact on a s. 10.1(6) appeal, that the entry and inspection should not have occurred in the first place.[67] In the absence of normal s. 8 *Charter* safeguards, the right of appeal under s. 10.1(6) of the *ACA*, in effect, forces the individual subject to a director's order to re-establish his or her s. 8 *Charter* rights in an exclusively *ex post facto* process within seven days, rather than the state agent justifying warrantless and potentially limitless entries and inspections before the fact.

Further, resort to a s. 10.1(6) appeal may be infeasible and unreasonable in situations where a person affected by a s. 10.1(1) order and corresponding s. 10.3(1) entry and inspection powers is incapable of initiating a s. 10.1(6) appeal due to financial, mobility or cognitive or mental health issues, particularly within seven days. In this situation, affected individuals may be forced to forego enforcing their rights, rather than the state justifying infringements. Indeed, in instances where an individual subject to a director's order fails to file an appeal within seven days, that individual is essentially to challenging the director's order only if charges are laid and a trial is pursued.

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67 *Hunter*, *supra* note 5 at para 27.

It is worth nothing that in 2017, only five per cent of individuals subject to a s. 10.1(1) director's order appealed the order. While it is impossible to determine precisely why appeals were not pursued, to some extent, this is irrelevant. This statistic indicates that with respect to s. 10.1(1) director's order, 95 per cent of the time in 2017, the state was relieved from justifying actions that may have included entries of and inspections within people's homes.[68]

Moreover, under s. 10.1(7) of the *ACA*, an appeal of an order under s. 10.1(1) of the *ACA* does not stay the operation of that order. It is reasonable to envision a scenario where after weeks, or possibly months, of s. 10.1(6) proceedings, the appeal board finds in favour of an applicant, yet that applicant has still been exposed to unjustified warrantless entries and inspections under s. 10.3(1) during that time.

With respect to s. 10.1(1) of the *ACA*, the fact that the director must confirm on reasonable grounds that an animal is "in distress" as defined in s. 6(1) of the *ACA*, provides some minimal measure of protection. Reasonable grounds that an animal is in distress, and may continue to be in distress, are, in all likelihood, what justifies entries and inspections undertaken via s. 10.3(1) of the *ACA*. However, the fact that, the director, who effectively authorizes the s. 10.3(1) entries and inspections by way of s. 10.1(1), has investigatory duties to discharge is problematic.

Finally, the fact that, as per s. 10.3(1), an APO can enter any place only where "reasonably required" to determine compliance with the director's order and where it is believed on reasonable grounds that the place being inspected contains or should contain an animal to which an order applies are insufficient safeguards. These "safeguards" are essentially clarificatory in character, and codify that an APO cannot arbitrarily exercise the s. 10.3(1) entry and inspection powers by entering and inspecting places for reasons unrelated to compliance with the director's order particularly, and where those places might not contain animals or items to which the director's order applies. The fact that an APO cannot look for things unrelated to a s. 10.1(1) director's order in places where the subject of the order might not be located is, at best, an absolute bare minimum protection, and certainly

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68 Manitoba, Animal Welfare Program, "Animal Welfare Program Statistics January to December 2017", by Manitoba Agriculture, online: <www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html> [perma.cc/YD3Q-HJTY].

not an adequate substitute for a system of prior authorization as outlined in *Hunter*.

Sections 10.1(1) and 10.3(1), then, functionally provides for a regime whereby the director and APO justify orders, entries and inspections only to themselves. It is conceivable to simply bypass warrant applications under ss. 8(9) and 10.3(2) of the *ACA* entirely since ss. 10.1(1), 10.3(1), and 10.4(1) of the *ACA* provide for warrant powers without having to apply for a warrant in the first place. Arguably, the warrant provision under s. 10.3(2) of the *ACA* exists chiefly to enable peace officers to accompany APOs during entries and inspections.

***2. Section 8(5) of the ACA***

Unlike ss. 10.1(1) and 10.3(1), the *ACA* provides *no* standalone pre- or post-review mechanisms for s. 8(5) inspections. Section 14(1) of the *ACA* does provide a right of appeal for seizures under s. 9(1) of the *ACA*. Presumably, a s. 14(1) proceeding would necessarily include a review of the grounds for a s. 8(5) inspection in situations where the APO relied on s. 8(5) of the *ACA* prior to the seizure. Unless charges are laid and a trial is pursued, or animals are seized specifically under s. 9(1), an APO's grounds for a s. 8(5) entry and inspection are functionally exempt from review. As such, a private pet owner is conceivably subject to unlimited entries and inspections of his or her non-commercial non-residentials private premises where entries and inspections are affected up until animals are seized.

Only Nova Scotia and Quebec provide for similar powers under their respective animal care statutes. It is noteworthy that a provision equivalent to s. 8(5) in the Nova Scotia's animal welfare legislation was declared unconstitutional by its Provincial Court ("the NSPC") in 2003.[69] To date, it does not appear that Quebec's animal welfare legislation, enacted in 2015, has been subject to constitutional challenge in any respect.

***3. Sections. 8(5) and 10.3(1) are Not Codifications of Exigent Search/Inspection Powers***

There may be some attraction to an argument that ss. 8(5) and 10.3(1) are highly specified codifications of the exigent circumstances exception. However, I would argue that ss. 8(5) and 10.3(1) generally apply to non-urgent situations, and are not codifications of the exigent circumstances exception.

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69 *R v Vaillancourt*, 2003 NSPC 59 [*Vaillancourt*].

To begin with, s. 8(11) of the *ACA* permits an APO to search a dwelling or any place, and seize animals or other "things" where that APO has reasonable grounds to believe there is an animal in distress, or offence under the *ACA* is being committed, but, by reason of exigent circumstances, it would be impracticable to obtain a warrant. That the Legislature would create redundant provisions is unlikely. Clearly, the *ACA* does not seem to view an animal in distress as an exigent circumstance in and of itself.

Admittedly, the language used in s. 6(1) of the *ACA* to define when an animal is "in distress" is broad. For example, s. 6(1)(a) of the *ACA* holds that "an animal is in distress if it is...subjected to conditions that, unless immediately alleviated, will cause the animal death or serious harm."[70] On the other hand, s. 6(1)(f) of the *ACA* also provides that an animal is in distress if it is "subjected to conditions that will, over time, significantly impair the animal's health or well-being."[71] Section 6(1)(c) of the *ACA* provides that an animal is in distress if it is "not provided food and water sufficient to maintain the animal in a state of good health."[72]

What constitutes "distress" in an animal under s. 6(1) of the *ACA* is context-specific. Circumstances where an animal is caught within the scope of s. 6(1)(a) of the *ACA* might be viewed as exigent. However, "distress" as described in ss. 6(1)(c) and (f) of the *ACA* is clearly conditioned on a decline in conditions over time, as opposed to an acute or emergent situation, and, it is submitted, would not be caught by the exigent circumstance exception provided for by s. 8(11) of the *ACA* or the common law without rendering that section redundant.

As such, the fact that an APO has reasonable grounds that an animal is in distress does not, by itself, necessarily give rise to exigent circumstances. The "type" of distress being responded to is important since, clearly, not all "distress" under s. 2(1) of the *ACA* is, by definition, identical in magnitude.

It is worth noting the absence in ss. 8(5) and 10.3(1) of an adjective such as "critical," "acute," or "immediate" to qualify the type of "distress" engaged. This is the kind of language used for exigent circumstances provisions in some provincial animal welfare statutes.[73]

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70 *ACA*, *supra* note 1, s 6(1)(a) [emphasis added]

71 *Ibid*, s 6(1)(f) [emphasis added]

72 *Ibid*, s 6(1)(c) [emphasis added]

73 See, for example: *Preventions of Cruelty to Animals Act*, (British Columbia) ss 12, 14; *Ontario Society for the Prevention of Cruelty to Animals Act*, (Ontario) s 12(6); *Animal Health and Protection Act*, s 11(4) (Newfoundland and Labrador).

### *4. Hunter-Redux*

Dickson CJ speaking for the majority in *Hunter* considered prior authorization by a neutral and impartial arbiter as imperative:

> In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties...ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. [A member of the Restrictive Trade Practices Commission] simply cannot be the impartial arbiter necessary to grant an effective authorization...On this basis alone I would conclude that the prior authorization mandated by s. 10(3) of the *Combines Investigation Act* is inadequate to satisfy the requirement of s. 8 of the *Charter*...[74]

Yet, in Manitoba, the director under the *ACA* functionally authorizes s. 10.3(1) inspections, which permits entries into and inspections of homes, despite discharging extensive investigatory duties of her own. The director may lay and swear Informations before the court, reinforcing the director's investigatory role. With respect to s. 8(5), an APO authorizes her own searches. This is precisely what the SCC in *Hunter* cautioned against.

With respect to s. 10.3(1), APOs should, at minimum, receive authorization at some point in the process from a neutral and impartial judicial arbiter, i.e. a warrant, before entering and inspecting a home, particularly since once a s. 10.1(1) director's order is given, the ability to enter and inspect someone's home is largely at the discretion of the APO tasked with inspecting. With respect to s. 8(5), *Vaillancourt* from the NSPC is instructive. Obviously *Vaillancourt* is not binding in Manitoba but its reasoning is persuasive. There is no necessity for a warrantless search of private premises in non-urgent situations with respect to the *ACA*. Section 46(2) of the *POA*, subject to s. 97(2), permits an enforcement officer to make an application for a warrant to enter and inspect by telephone or any means acceptable to the court.

Given the foregoing, I would contend that ss. 8(5) and 10.3(1) violate s. 8 of the *Charter*.

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74 *Hunter*, *supra* note 5 at paras 35-36 [emphasis added].

## V. SECTION 1 OF THE *CHARTER*

Assuming that ss. 8(5) and 10.3(1) violate s. 8, I would argue that that neither section can be justified under s. 1 of the *Charter*. The overreaching of both sections is largely unnecessary, and, therefore, not minimally impairing. Further, the salutary effects do not outweigh the deleterious effects. Indeed, the SCC has held that infringements of the s. 8 *Charter* right are unlikely to be justified under s. 1 of the *Charter* given the overlap between the reasonableness standard under s. 8 of the *Charter,* and the minimal impairment analysis under the s. 1 test.[75]

*R v Oakes* is the seminal case on justification analysis under s. 1 of *Charter*. *Oakes* created a two-step balancing step to determine whether the government can justify a law that limits *Charter* rights:

i) The law under review must have a goal that is pressing and substantial, and
ii) The means chosen must be reasonable and demonstrably justified.[76]

The second-step, commonly referred to as proportionality analysis, includes three sub-tests:

i) The measure must be rationally connected to the legislative objective;
ii) The means, if rationally connected to the objective, should minimally impair the *Charter* right or freedom in question; and
iii) There must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the pressing and substantial legislative objective.[77]

Each step of the *Oakes* test must be satisfied for ss. 8(5) and 10.3(1) to be "saved" under s. 1 of the *Charter.*

It is clear from the *Hansard* debates that the purpose of the modern ACA is to bring under control the abuse of animals at the hands of negligent

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75 *Lavallee, Rackel & Heintz v Canada (Attorney General), 2002 SCC 61* at para 46; *Grant, supra note 54* at para 46; *Thomson, supra note 41 at para 107; Canada (Attorney General) v Chambre des notaires, 2016 SCC 20* at paras 89-91

76 *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7.

77 *Ibid.*

owners, and to ensure proper care for animals. Indeed, the ACA was a legislative response to the discovery of puppy mills in rural Manitoba in 1995, more specifically the horrendous and inhumane conditions in which a number of the dogs were found, and the concomitant suffering of those dogs.[78]

As noted above, s. 10.3(1) was adopted in only 2009 by way of the ACAA, although s. 8(5) essentially existed in the ACA prior to 2009. The specific motivation for the amendments is unclear, but the *Hansard* debates indicate an ongoing concern over the continued proliferation of puppy mills and general animal abuse throughout rural Manitoba. The ACAA was characterized in part as providing stronger inspection and search and seizure powers to APOs, which, as matter of logical necessity, included s. 10.3(1). Evidently, no meaningful debate in House and Committee happened over the new warrantless inspection powers. The issue was raised once in House, and once in Committee but was never discussed on record beyond that.[79]

In any event, the pressing and substantial objective of ss. 8(5) and 10.3(1) is to effect the statute's overall purpose of protecting animals from abuse by ensuring compliance with statutorily-prescribed minimum standards of care. This is, indisputably, an important government goal.[80]

I would argue, however, that ss. 8(5) and 10.3(1) are not minimally impairing. In asking whether measures are minimally impairing, the Court must also determine:

> (1) The level of deference, if any, owed to the provincial legislature in enacting legislative measures, and
>
> (2) Whether the legislative measures enacted fall within a range of minimally impairing solutions.

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78 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 36-2, No 56 (30 September 1996) at 3855 (Rosann Wowchuk).

79 Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39-5, No 17B (9 December 2008) at 379 (Rosann Wowchuk), 379 (Blaine Pedersen), 382 (Ralph Eichler); Manitoba, Legislative Assembly, *Standing Committee on Agriculture and Food (Hansard)*, 39-3, No 1 (17 March 2009) at 36 (Rory McAlpine, Vice President, Government & Industry Relations, Maple Leaf Foods Inc.).

80 In my analysis, I assume that the measures are prescribed by law. Further, I would concede that the legislative measures are rationally connected to the legislative objective insofar as the measures are one way of achieving the legislative objective.

Regarding deference, the legislature is owed some level of deference in trying to protect a vulnerable group, assuming animals qualify as a "vulnerable group." Further when the prosecution of a regulatory offence is at issue, some deference is warranted, although Parliamentary deference is not unlimited.[81]

With respect to whether the legislative measures enacted fall within a range of minimally impairing solutions, the test is whether the government can demonstrate that among the range of reasonable alternatives available, there is no other less rights-impairing means of achieving the objective in a real and substantial manner.[82]

Clearly, under the circumstances, the Legislature is entitled to some degree of deference in attempting to balance individual expectations of privacy with society's interests in protecting the welfare of an extremely vulnerable group, the care of which, or lack thereof, can give rise to regulatory prosecutions. Despite this deference, there is an obvious less rights-impairing measure already available in the *ACA*: warrant applications under ss. 8(9), 8(10), and 10.3(2) supplemented by ss. 46(2) and 97(2) of the *POA*. Section 46(2) of the *POA*, subject to s. 97(2), permits an enforcement officer to make an *ex parte* application for a warrant to enter and inspect by telephone or any means acceptable to the court. In other words, an APO merely has to pick up the phone and communicate her reasonable grounds to a Justice. As the NSPC held in *Vallaincourt*: "A warrant is the best guarantee that a person's right is safeguarded, through the prior assessment of the reasonableness of the peace officer's ground to enter and seize an animal he or she believes is in distress."[83] As such, in situations where ss. 8(5) or 10.3(1) are used to legally justify an entry and inspection, it will almost always be practicable, and desirable, to obtain a warrant.

It is noteworthy that the Law Reform Commission's Report, the recommendations of which, were, to some extent, incorporated into the *ACA*, recommended that agents should apply for a warrant before entering a residence except where exigent circumstances make obtaining a warrant impracticable:

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81 *Wholesale Travel Group Inc v The Queen*, [1991] 3 SCR 154, [1991] SCJ No 79 (QL); *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, [1995] SCJ No 68 at paras 129, 136.

82 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 102 citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 55.

83 *Vaillancourt*, *supra* note 69 at para 54.

> [I]ndividuals' expectation of privacy are highest in the apartments, houses and other premises in which they make their homes. Therefore, although society has a legitimate interest protecting animals in residences, the powers of agents to enter premises in pursuit of those interests must, in our view, be significantly restricted.
> ...
> [A]s a general rule, agents should be required to obtain a warrant from a judicial officer prior to entering a residence. Allowing an impartial person to review the evidence prior to an entry will ensure that reasonable and probable grounds do, in fact, exist or belief that an animal is suffering within the residence.
> ...
> In addition, we recognize that the power of warrantless entry to residences is exceptional and could be abused.[84]

Up until 2009, an APO required a warrant to enter dwelling.[85]

The Manitoba Law Reform Commission also argued that warrants should still be required even when entering non-commercial private premises except where exigent circumstances make obtaining a warrant impracticable:

> In our view, non-residential private premises...give rise to a somewhat lower expectation of privacy than residences...In general, we believe that agents acting to protect animals should still require a warrant prior to entering a non-residential private premises.[86]

It is worth noting that the Manitoba Law Reform Commission's views in 1996 are much more closely aligned with the animal welfare legislation of most Canadian provinces with respect to entry and investigation powers as of 2018. Obviously, the Manitoba Law Reform Commission's views are not legally binding in any way. Nonetheless, these views are persuasive insofar as they further reinforce the proposition that less-rights impairing measures are available and desirable in a free society. With the above in mind, the clear availability of telewarrants under the *POA* suggests that ss. 8(5) and 10.3(1) are not minimally impairing.

The final step in the proportionality analysis asks whether the benefits of the legislative measures outweigh the deleterious effects. The effects of the limit must be proportional to the objective; the more serious the deleterious impact on the rights in question, the more important the objective must be. Where the legislative means at issue will not fully or nearly fully achieve the objective, the salutary effects of the measure must

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84 Manitoba Law Reform Commission, *supra* note 9 at 47-48

85 *ACA*, *supra* note 1 as it appeared between 1 August 1998 to 19 September 2010, s 8(7).

86 Manitoba Law Reform Commission, *supra* note 9 at 49.

outweigh the deleterious effects as measured against the values underlying the *Charter*.[87]

As has been argued above, people hold an extremely high expectation of privacy in their own home, a relatively high expectation of privacy in non-residential and non-commercial private premises (although this expectation of privacy is subject to variation), and animal welfare charges can result in significant stigma and consequences. A warrant requirement for entrance and inspection would balance these interests and factors with the goals of the ACA. Sections 8(5) and 10.3(1), however, side-step the balancing exercise particular to warrant applications.

It is worth noting that in 2009, the CVO investigated 323 complaints; in 2017, it investigated 1026—a 300 per cent increase. In Winnipeg, in 2017, the Winnipeg Humane Society investigated 1575 investigations compared to 1129 in 2015. Of all animal abuse complaints investigated in 2017 by the CVO, only 39 per cent resulted in findings of non-compliance. In 2016, the CVO dismissed nearly 53 per cent of the 952 complaints received following investigation. It would appear that between 2009 to 2013, approximately 40 per cent of all complaints were unjustified.[88]

These statistics are significant with respect to salutary and detrimental effects of the legislative measures. It is conceivable and reasonable to suggest that the exercise of warrantless search powers under s. 8(5), for example, may have been relied on some of the time in response to unwarranted complaints, and, as such, there is potential for abuse. The problem of false complaints has been recognized to some extent:

> There was a comment made earlier in regard to false complaints and potentially requesting a deposit from people who are filing complaints. As an animal protection officer, if I am asked to inspect a complaint I do that in a very methodical way. Around 50 percent of the time, the complaint that is brought forth to me upon inspection is proven to be unjustified. That may be due to lack of education by the person filing the complaint, may be due to family or neighbourly conflicts. It may just be due to lack of education. If a complaint is

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87 *Canada (Attorney General) v JTI-MacDonald*, 2007 SCC 30 at para 45; *Thomson, supra note 41.*

88 Manitoba Agriculture, Animal Welfare Program, "Animal Welfare Program Statistics January to December 2017", online: <www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2017.html> [perma.cc/J3Y4-772J]; Manitoba Agriculture, Animal Welfare Program, "Animal Welfare Program Statistics January to December 2016", online: <www.gov.mb.ca/agriculture/animal-health-and-welfare/animal-welfare/awp-2016.html> [perma.cc/NJ2J-QLZH]; Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 40-2, No 66B (27 June 2013) at 2895 (Ron Kostyshyn).

> deemed to be unjustified and we receive future complaints about the same individual within a short period of time, we don't necessarily go back and continually probe that individual. We recognize the problem that was present, if it was present...If not, then we keep those complaints on file and we take note, but our goal isn't to constantly be at somebody's backdoor and barrage them on a weekly or a monthly basis. I think if we were to impose a levy on people or a fee on people filing complaints, it would actually discourage people from filing complaints in good faith.[89]

This statement is troubling in two ways: (1) there is a history or at least recognition of a significant number of false or unjustified complaints, and (2) even if an individual who is the target of an unjustified complaint is not subjected to subsequent probes, that individual was subjected to an initial unjustified intrusion. Further, that one APO may be "methodical" during an initial probe is not an indication that other APOs are as discreet. Moreover, what is "methodical" with respect to an initial probe is discretionary, and may not properly balance interests to the extent that a neutral and impartial judicial arbiter would, particularly since APOs serve as law enforcement agents for the *ACA*.

The increases in complaints and investigations are themselves noteworthy with respect to the salutary and deleterious effects of ss. 8(5) and 10.3(1). On one hand, the increases may represent heightened public vigilance of animal abuse in Manitoba, and the existence of the animal complaint line and the CVO. On the other hand, they may be consistent with an increase in the incidence, and complexity of animal abuse cases throughout the province. The implications of the latter explanation warrant some exploration. The volume and severity of animal abuse cases in Manitoba appear to be worsening. Therefore, strong measures of some sort are necessary for achieving the Legislature's pressing and substantial legislative goal. At the same time, however, measures such as ss. 8(5) and 10.3(1), which have been in force since 2009, are clearly not having their intended effect. In other words, both provisions are, to some extent, failing to aid in achieving the Legislature's goal with respect to the *ACA*. It is difficult to seriously argue, then, that the salutary effects of ss. 8(5) and 10.3(1) outweigh their detrimental effects when it is unclear that they have had any salutary effects at all.

In light of the above, I would argue that ss. 8(5) and 10.3(1) cannot be saved under s. 1 of the *Charter*.

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89 Manitoba, Legislative Assembly, *Standing Committee on Agriculture and Food (Hansard)*, 39-3, No 1 (17 March 2009) at 19 (Dr. Colleen Marion) [emphasis added].

## VI. CONCLUSION: HOW DO YOU EAT A CONSTITUTIONAL ELEPHANT?

I have argued that given (1) the stigma and consequences endemic to animal cruelty charges, and (2) the vast respective scopes of ss. 8(5) and 10.3(1), diminishing privacy interests in the dwelling, or even non-residential non-commercial premises, purely on the basis of legal taxonomy borders on intellectually bankrupt. I would further contend that the SCC in decisions such as *Comité* or *Jarvis* never intended the classification of "regulatory inspection" or "administrative search" as something to hide behind and with which ignore otherwise plausible and reasonable privacy concerns.

I have also argued that ss. 8(5) and 10.3(1) fall well-short of the standards established in *Hunter*. Strict adherence to that standard matters here. For all of the reasons above, the *ACA* fails to strike a proper balance between the interests of society and the individual's right to privacy, particularly with respect to one's dwelling. The fact that a statute is regulatory, may mean that one's REP is reduced under certain circumstances; that does not mean that no balance needs to be struck at all. In *Comité*, the relevant inspection powers were clearly restricted by the "nature of the persons affected—the employer and employee," and it is always "possible to challenge abuses" under the pertinent act.[90] The same is not true of the *ACA*. The Crown has previously (and unsuccessfully) argued that "if you own a dog or a cat, your home is a '*Charter*-free zone' for animal control officers and those assisting them in carrying out their duties."[91] Furthermore, there is little data with which to conclude that ss. 8(5) and 10.3(1) have achieved the *ACA*'s goals.

A bright-line analytical approach to ss. 8(5) and 10.3(1) causes one to question the meaning of privacy rights in an era already replete with exceptions to s. 8. While such an approach is superficially consistent with decisions such as *Thomson*, *Comité*, and *Branch,* it (1) ignores the SCC and MBQB's emphases on context, and (2) disrupts our constitutional and common law narratives on privacy interests in the dwelling. Under this paradigm, a private pet owner has a greater privacy interest in text messages she has sent to someone else's phone than in her own home when a search

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90 *Comité*, *supra* note 30 at para 19.

91 *Taylor*, *supra* note 7 at para 20.

thereof is categorized as regulatory.[92] Under this paradigm, a private pet owner disclaims her privacy interest in any non-residential non-commercial private property by virtue of pet ownership. Under this paradigm, a private pet owner altogether abandons her privacy interest in her dwelling once served with a s. 10.1(1) director's order. The question, then, is not how does one eat a constitutional elephant, but how does a constitutional elephant eat you? Apparently, one right at a time.

92 *R v Marakah*, 2017 SCC 59.