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Criminal Law Edition (Robson Crim)

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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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Towards Dialogue in the Criminal Disciplines

DAVID IRELAND AND
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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.

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

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; James Gacek, "Species Justice for Police Eagles: Analyzing the Dutch 'Flying Squad' and

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

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.

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.

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.

Flaming Misogyny or Blindly Zealous Enforcement? The Bizarre Case of *R v George*

LUCINDA VANDERVORT *

ABSTRACT

This article examines the distinction between judicial reasoning flawed by errors on questions of law, properly addressed on appeal, and errors that constitute judicial misconduct and grounds for removal from the bench. Examples are from the transcripts and reasons for decision in *R v George* SKQB (2015), appealed to the Saskatchewan Court of Appeal (2016) and the Supreme Court of Canada (2017), and from the sentencing decision rendered by the same judge more than a decade earlier in *R v Edmondson* SKQB (2003). Both were sexual assault cases. In *George* a thirty-five year old woman with five children was tried and ultimately acquitted of sexual assault and sexual interference after she was assaulted in her home by a fourteen year old male. Striking similarities between the reasoning and language in the trial decision in *George* and the sentencing decision in *Edmondson* demonstrate entrenched antipathy for sexual assault law and the fundamental principles of justice, equality, and impartiality. This is arguably judicial misconduct, persisting despite access in the interim to many years of judicial education programming, not merely legal error. The problem

* Lucinda Vandervort, BA (Honours in Philosophy), Bryn Mawr; MA, PhD, McGill; JD, Queen's; LLM, Yale Law School, is a legal philosopher, lawyer and Professor in the College of Law, University of Saskatchewan, whose writings on sexual assault law and sexual consent are cited by the Supreme Court of Canada in decisions from *Seaboyer* (1991) to *Barton* (2019), by trial and appellate courts, and by legal scholars and law reformers internationally. This research was supported by grants awarded by the Foundation for Legal Research and the College of Law Endowment Fund. The author thanks the reviewers for their comments, Maria Shupenia, 2020 JD candidate at the University of Saskatchewan, for her research assistance, and Brendan Roziere, Student Editor, Manitoba Law Journal, for exemplary editorial work.

does not lie with the judge alone, however. A toxic mix of misogyny and blindly zealous enforcement of the law appears to have undermined the administration of justice in *George* from the outset at all levels. The problems are systemic. Were this not the case, it is likely that Barbara George would not have been charged.

Keywords: sexual assault; judicial misconduct; legal reasoning; victim-blaming; principles of fundamental justice; impartiality; equality; misogyny; racism; rape-myths; administration of criminal justice; *Judges Act*, s. 65.

I. INTRODUCTION

The back story of *R v George*¹ is not widely known or discussed. This article aims to change that in order to highlight questions this bizarre case raises about decision-making processes used in enforcing the sexual assault laws in Saskatchewan. These questions also have implications for child apprehension and protection cases handled by family services and for the administration of criminal justice in cases of alleged sexual abuse and exploitation of minors. Is discretion exercised by police and prosecutors in these cases in a manner that is consistent with fundamental principles of criminal justice? Were the police and prosecutors blind-sided in the *George* case by misogyny or simply blindly zealous in their effort to protect minors from sexual abuse and exploitation?

In *George* a thirty-five year old woman was prosecuted on criminal charges of sexual interference and sexual assault. She had been forcibly subjected to sexual intercourse in her own home by a fourteen and a half year old male who was a friend of her seventeen year old son. The trial judge found that the minor was the aggressor, initiated the sexual activity, and thereby clearly consented to it in fact. But a fourteen year old lacks legal capacity to consent to sexual contact with an adult of thirty-five years of age.² Following police interviews with the parties, George was charged with sexual assault and sexual interference. The minor was not charged.³ George

¹ *R v George* (27 February 2015), Regina NJ 53/2013 (SKQB).

² *Criminal Code*, RCS 1985, c C-46, s 150.1 [*Criminal Code*].

³ No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years. *Criminal Code*, *supra* note 2, s 13. Offenders between the age of 12 and 18 are subject to the *Youth Criminal Justice Act*, SC

was acquitted at trial, but the Crown appealed. On appeal, the acquittals were set aside, and a new trial was ordered by the provincial court of appeal in a 2-1 decision.⁴ George then appealed to the Supreme Court of Canada. The Court set aside the order for a new trial and restored the acquittals with written reasons to follow.⁵ After more than six years of uncertainty, George was discharged.

My review of the record in the *George* case led me to pose some questions about the handling of the case as it moved through the criminal justice system:

- 1) How was it possible for criminal charges to be prosecuted through two levels of appeal to the Supreme Court of Canada in the absence of evidence that the accused deliberately and voluntarily committed a criminal act? Without evidence to prove the *actus reus* of the offence, how is it possible to argue that the accused committed a criminal act...unless legal fundamentals are simply ignored?
- 2) Why was this fundamental error not identified by the judges presiding over the case and used to dismiss the case and discharge the accused forthwith? Does the judiciary not have a duty to oversee the use of the prosecutorial powers and inherent jurisdiction and authority at common law to take steps as appropriate and necessary to shield individuals from clear abuses of prosecutorial discretion?
- 3) Why was George charged? Why did the prosecution not withdraw the charges at an early stage or, at minimum, allow the acquittal at trial to stand unchallenged?
- 4) Why was the “complainant,” CD, not charged with sexual assault?⁶

2002, c 1.

⁴ *R v George*, 2016 SKCA 155 [*George* (SKCA)].

⁵ *R v George*, 2017 SCC 38 [*George* (SCC)].

⁶ At the end of preliminary inquiry, at which the accused, Barbara George, did not testify, the presiding judge reassured the complainant CD (who was under Cross-Examination by defence counsel) that “just to be clear, nothing has been indicated that would give rise to any possibility of charge, even if one wanted to lay one.” Defence counsel thanked the presiding judge and stated “That’s exactly correct, yeah. Yeah, in case you were worried about that leaving here.” See Cross-examination of CD, *R v George*, Regina NJ 53/2013 (Transcript of Preliminary Inquiry), Volume II, July 9th and August 14th,

The case does indeed raise fundamental questions about the conduct of the police investigation, the Crown's analysis of the evidence as the case progressed through the trial and appellate process, the allocation of police and prosecutorial resources in its handling of the case, and the approach to legal analysis and decision-making revealed in the trial judge's reasons for decision. Is this case aberrant? Or is the approach to enforcement of the sexual assault laws that was taken in this case typical and thus indicative of systemic short-comings in the administration of criminal justice in Saskatchewan? What roles, if any, did misogyny, stereotypes and related generalizations about child abuse and juvenile sexuality, tunnel vision, confirmation bias, and insufficient supervisory oversight have in the decision-making processes as the file moved forward, assigned, in turn, to a series of prosecutors, four in all?

Similar questions arise with respect to the decision of the Saskatchewan Office of Public Prosecutions to authorize the appeal from the trial acquittal and the righteous zeal plainly exhibited in the Crown prosecutor's written and oral arguments in the Supreme Court. The five members of the hearing panel at the Supreme Court of Canada made their criticisms of the Crown's written materials and reasoning abundantly clear during oral argument.⁷ There is indeed much to question here. The public interest was not well served by the decisions made by the Regina Police Service and the Saskatchewan Office of Public Prosecutions or the reasoning used by the trial judge. Close study of the record, including the transcripts of the preliminary inquiry and trial proceedings, provides strong evidence in support of the widely held public view that Canada needs a new approach to the handling of sexual assault cases. Personnel involved in investigation and prosecution of these cases need to bring experience and expertise to bear on the legal and factual challenges decision-making about sexuality and sexual activity often poses. Had the *George* case been investigated and prosecuted by professionals with specialized up-to-date training and experience in the legal analysis and impartial investigation and prosecution of sexual offences, perhaps the matter could have been dealt with in a

2013, Pages T105-T233) at T227 [*George*, "Preliminary Inquiry vol II"].

⁷ Supreme Court of Canada, "Webcast of the Hearing on 2017-04-28: 37372 *Barbara George v. Her Majesty the Queen*" (28 April 2017), online (video): <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37372&id=2017/2017-04-28-37372&date=2017-04-28&fp=n&audio=n> [perma.cc/D2M7-686R].

manner more consistent with the principles of fundamental justice and equality before and under the law and the best interests of the public and the parties.

II. THE POLICE AND THE CROWN PROSECUTOR: THE DECISION TO LAY AND PROSECUTE CHARGES AGAINST GEORGE

In 2011, Barbara George applied for a position with the RCMP in Regina and completed a thirty-three page questionnaire as part of the intake screening process. One question asked whether she had ever engaged in sexual activity with a minor. She realized she was not sure. Because she was trying to provide detailed and accurate answers to all the questions she asked her seventeen year old son how old his friend CD was, and then answered the question with a “yes” together with a brief explanatory note indicating that the sexual activity occurred once only and that she “regretted” the incident. A retired RCMP officer who was working for the RCMP on contract reviewed George’s answers to the questionnaire, interviewed her by phone, and advised George that her application was declined. The RCMP disclosed the information received from George about her sexual activity with a minor to the Regina Police Service. Further investigation resulted in charges of sexual assault and sexual interference against George.

The child abuse and exploitation unit of the Family Services Office of the Regina Police Services did a video-taped interview with the complainant, CD (the male juvenile), at the Children’s Justice Centre. The record does not indicate whether members of the Regina Police Services met with George or simply relied on the contents of the notes in the file the RCMP forwarded to them as a “public interest” matter. Only some details from that file appear in the trial record, but it is clear that the police had at least two different partial accounts of the sexual activity between the parties. This is common in sexual assault cases. When investigators have no basis to accept the account provided by one party as reliable and that provided by the other party as unreliable, research data suggests that, although police practices differ widely, some police services have been inclined to classify such cases as unfounded and close the file, with or without review and consultation with the local prosecutor.⁸ In the *George* case, however, the parties were a

⁸ Robyn Doolittle “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as

thirty-five year old female and a male who was fourteen years of age at the time of the alleged offence. The police may have laid the charges on the ground that the public interest requires the prosecution of all cases in which the facts, supported by some evidence that a trier of fact could find credible, suggest that a minor may have been subject to sexual exploitation or sexual assault. The Crown then decides whether to proceed to trial, stay, or withdraw the charges. Unfortunately, however, such a policy may make charges appear to the police to be inevitable in most such cases and, ironically, the very inevitability of charges may tend to discourage police from completing a full and comprehensive investigation before charges are laid. The policy may have a similar effect, in turn, on the exercise of prosecutorial discretion with respect to the decision to prosecute those same charges.⁹ The latter effect is likely compounded when the file obtained from the police is as incomplete as it appears to have been in this case.

And what of the failure to charge the fourteen year old with sexual assault? The partial information available to the police from their investigation clearly suggested George was an active participant in sexual activity that the complainant, CD, described as “mutual.” In the absence of a complaint by George and a full investigation and analysis that uncovered the additional facts subsequently established by the evidence at trial, it is likely the police did not consider laying charges against CD. Barbara George appears to have presented herself to the police as a mother who was responsible for a household of four children and was distressed by the sexual encounter in question. It is clear that she became even more distraught when she discovered that CD had been only 14 years of age when the sexual activity took place. Her impulse appears to have been to blame herself and assume responsibility for CD’s actions rather than viewing herself as the

Baseless”, *The Globe and Mail* (3 February 2017), online: <www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/> [perma.cc/Z2P4-23P6].

⁹ These observations suggest that charges of sexual assault and sexual interference with juveniles should be reviewed in the light of the experience seen in the *George* case. In some cases the decision to lay charges will trigger scrutiny by child protection officers and apprehension of children from the care and custody of the accused or another adult, resulting in the destruction of a family unit. Racism combined with misogyny can only exacerbate the socially destructive effects of enforcement decisions that are based on policy rather than evidence. It must also be recognized that convictions in many of these cases are based on a guilty plea by the accused without the benefit of a thorough investigation and without a legally informed analysis of the evidence and the law.

victim. In this she is no different than many other sexual assault victims who are often quick, with or without prompting by others, to blame themselves for “causing,” “facilitating,” or “provoking” the actions of their assailants.¹⁰ George did not report the assault against herself to the police at the time it took place and, in the whole of the circumstances, it is likely that she never considered doing so. Her trial testimony (reproduced below) shows that she experienced CD’s conduct as a serious breach of trust and was shocked by it, but she may not have appreciated that what CD did to her was the crime of “sexual assault.” This too is not uncommon. Failure to understand what constitutes sexual assault in law is widespread.¹¹

¹⁰ Subordinates in many social hierarchies are socialized to assume responsibility for events and misadventures they did not cause. Gender hierarchy is no different. In the case of sexual assault in the North American context, research studies have established that self-blame is a coping strategy used by many victims as they attempt to make sense of what happened. Blaming him/herself, even when it is patently contrary to the facts, allows a victim to believe s/he retains some measure of control over his/her life and thus may serve to alleviate emotional and psychological distress in the after-math of an assault. Individual differ in personality and circumstances, however. See Kirsten J Russell & Christopher J Hand, “Rape myth acceptance, victim blame attribution and Just World Beliefs: A rapid evidence assessment” (2017) 37 *Aggression & Violent Behavior* 153; Carin Perilloux, Joshua D Duntley & David M Buss, “Blame Attribution in Sexual Victimization” (2014) 63 *Personality & Individual Differences* 81; Sarah E Ullman, Liana C Peter-Hagene & Mark Relyea, “Coping, Emotion Regulation, and Self-Blame as Mediators of Sexual Abuse and Psychological Symptoms in Adult Sexual Assault” (2014) 23:1 *J Child Sexual Abuse* 74; Mary C Anders & F Scott Christopher, “A Socioecological Model of Rape Survivors’ Decisions to Aid in Case Prosecution” (2011) 35:1 *Psychology Women Q* 92; Sarah E Ullman et al, “Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-Blame, and PTSD Among Sexual Assault Survivors” (2007) 31 *Psychology Women Q* 23; Patricia A Frazier, Heather Mortensen, & Jason Steward, “Coping strategies as mediators of the relations among perceived control and distress in sexual assault survivors” (2005) 52:3 *J Counseling Psychology* 267; Nyla R Branscombe, “Counterfactual Thinking, Blame Assignment, and Well-Being in Rape Victims” (2003) 25:4 *Basic & Applied Soc Psychology* 265; Melanie L O’Neill & Patricia K Kerig, “Attributions of Self-Blame and Perceived Control as Moderators of Adjustment in Battered Women” (2000) 15:10 *J Interpersonal Violence* 1036; Patricia A Resick, “The Psychological Impact of Rape” (1993) 8:2 *J Interpersonal Violence* 223; Linda S Williams, “The Classic Rape: When Do Victims Report?” (1984) 31:4 *Soc Problems* 459.

¹¹ *Ibid.* A victim who blames him/herself for a sexual assault is less likely to define or label what occurred as sexual assault or to report it to the police. See also Lucinda Vandervort, “Mistake of Law and Sexual Assault: Consent and *Mens Rea*” (1987-1988) 2:2 *CJWL* 233 at nts 94-98 and discussion in accompanying text.

Officers from Family Services conducted a video-taped interview with CD. In that interview CD stated that he had previously engaged in what he described as “consensual” “sexual activity” with other older women, some of whom who were at least five years older than CD. CD explained in some detail how he typically groomed these women for “consensual” sexual intercourse just as he had with George.¹² If the Regina Police Service had interviewed some of these women and girls, the file prepared for the prosecutor’s office might have provided an evidentiary foundation for multiple charges against CD as a serial sexual offender who used a *modus operandi* with each of his victims that was similar if not identical to that he used with George. In the alternative, such “similar fact” evidence could have been adduced along with the other evidence to prove a single charge against CD with respect to his sexual assault against George. But the Regina police do not appear to have interviewed these women.

III. TRIAL PROCEEDINGS

The preliminary inquiry in *R v George* commenced November 29, 2012. The oral trial judgment acquitting Barbara George was issued February 27, 2015. The order for a new trial was issued by the Saskatchewan Court of Appeal in 2016. George appealed. On April 28, 2017, in a 5-0 decision, the Supreme Court of Canada restored the trial verdicts acquitting Barbara George on the charges of sexual assault and sexual interference. Written reasons for the decision by the Supreme Court of Canada were released July 7, 2017, approximately six years after the sexual activity in question was disclosed to the RCMP by Barbara George and roughly six and one-half years after CD assaulted her in early 2011.¹³

¹² CD provided testimony to the same effect at trial: see *R v George*, Regina NJ 53/2013 (Trial transcript, April 15, 2014 and May 21, 2014, Pages T1-T233) at T134-T165 [George, “Trial Transcript”].

¹³ The disclosure was contained in George’s written answers on the thirty-three page questionnaire she completed as part of her application for employment with the RCMP in June 2011. See testimony of Donald Ross Gervan, retired RCMP officer, sworn on a voir dire, who reviewed the questionnaire (Exhibit-1) and interviewed George in 2011, in *George*, “Trial Transcript”, *supra* note 12 at T13-T46. See also Examination in Chief and Cross-Examination of Barbara George, *George*, “Trial Transcript”, *supra* note 12 at T166-T-209, T-209-T223.

A. The Defence

The rationale for the decisions taken by defence counsel that contributed to shaping the manner in which the case unfolded in court are protected by solicitor-client privilege. Prior to the preliminary inquiry the Crown provided defence counsel with disclosure of the Crown's evidence, including a copy of the video-taped Family Services interview with the complainant, CD. The preliminary inquiry was conducted over four days-- November 29, 2012; January 23, 2013; July 9 and August 14, 2013.¹⁴ On July 9, 2013 defence counsel brought an application pursuant to s. 276.1 of the *Criminal Code* seeking a hearing under s. 276.2 to determine the admissibility of evidence that the complainant, CD, had engaged in sexual activity other than the sexual activity that formed the basis of the charge before the Court. At the hearing on the s. 276.1 application, defence counsel disclosed that George's defence was her mistaken belief at the time of the sexual activity at issue in the case, that CD was at least 16 years of age. Defence counsel argued that the sexual history evidence was probative on the issue of how the complainant presented himself socially and, in turn, how old he appeared to be at the time of the alleged offence. The Crown's position was that George had failed to take all reasonable steps to ascertain the complainant's age and therefore s. 150.1 of the *Criminal Code* barred her from raising a defence of belief in consent. The preliminary inquiry then adjourned to August 14, 2013, at which time the s. 276 application was denied on the ground that the application failed to specify when the alleged previous sexual activity had taken place. The complainant, CD, then testified as a Crown witness and was cross-examined at length by defence counsel. George attended the preliminary inquiry but was not obliged to testify and did not appear as a witness. In fact, the defence called no witnesses. At the conclusion of the preliminary inquiry the presiding provincial court judge held that the evidence was sufficient on the counts charged and committed the accused, Barbara George, to stand trial.

Strategically, mistake as to age was likely the best defence in this case, because it placed a burden on the Crown to identify "reasonable steps" George could have taken in the circumstances but did not. This afforded

¹⁴ Barbara George's fifth child was born in early 2013: Examination in Chief of Barbara George, *George*, "Trial Transcript", *supra* note 12 at T-167. When the infant cried during the preliminary inquiry on July 9, 2013, the presiding provincial court judge granted George permission to breast-feed the infant in the courtroom. See *George*, "Preliminary Inquiry vol II", *supra* note 6 at T130-T132.

George a good chance of acquittal at trial. In theory, two defences (failure to prove the *actus reus* and mistake of fact with respect to CD's age) could have been put forward in the alternative but that would have entailed greater complexity and the risk of apprehended inconsistency.¹⁵ In the end, defence counsel was undoubtedly influenced by her experience appearing before judges in the Regina district, but whether counsel considered arguing that the Crown had failed to prove the *actus reus* is unknown, protected by solicitor-client confidentiality. Arguing that the evidence rebutted the ordinary presumption or inference that the sexual activity involved voluntary and deliberate acts by George might have made sexual assault charges against CD more likely and in turn required George to assume the role of complainant. If these options were discussed, George may well have instructed her counsel not to pursue defences that risked embroiling her as a complainant in a case in which CD was the accused.

B. The Findings of Fact and the Decision at Trial

The trial judge summarized his findings with respect to the circumstances of the matters before the court as follows:¹⁶

Circumstances of the Offence

On the date in question, [J], together with several of his friends, had gathered at the George apartment. They had originally planned to go out drinking and driving around. However, Ms. George had convinced [J] to use the apartment and avoid the risk of drinking and driving. The group included [J] and Chelsey, [J]'s then current girlfriend, [M] and [A], [M]'s then current boyfriend, [B] (phonetic), [CD], and [D] (phonetic), and perhaps others.

Ms. George remained at the apartment but stayed discreetly in her bedroom, allowing the group to carry on. She left her bedroom on occasion to ensure the

¹⁵ E.g. Defences stated in the alternative as: "I committed no act and therefore am not criminally liable, but if I am found to have exercised agency and be accountable for my criminal actions, I must nonetheless be excused from criminal responsibility because I was relying on a mistake about the factual circumstances."

¹⁶ This section, entitled "Circumstances of the Offence," and the section entitled "Conclusions," reproduced below, are from the Oral Reasons for decision at trial as recorded on February 27, 2015 and transcribed by the Court Reporter. The entire "Analysis" section of that unreported decision is reproduced in redacted form in the reasons for judgment by Jackson JA, dissenting in the Saskatchewan Court of Appeal in *George* (SKCA), *supra* note 4 at para 75. The findings of fact at trial are also summarized in the reasons for judgment by Gascon J for the Supreme Court of Canada, in *George* (SCC), *supra* note 5.

gathering remained under control. There were no problems. The group consumed mainly beer.

[M] visited her mother's bedroom several times during the evening. They were shopping online for a new bed comforter. Several other members of the group, including [CD], stopped by the bedroom on occasion to say "hi" or inquire how Ms. George was doing.

The gathering carried on until, approximately, 11:30 or midnight, by which time, most of the individuals had either gone home, passed out, or were sleeping somewhere in the apartment. This was not a totally uncommon occurrence. Indeed, [CD], who had an 11 PM curfew, at the suggestion of [J], had made arrangements, unbeknownst to Ms. George, to spend the evening.

Ms. George was lying in bed, using her laptop, searching for comforters. She was wearing her pajama bottoms, together with a tank top and t-shirt. [M] entered her bedroom to say goodnight. Ms. George brushed her teeth, closed her bedroom door, removed her pajama bottoms, and climbed under the blankets. She was still wearing underwear. She continued to use her laptop.

For some reason, [M] later knocked and re-entered her mother's bedroom. While she was there, [CD] also entered the bedroom. He had a brief conversation with [M]. She kissed her mother goodnight and left the room. [CD] remained. He and Ms. George started talking. According to Ms. George, this turned into a lengthy personal conversation. It involved discussion about music, custody issues, various of [CD]'s relationships, and difficulties he had meeting mature girlfriends.

[CD] was aware that Ms. George and her husband were separated. He had been present during a previous access exchange. His family was experiencing a similar dynamic. He had assumed the responsibility of assisting his mother ~ care for his siblings.

There is disagreement about how the issue of mature girlfriends arose, but the topic led to a discussion about old news reports addressing the story of an American school teacher who became romantically involved with a much younger male student.

Ms. George was lying at the head of the bed, propped up against the headboard, with a pillow behind her back and a blanket pulled up to her chest, under her laptop. [CD] was situated at the end of the bed, sitting crossways, with his back against the wall. At approximately 3 or 4 AM, things became rather more physical. While Ms. George was still at the head of the bed, [CD] asked if it "would be weird if he would kiss (her)". Almost simultaneously, he moved and leaned forward to kiss her. She backed away momentarily. He again moved towards her. She allowed him to complete the kiss.

The kiss lasted only a few seconds. It was followed, immediately, by [CD] moving on top of her, pushing the blankets down, lowering his pants, and moving her underwear to the side. She asked him what he was doing and to stop, several times to her recollection. He ignored the request and continued. She decided to simply let him finish. She described the encounter as being weird, awkward, and

quick. She didn't recall if he ejaculated. Ms. George testified that following the encounter, [CD] said, "I could, kind of, do that once a week though."¹⁷

Based on those findings of fact, the trial judge continued:

Conclusions

- (1) That wherever there is a conflict in the testimony between Ms. George and [CD], I accept the testimony of Ms. George.
- (2) That there was a sexual encounter between Ms. George and [CD], at Ms. George's apartment, between the dates stated in the indictment.
- (3) That the sexual encounter involved kissing and an act of intercourse.
- (4) That the sexual encounter was initiated by [CD], but continued with the willing participation of Ms. George.
- (5) That the sexual encounter was clearly consensual [on CD's part]¹⁸ from a factual perspective.
- (6) That Ms. George believed [CD] was 16 years old at the time.
- (7) That, regardless of her belief in [CD]'s age, Ms. George's conduct in allowing herself to be placed in the circumstance that she was in, alone in her bedroom with her teenaged son's friend, for an extended period of time, at that time of night, demonstrated an appalling lack of judgment.
- (8) That her lack of judgment aside, the reasonableness of steps taken by Ms. George to ascertain [CD]'s age must be assessed in context, and with an appreciation for the particular circumstances under review.
- (9) The onus is on the Crown to prove, beyond a reasonable doubt, that Ms. George did not take all reasonable steps to ascertain [CD]'s age.
- (10) That considering all of the evidence, and, in particular, the indicia outlined by Madam Justice Jackson in *Slater*, and [CD]'s apparent comfort and familiarity with matters sexual, as evidenced by his rather callous conduct at the time and his subsequent testimony in that regard, I am left with a reasonable doubt regarding sufficiency of the steps taken by Ms. George to ascertain [CD]'s age.
- (11) That doubt, regarding sufficiency, must be resolved in favour of the accused, and accordingly, I find Ms. George not guilty of both counts in the indictment.¹⁹

C. Evidence Not Addressed in the Trial Judge's Reasons for Decision

The trial judge's conclusion that George was a "willing" participant" in the sexual activity in question is extremely puzzling. In the reasons for decision the trial judge states that whenever there is a conflict in the testimony between George and CD, he accepts George's testimony, but his analysis omits any reference to crucial portions of Barbara George's trial

¹⁷ *R v George* (27 February 2015), Regina NJ 53/2013 (Sask QB) at T4-T6 [George, "Oral Reasons"].

¹⁸ As specified in the Oral Reasons, *supra* note 17; and see text below at note 25.

¹⁹ *George*, "Oral Reasons", *supra* note 17 at T6-T12.

testimony in which she provided detailed evidence about the words and conduct of the parties and her own state of mind.²⁰ George's testimony, reproduced below, shows that subjectively, in her own mind, she was "unwilling" rather than "willing" and that her words and conduct were objectively consistent with an "unwilling" state of mind. The trial judge's conclusion that George was a "willing" participant lacked any evidentiary support other than the testimony of CD, which the trial judge said he rejected when it conflicted with George's testimony.

Moreover, her testimony shows that the sexual activity in question consisted of acts by CD that brought his body into physical contact with George's body, not acts by George. George's conduct did not violate the criminal law, she did not initiate, commit, or "do" any acts of a sexual nature²¹ and therefore the Crown failed to prove the *actus reus* of the offences on which George was indicted.²² As a consequence, the presence or absence of *mens rea* was not at issue and no "reasonable steps" analysis was required. George was entitled to be acquitted on the ground that the Crown had failed to prove that she committed either of the offences on which she had been indicted. It appears that the trial judge simply assumed that the Crown had proven the *actus reus* of the offences with which George was charged, without actually directing his mind to that issue and then proceeded to analyze the evidence in the case as if the presence or absence of *mens rea* or criminal responsibility for the offences George was assumed

²⁰ See excerpts from the trial transcript reproduced below in the text at notes 23 and 24.

²¹ Whether the "kiss" George tried to avoid, and then allowed CD to complete (when CD suddenly kissed her without waiting for her permission to do so) is categorized as "an act," as unconscious and automatic social "mirroring" behavior, or as a "reflex" in response to the pressure of CD's lips on hers, it is undeniable that a kiss is a far less intimate activity than sexual intercourse. Not all "kisses" are or would be classified by objective third party observers as being "of a sexual nature," as violating "sexual integrity," or to be motivated by a desire for "sexual gratification." In addition, in many cultural and social contexts a kiss may signify respect, friendship, or affection, whereas sexual intercourse is ordinarily seen to be unequivocally "of a sexual nature." In her twenties Barbara George, had moved from Quebec to Saskatchewan. In Quebec, friends and acquaintances routinely exchange affectionate hugs and kisses on both cheeks (or in the air next to the cheek). In my experience, this is rare in Saskatchewan. A Francophone from birth, in 2011 George spoke English with an accent and sometimes hesitated as she searched for words in English. Linguistic and cultural differences may have affected multiple aspects of the case and its investigation and prosecution.

²² Unless the argument is that George was vicariously liable for CD's acts and his acts were to be attributed to her.

to have committed was the only issue to be decided. The presumption of innocence was apparently presumed not to apply or was simply not considered. Quite an odd approach for a criminal trial. Just how odd or discordant the trial judge's approach was, given the facts established by the evidence adduced at trial, becomes yet more striking, if that is possible, when viewed in the light of the specific details addressed in George's testimony--which the trial judge said he accepted whenever it conflicted with CD's.

Excerpts from the Examination in Chief of Barbara George at trial:²³

Q Let's start with the basics: Did ~ did the situation get physical at one point, physical interaction?

A I remember ~ because we were ~ like, I was on the laptop; right. And I remember ~ I think it was three ~ three ~ three ~ like, it was between three and four in the morning when I looked at the time once. And I remember that because it was just before we were talking and I said to CD that, you know, it was actually nice to be able to have a conversation like that and ~ and, you know, share different topics of life and

Q So you were telling him, you appreciated the connection?

A Yeah. It was nice to ~ you know, to have a good conversation with someone and ~ and just ~ it was nice to be able to share that with somebody. [T189] And after I said that, CD asked me if I thought it was ~ would be weird if he would kiss me. And I ~ kind of ~ I was in the ~

Q So he said that ~ he said that to you?

A Yeah. I wasn't expecting that ~ so I, kind of ~ and I didn't really have time to answer anything because he was, kind of, leaning forward to kiss me.

Q Did you lean in, as well?

A No. I, kind of, backed away a little bit because I was, kind of, caught off-guard. I wasn't expecting that. And then he, kind of, came back, and ~ and then I kissed him back at that point.

Q Okay. You kissed him ~ okay. The ~ so it was ~ how he describes it, this, sort of, 50/50 mutual thing, you kissed back at that point?

A No. It ~ it wasn't really 50/50 to start with, no. I ~ you know, he ~ leaned forward, and then I, kind of ~ got ~ caught off-guard. And then ~ then I ~ I let him kiss me.

Q Yes. Sure, sure. Okay. And, now, about the timing ~ okay, so if you talked for ~ for ~ you know, six, seven hours, where in the time-line does [T190] this kiss come in?

A Say, when we ~ when I looked and it was about ~ between 3:30 and four ~ we talked. Then, you know, I brought up the fact that I enjoyed the conversation and all of that. And we kept talking.

Q Oh, so it wasn't right at that point?

²³ Examination in Chief of Barbara George, George, "Trial Transcript", *supra* note 12 at T188-T197. Many, but not all, non-substantive mono-syllables interjected by counsel have been deleted from the excerpt of the redacted transcript reproduced here.

A No, no. We kept talking about stuff. And he showed me a song and stuff like that. Like, we kept chit-chatting and listening to some music.

And it was a good two hours, if not a little bit more, before ~ after ~ then the kiss happened.

Q Okay, so you just-you tell him, "I'm really enjoying this, it's a connection," and- and then you just keep connecting ~ for a couple more hours?

A Well, yeah, I was ~ enjoying the talk, and just talking about ~ like, just ~ you know? It was just nice to be talking with someone.

Q Okay. Okay, so ~ so then what happens at ~ at the kiss?

A (No audible response.)

Q So the kiss ~ how long was that kiss?

[T191] A I don't ~ I don't even think it lasts 20 seconds. It was ~ everything happened so fast after that. So he came forward to kiss me. I, kind of, backed away. And then ~ then I let him kiss me. And then as soon as I did it, CD was on his way on top of me. And ~ and I asked him what he was doing, and he didn't answer me. So I ~ I was completely surprised. I wasn't expecting anything like that.

Q But were ~ sorry. Were the blankets still on you at this point?

A When I asked him what ~ what he was ~ like, what he was doing? Yeah, they were. Then he wouldn't answer. And then I asked him again. I said, "Okay, what are you doing?" And as I asked him again, he was pulling ~ like, pushing the blankets down. Because the blankets were, like, in the middle of my tummy and my ~ and my breast at that point. [T192] Like ~ and so he, kind of, pushed them down. And it happened ~ like, I felt him pulling his pants down and pushing my ~ my underwear out of the way. It just happened so fast.

Q So ~ so if I understand it, well, what ~ what clothing came off for the two of you, which clothing came off?

A None of my clothes came off.

Q None?

A And his ~ his pants didn't come off. I ~ if ~ like, from what I felt, they just came down.

Q Yes. What was he wearing that night?

A He was wearing a pair of jeans ~ and he had a t-shirt, and, like a ~ actually, the only clothing that came off that night was his hoodie ~ earlier in the night. He was wearing a red hoodie, and he had a t-shirt under.

Q Mmmhmm. Okay. Okay, so ~ so was there any oral sex or ~

A No. Not at all, no.

Q None at all?

A There was ~ no oral sex or caressing. Like, it was absolutely nothing besides that kiss. [T193]

Q Was there anything fondling or caressing?

A No.

Q Did he touch your ~ did he pay any attention to your chest or ~

A No, not at all, no. He was on top of me, but his hands weren't on me. And, like I said, I asked him what he was doing. And after that, it just happened so fast. And then I said to him, "Look, this is wrong." "Can you, please, stop." And he wasn't responding. And he was just, kind of, looking at me. And so I just ~ I don't know.

I ~ honestly, I was so surprised and ~ I wasn't expecting a kiss to turn into this, that I just ~

Q Yes. Did you ~ did you push him off or try to fight him?

A No. I ~ I ~ you know, I should have been ~ but I think I was just ~ so surprised and shocked, I just ~ I mean, and at this point, I had asked him more than twice to ~ if he could stop and that ~ that this is ~ was wrong. And nothing was happening. So I ~ and I, kind of ~ I think I, kind of, felt guilty because I kissed him back, so I thought maybe ~ so I just thought, okay ~ I, kind of, just let him finish.

Q Yes, yes. What was he doing, what was he doing during all of this?

A (No audible response.)

Q Did ~ did he say anything or ~ or ~

A No, it was just ~

Q ~ other than doing his thing?

A It was just so weird. It ~ nothing. [T194]

Q Did he ejaculate?

A I don't ~ honestly, I don't know because it was so awkward. There was no ~ I'm sorry. I don't ~ there was ~ there was no ~ he wasn't making any noise or moaning. Do you know what I mean?

Q M m h m m .

A There was absolutely nothing. I ~ he was just looking at me, and I was just ~ like, okay, what is this? Like, I ~ I just ~

Q And so you just let him finish?

A And it was so quick, too.

Q Yes. How quick?

A I don't even think it lasted five minutes. I ~ it was just ~ it happened so quick ~ and it was done so quick, too.

Q Okay.

A So I just ~ I was just completely frozen. I ~

Q Okay. Okay, so how did it end?

A (No audible response.)

Q How ~ how did it ~ how did that physical stuff end?

A He just got off me and ~ like, he, kind of, pulled himself off at the end of the bed, and he pulled his pants back up. And he said to me, "Holy ~" if I remember the right words, he said, "Holy shit, [J] can't find out about it." And I said, "No kidding." And then at this point, I grabbed my PJ pants because I didn't feel good at all. I just ~ I wanted to put them back on right away. And he said, "You know, I could, kind of, do that once a week though." And I said, "Do you know what, CD, that's not funny at all, so let's just ~ you know ~[T195] - let's just ~ end this right now, and not talk about it, please."

Q Did you ~ did he stay in your room any longer after that?

A No. I asked him to leave.

Q CD said something about [J] - [J] recommending he go sleep in your mom's ~ in your room?

A No.

Q Did you hear ~ see ~ observe any of that?

A No, never. And it ~ you see, I didn't understand why he made that comment because he was ~ I mean, if he brought up the fact to me, you know, "Holy shit, [J] can't find out," then why would [J] give you permission to ~ no.

Q Well, yes ~

A It makes ~ no sense to me.

Q Yes ~ no, I know. And that's ~ we'll ~ talk about that. Yes, that's argument for the end ~ for the end, but, yes. Okay, so did ~did Mr. D wear a condom or ~

A I don't see where he would have had time to wear one. I'm sorry, but it's the truth. [T196] And if he did, I didn't noticed (sic) it.

Q Okay. So through all of ~ even the romantic talk with him that night, and, you know, romance and ex-girlfriends and stuff, did you ~ did the two of you speak of having sex at all?

A Never.

Q Was there-any discussion?

A ~ It was never brought up. I mean, I ~ to ~ for me, personally, I was ~ you know, yeah, I was loving the conversation and the sharing part of ~ you know, but, I mean ~ and, yeah, I did ~ I let him kiss me back, but ~ I mean, no, I never had any sexual intention or ~ it never ~

Q That's not ~

A ~ I mean ~

Q ~ what you ~

A ~ it was ~

Q ~ were set out to do that night, is what ~

A Well, I was ~ in my PJ pants all night, and I was ~ no, I wasn't ~ no.

Q Okay. Okay, so ~ and at that time, when you're thinking, no, no, that wasn't my intention, or when ~ when you testify about that, are the reasons that you thought, no, no, because he's too young, or ~ or were you ~

A No. That ~

Q That your mind ~ [T197] - didn't even go there?

A Well, the thing is, you know, to me, he was [J]'s age, and I don't care if he would have been 26. He ~ he's my son's friend. You don't do things like this. It's ~

Q Did you feel bad about that, about being the~

A Well, I ~ felt bad about the kiss, yeah, because ~ and, I mean, it ~ because it turned into this right away, too. I ~ you know, I thought, like, oh, my gosh, like ~ okay, this is your son's friend. And he's ~ like, he ~ what's going on here.

Q Yes. Okay. Okay, so at any point in the evening did you turn your mind to thinking he's too young for me?

A Never ~ I didn't have those intentions, so ~ I was just ~ honestly, I was just enjoying the conversation. And I think at this point, some ~ you know, some topic he was talking about, like, his ex-girlfriend and stuff like that, yeah, you, kind of, share an emotional connection, too. But, you know, sharing an emotional connection and a conversation ~ does ~ has nothing to do with sexual intercourse and it ~ no. I never thought of going to bed with my son's friend, no.

Excerpts from Cross-Examination of Barbara George by the Crown prosecutor at trial:²⁴

Q And then I suggest to you, in fact, you wanted to get intimate with him?

A No, I never did. The reason why CD ended up coming closer to me on the bed, it's when he wanted to play that song for me. And I turned my laptop. Then he came and put the song on. That's the only reason why CD ever got closer to me.

Q I suggest to you that you would ~ it was ~ you were the one who asked if it was weird if you wanted to kiss him?

A No, I did not.

Q And subsequently, you and him both kissed?

A I'm sorry.

Q And then you and him both kissed; is that correct?

A No. CD reached to kiss me. And like I explained with Christina [defence counsel], I ~ I, kind of, backed away. I was, kind of, surprised. And then he came back, and then I kissed him back. But I never invited him to a kiss.

Q And after the kissing, then you began to touch each other, it was a physical [T217] contact between you and CD?

A There was absolutely no physical touch that night, beside my lips that touched his lips, and him on top of me. There was no ~ with my hands or his hands, there was actually no contact or no caressing or none of that happened that night.

Q If I suggest to you that after the kissing, you took your clothes off?

A I never removed any of my clothes off. The only moment in that night where I removed a piece of my clothes off is when I came back from the washroom, I closed my door, and I removed by [sic] PJ pants to go under my blanket. That's the only moment where any of my clothes came off that night. [Ed. Note: here G refers to a point before CD came into her bedroom]

Q And I suggest to you that, in fact, you and CD engaged in oral sex?

A Never.

Q And then you then had sexual intercourse with CD?

A I'm sorry?

Q You then had sexual intercourse with CD?

A If I had sexual intercourse with CD?

Q Yes.

A Yeah, it happened, yeah, but not because I wanted to.

Q So there was a physical contact between you and CD?

A Yeah, from after the kiss, yeah, CD came on top of me, and ~ yeah, so it did create physical contact, yeah.

D. Analysis of the Grounds for Acquittal

The trial judge's oral reasons for decision succinctly state his conclusions on a number of crucial issues:

²⁴ Cross-Examination of Barbara George, George, "Trial Transcript", *supra* note 12 at T215-T217.

There is no dispute that an act of intercourse occurred between Ms. George and [CD]. There is similarly no dispute that, although reluctant at first, Ms. George was a willing participant. I find, as a fact, that [CD] actually initiated both the kiss and the intercourse. In reaching this conclusion, I specifically accept the testimony of Ms. George over the testimony of [CD]. Factual consent on the part of [CD] is abundantly clear, however, considering his age, he was incapable of consenting in law.²⁵

The trial judge found that George believed that CD was at least 16 years of age and then turned to discussion of the defence of honest mistake of age and the requirement, pursuant to s. 150.1 of the *Criminal Code*, that to rely on the defence she must have taken all reasonable steps to ascertain CD's age. No other ground for acquittal was raised by counsel and none is considered in the decision. Instead the trial judge focused his attention and subsequent analysis on evidence related to the defence under s. 150.1, not the case as a whole, and acquitted George on the ground that the Crown had failed to prove beyond a reasonable doubt that George failed to take all reasonable steps to ascertain CD's age. George was found not guilty on both counts in the indictment.²⁶

But George's evidence, accepted by the trial judge on all disputed points of fact, shows that the Crown had actually failed to prove the *actus reus* of the offences on which George had been indicted. George was therefore entitled to acquittal on both counts on that ground alone. The excerpts from the trial transcript, reproduced above, show that the accused, Barbara George, did not voluntarily and deliberately touch the complainant, CD, in

²⁵ From the unreported Oral Reasons at trial in *R v George* at T6, and reproduced in redacted form in the dissenting reasons for judgment by Jackson JA in the Saskatchewan Court of Appeal, *George* (SKCA), *supra* note 4 at para 75.

²⁶ George testified that she had no intention to engage in sexual activity with CD; that eventuality had not crossed her mind. Unless she was curious about CD's age, or a question of how old he was had somehow come up in the course of their conversation, she had no reason to ask CD his age before he assaulted her. The fact that she did not anticipate CD's assault made it impossible in practice for her to comply with the legal requirement to take reasonable steps to ascertain CD's age or take evasive action before he initiated physical contact with her. 'Ought' implies 'can,' while 'cannot' or 'impossible' suspend the effect of an obligation. Cf *R v Tannas*, 2015 SKCA 61, decided in June 2015 (after the oral reasons for decision in *George* were delivered by the trial judge February 27, 2015) in which the Court held that the circumstances of the case obviated the need to make a direct inquiry about the complainant's age. The *Tannas* decision should have been considered by the Office of Public Prosecutions before the Crown proceeded with the oral hearing in the Crown's appeal from Barbara George's acquittal.

a sexual manner. The principles of fundamental justice encompass the long-standing proposition that individuals are not criminally liable for acts they are alleged to have committed unless they committed those acts freely and voluntarily.²⁷ In the circumstances of the offences she allegedly committed, Barbara George had no real opportunity to exercise agency, to make relevant choices, and act accordingly. Where there is no act, questions about whether the act was deliberate and voluntary simply cannot arise. To conclude, as the trial judge did, that George was a “willing participant” is to intimate that she actively and voluntarily engaged in the sexual activity at issue in this case even though her evidence, evidence accepted by the trial judge, shows that she did not.

E. “Willing Participant”

The trial judge’s assertion that there is “no dispute that, although reluctant at first, George was a willing participant”²⁸ is curious. This is a criminal case, not a civil matter, and the onus is on the Crown to prove all elements of the alleged offence, including commission of a voluntary act. To suggest there is “no dispute” about this issue is to relieve the Crown of the burden of proof on an essential issue. The record contains no indication that the defence waived proof of the *actus reus* of the offences on which George had been indicted.

The trial judge’s statement is also ambiguous. The trial judge does not indicate whether the finding: 1) is with respect to George as the accused who is thereby said to have voluntarily and deliberately performed acts of participation that constitute the offences with which she is charged, or 2) is intended to serve as a finding that George consented to the sexual encounter initiated by CD and therefore was not sexually assaulted by CD. Either way, the conclusion was an error on a question of law on multiple grounds. First, with respect to George as the accused, it was an unreasonable conclusion in that it was inconsistent with the evidence the judge accepted. On the other hand, if it was intended to address the question of whether the sexual encounter was consensual on George’s part, the assertion—that George was a “willing” participant—shows that the trial judge misdirected himself with respect to the legal meaning or definition of consent, a

²⁷ Michael Manning & Peter Sankoff, *Mewett, Manning & Sankoff on Criminal Law*, 5th ed (Toronto: Lexis-Nexis Canada, 2015) at 151-158; Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 115-142.

²⁸ See the text above at note 25.

question of law governed by the common law and the statutory definition of sexual consent in s. 273.1 of the *Criminal Code*.²⁹

Furthermore, the conclusion that George was a “willing participant” in the first respect violates principles of fundamental justice in that it fails to acknowledge that in the circumstances George had no meaningful opportunity to choose to perform or not perform any sexual act for which she, as the accused, was being required to account at criminal law.³⁰ The sexual contact between her body and the complainant’s body that took place was the result of CD’s conduct, not George’s conduct. CD engaged in sexual activity and touched George’s body with his body for the purpose of sexual intercourse and sexual gratification. George did not initiate the activity or reciprocate. Furthermore, given the evidence the trial judge accepted, the conclusion—although arguably merely *obiter* given that George was the accused in the matter before the court, not the complainant—that she was a “willing” participant in the second respect also had the practical effect of denying George equal protection and benefit of the common law and statutory definitions of sexual consent and was therefore a violation of s. 15 of the *Charter*.

The trial judge specifically stated that he accepted George’s testimony over that of the complainant, CD, on all points in conflict.³¹ The evidence accepted by the trial judge shows that George did not subjectively want or intend to engage in sexual activity with CD; nor did she initiate the sexual activity or communicate affirmative consent or voluntary agreement to the sexual activity in question by her words or conduct. Under s. 273.1 of the *Criminal Code*, as at common law, passivity, resistance, and refusal, all signify the absence of the communication of voluntary agreement, that is, consent.³² The trial evidence reproduced above shows that the complainant, CD, initiated the sexual activity and used force in order to have sexual intercourse with her, a circumstance s. 265(3)(a) of the *Criminal Code* identifies as one in which consent is not obtained. In the absence of

²⁹ This is an error of law, not a mistake of fact. See *R v Ewanchuk*, [1999] 1 SCR 330 at para 21, [1999] SCJ No 10 [Ewanchuk].

³⁰ To find George liable to conviction in these circumstances is contrary to s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³¹ Text above at note 25.

³² See *Ewanchuk*, *supra* note 29 at para 51: “For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3.”

evidence to show that George voluntarily and deliberately touched CD in a sexual manner, there was no *actus reus*, no criminal act, no crime for which she could be lawfully convicted. An acquittal was the only correct verdict available in law. Whether George knew how old the complainant was and whether George had taken all reasonable steps to ascertain the complainant's age were both immaterial questions in these circumstances.

As the trial judge found, the evidence makes it clear that CD, not Barbara George, initiated all aspects of the sexual activity. George's testimony shows that CD's attack took her by surprise. She resisted and repeatedly objected but to no avail. CD ignored her words and conduct. She testified that she finally gave up and "just let him finish." This is acquiescence, not consent. The trial judge's characterization of the evidence as showing that "although reluctant at first, she was a willing participant"~ is an outmoded perspective³³ that disregards decades of development in Canadian sexual assault law. Moreover, the trial judge not only disregards the fact that George was the victim of the piece, but in addition ignores the circumstances and faults her for exercising "bad judgment" in allowing CD be in her bedroom for an extended period of time at night.³⁴ This is classic

³³ See e.g. *R v Hindle* (1978), 39 CCC (2d) 529 (BCCA), [1978] BCJ No 1148 (QL) in which the judge in instructing the jury at trial stated "...if the woman first resisted and then later consented to the act of intercourse because she yielded to her own passion, then this would be a genuine consent, notwithstanding the fact that she at first objected or resisted the advances made to her" (at 530). A recent example of this same perspective~whereby intercourse by the assailant is taken to demonstrate that the complainant may have consented is seen in the recent trial decision in *R v Adeju*, 2014 ABCA 100, in which lengthy resistance, followed by what the complainant explained was resignation, resulted in an acquittal on the ground of doubt about the absence of consent. On appeal the Court substituted a conviction. The false equation of 'resistance subdued' or 'compliance obtained' with 'doubt about the absence of consent' has long been a recurrent motif in sexual assault cases. Current law prohibits this type of reasoning by: 1) requiring affirmative consent and defining it as the communication of voluntary agreement by words or conduct as provided in s 273.1(1) of the *Criminal Code*; and, in addition, 2) specifying that "no consent is obtained" when "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity" as provided in s 273.1(2)(d).

³⁴ George was supervising, not participating in, a house party of teenagers organized by her teenage son. She had asked her son to party at home to ensure that he and his friends would not be drinking and driving. She had no reason to regard CD any differently than any of the other half dozen or so young people, including her own children, who were spending the night in her home that evening. She had no reason to anticipate and did not anticipate that her interactions with any of these young people would become sexualized. Moreover, neither she nor CD were drinking alcohol, unlike

victim-blaming misogyny, especially poignant in a case where it is the alleged accused who is criticized for her own vulnerability—apparently ‘conversing while female in the security of one’s home’ is like ‘driving while Black’ or ‘walking while Indigenous.’ Such statements about a victim’s bad judgment are gratuitous slap downs, signaling judicial bias and a lack of judicial impartiality and can only perpetuate outmoded beliefs and attitudes that have no place in judgments issued by judges in the 21st century. Law students and the legal professionals who read those judgments should not be burdened with the task of disabusing their minds of such prejudicial clap-trap. It inevitably wears on the unconscious mind of the reader like water on a stone and can only reinforce implicit social and cultural biases.

To re-cap—George’s testimony showed that she was not a “willing participant” in the sexual activity and that she was not even a “participant” in any proper sense. The sexual activity consisted entirely of acts by CD. Absent proof that George committed an act prohibited by the definition of the offences on which she was indicted, there was no *actus reus*, and acquittal was required by law. Analysis of *mens rea* was not required in the circumstances. Whether George could or should have known or inquired about CD’s age was immaterial in the absence of the commission of a prohibited act by her.

It follows that the trial judge was required to acquit George on the ground that the Crown failed to prove that George had committed either of the offences with which she was charged.³⁵ Instead, without analyzing the legal significance of the facts in evidence that were of material relevance to the issues before the court, the trial judge appears to have based his reasons for decision on the assumption, contrary to the evidence, that: 1) George committed one or more prohibited acts or omissions, and 2) that she did so “willingly.” To say that an act is committed is to assert that the actor controlled the means used to commit the act, made a deliberate choice to

some attendees. There was no reason for her to anticipate that CD would act as he did or for her to appreciate that she needed to take steps to protect herself from an attack by him. She knew CD only slightly as someone who was her teen-age son’s friend and had been in her home with her son a number of times in the past. She was aware that CD helped his mother care for his younger siblings. She clearly believed him to be a responsible young person and she trusted him. In the whole of the circumstances that was not inappropriate. See Examination in Chief and Cross-Examination of Barbara George, George, “Trial Transcript”, *supra* note 12 at T166-T209, T209-T223.

³⁵ Had the trial judge done so, the prosecution of George on the charges in question should have been at an end.

commit the act, and had a real opportunity to do otherwise. The term “willingly” suggests that any acts an individual is alleged to have performed were undertaken without coercion, freely and voluntarily, and were consistent with that individual’s wishes and desires. George’s testimony, however, provides no support for the first conclusion—that she deliberately “chose,” in any meaningful sense of the word, to participate in the sexual activity—or for the second conclusion—that she did so “willingly.”

F. At the Saskatchewan Court of Appeal—Roads Not Taken by the Crown, Defence, and the Court

1. The Crown

Following George’s acquittal at trial on the ground of reasonable doubt that she failed to take all reasonable steps to ascertain CD’s age, the Crown could have accepted the verdict, decided whether to charge CD with sexual assault of George, and closed the file. Instead, the Office of Public Prosecutions filed an appeal requesting a re-trial on the ground of alleged judicial errors on questions of law dealing with application of the reasonable steps provision in s. 150.1 of the *Criminal Code*. Interpretation and application of s. 150.1 is a matter of interest to judges, prosecutors and criminal defence lawyers. Yet in this case the accused was not only acquitted at trial but also arguably shown—by evidence the trial judge accepted—to have been wrongfully accused in the first place. The appeal placed her at fresh risk of wrongful conviction. The direct and indirect harm the criminal proceedings had likely already caused George and her young family could hardly have been insignificant. The appeal was oppressive and an abuse of discretion.

The legal resources consumed by the appeal were not insignificant either. Appeals from acquittals on charges that patently lack a lawful foundation oppress and torment hapless accused and divert public resources sorely needed for legitimate purposes, including adequate review and supervision of prosecutions. Such appeals further undermine public confidence in the administration of justice. Before authorizing the appeal in the *George* case, the Office of Public Prosecutions should have reviewed the entire record with care and taken due note of the findings of fact at trial and the evidence in the trial record. Instead, the record shows that the Crown proceeded with the appeal on the basis of the understanding of the facts and theory of the case the prosecution relied on at trial. This is

puzzling. Was there no review of the record? Or was the review conducted only with respect to the trial judge's interpretation and application of s. 150.1 of the *Criminal Code*? A portion of the substantial resources required to appeal the case to the Saskatchewan Court of Appeal and to the Supreme Court of Canada should have been devoted to a comprehensive review of the facts and the law, based on the whole of the evidence in the case, as it emerged in the pre-trial and trial stages. The public interest required a decision not to appeal the acquittal. Appellate jurisprudence dealing with proper judicial application of s. 150.1 could have been developed in a case in which s. 150.1 was actually material to the verdict.

2. *The Defence*

The evidence in trial record afforded the defence an opportunity to oppose the Crown's appeal of the acquittal and request for a new trial on the ground, identified above, that the Crown had failed to prove that the accused, George, had committed any voluntary act of sexual touching. She was entitled to acquittal on that ground alone. The errors on questions of law raised in the Crown's appeal were immaterial to the outcome. A trial judge's failure to consider a defence for which there is sufficient evidence is an error on a question of law that affords the accused a ground of appeal. "The accused is entitled to have all available defences founded on a proper basis considered by the court, whether he raises them or not."³⁶ Nonetheless, the defence did not take this approach and chose not to augment the grounds relied on, instead limiting its arguments in the appeal to the issues raised by the Crown. Defence counsel, following consultation with the client, may have made strategic choices at both the trial and appellate levels that reflected counsel's professional experience and knowledge of judges serving on the courts in Saskatchewan.

3. *The Court*

Similarly, it was open to the Saskatchewan Court of Appeal to dismiss the appeal and affirm the verdict of acquittal on the ground that the record showed that Crown had failed to adduce any evidence to prove the *actus reus* of the offences in the indictment. Clearly the Court did not do so. Moreover, the reasons for judgment by the Chief Justice of the

³⁶ *Ewanchuk, supra* note 29 at para 55, citing *R v Bulmer*, [1987] 1 SCR 782 at 789, [1987] SCJ No 28.

Saskatchewan Court of Appeal for the majority largely adopted the Crown's view of the facts rather than the findings of fact made by the trial judge.³⁷

G. Duty of the Judiciary: Appealable Errors Versus Disciplinable Conduct

The trial judge's handling of the *George* case arguably bridges the divide between errors on questions of law, subject to challenge on appeal, and judicial misconduct, subject to discipline. The trial judge's alleged errors on questions of law with respect to interpretation and application of the reasonable steps requirement under s. 150.1 could be and were appealed.³⁸ The other errors of law identified above, were not raised as grounds of appeal but could have been. The remaining question is whether there is evidence of judicial misconduct on the part of the trial judge.

The trial judge in question is experienced, having sat as a superior court judge in Saskatchewan for many years. The judge is presumed to be competent, knowledgeable in the law, and cognizant of developments in the law of sexual assault including enactment of the amendments to the sexual assault provisions in the *Criminal Code* in 1992 and subsequent years. If the reasons for decision in *George* do not reflect current law and fundamental legal principles, it is fair to assume this is due to choices the trial judge made and was not due to his lack of relevant legal knowledge, as has occurred with

³⁷ *George* (SKCA), *supra* note 4. In the judgment for the Supreme Court of Canada in the further appeal, Gascon J observed that Richards, CJS writing for the majority in the Saskatchewan Court of Appeal had translated "strong opposition to the trial judge's factual inferences (severity) into supposed legal errors (character). Here, that was an improper approach, and it disregarded the restraint required by Parliament's choice to limit Crown appeals from acquittals in proceedings by indictment to "question[s] of law alone" (*George* (SCC), *supra* note 5 at para 17, citing *Criminal Code*, *supra* note 2, s 676(1)(a).

³⁸ Richards CJS, writing for the majority of the Saskatchewan Court of Appeal, allowed the appeal, quashed the acquittals and ordered a new trial (*George* (SKCA), *supra* note 4 at paras 50-51), holding that the trial judge had erred in law: (1) by considering evidence from during or after the sexual encounter in assessing the reasonableness of the steps taken by Ms. George before the encounter; and (2) by relying on questionable factual inferences regarding whether C.D. may have looked mature for his age at the time of the sexual activity (at paras 41-46). Richards CJS ruled that those legal errors were "central" to the trial judge's analysis and were therefore material to the verdict, justifying appellate intervention (at paras 48-49); *George* (SCC), *supra* note 5 at para 12. The Supreme Court of Canada, in turn, held the trial judge had not erred in law, dismissed the Crown appeal, and restored the acquittals.

judges newly appointed to the bench with limited prior professional experience in criminal law.³⁹ It is therefore arguable that the trial judge's failure to decide the case on the evidence and apply the law correctly were not merely errors on questions of law but instead errors on questions of law by choice, a "wilful refusal" and therefore misconduct.⁴⁰

A further aspect of the trial judge's "wilful refusal" to apply current law that is apparent on the face of the reasons for decision in *George* lies in the extent to which the trial judge's reasoning relies on and reinforces classic rape myths. This arguably demonstrates the trial judge's antipathy for current sexual assault law and fundamental legal principles of equality and impartiality. The trial judge acquitted Barbara George on the ground of mistake of fact with respect to age—affirming, in effect, that mistake with respect to age can be a highly effective defence for persons accused of sexual assault. Yet the reasons for decision also advise the community, the police, and prosecutors that in Saskatchewan anyone who is kissed and subjected to sexual intercourse even though they did not communicate affirmative consent, must have been "willing" even if the complainant says s/he refused, resisted, and ultimately just acquiesced. This is a classic rape myth—that no one can be "raped" against his or her will. The net effect will inevitably be to continue to deter complainants from reporting, police from laying charges, and prosecutors from proceeding to trial. Trial judges who perpetuate such myths abuse the judicial role, violate public trust, and should be removed from the bench because such conduct erodes public confidence in the administration of justice and places persons who are vulnerable to sexual assault at enhanced risk of assault, including repeated assaults by serial offenders.⁴¹

The characterization of Barbara George as a "willing participant" precludes the conclusion that she was sexually assaulted and implies,

³⁹ For example, in *R v Vader* 2016 ABQB 505 the trial judge rendered a verdict of murder by relying on s 230(a) of the *Criminal Code*, a provision that has not been in effect since the Supreme Court of Canada held the section to be unconstitutional in *R v Martineau*, [1990] 2 SCR 633, [1990] SCJ No 84. But the Code provision had not been repealed and therefore still appeared in the published consolidated version of the Code. In those circumstances the cause of the error was the judge's lack of training and experience in the practice of criminal law, not a "wilful refusal" to apply the law.

⁴⁰ Cf *In the Matter of an Inquiry Pursuant to S. 63(1) of the Judges Act, R.S., c. J-1: Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp*, (Ottawa: CJC, 2017) at para 83 [Camp Report].

⁴¹ *Ibid* at paras 115, 116, 165, 241.

without deciding, that her conduct was voluntary and deliberate conduct for which she was liable to be held to account at criminal law. In acquitting George, the trial judge would have been able to assume that the defence would not file an appeal, and that any grounds of appeal the Crown might rely on likely would be limited to issues related to interpretation of the “all reasonable steps” requirement under s. 150.1. The trial judge could have been confident that the Crown would not raise questions in an appeal about presumptions about voluntariness as an element of the *actus reus* of sexual assault or the legal definition of sexual consent, or, of course, how either might apply to the facts of the case if George rather than CD were the complainant.

The trial judge’s comment, noted above, that George exercised “an appalling lack of judgment” in allowing herself to be alone in her bedroom for an extended period of time at night with her teen-aged son’s friend, is gratuitous victim-blaming. This is a classic form of discriminatory reasoning in which responsibility is deflected from an actor to a victim in a rhetorical slap-down that purports to justify a conclusion that gives effect to misogyny or racism or both and thereby reinforces a hierarchical social order.⁴² The decision to include such a comment in the trial judge’s reasons for decision provides further evidence of the trial judge’s conscious or unconscious reliance on long-discredited rape myths that the Supreme Court of Canada has repeatedly denounced as discriminatory in their effects.

Are these comments indicative of deeply held beliefs and attitudes that may affect this trial judge’s ability to exercise impartiality in other cases or are the trial judge’s comments and approach in the *George* case uncharacteristic and atypical? To begin to answer this question it is useful to review the sentencing decision by this same judge in 2003 in another high profile sexual assault case, *R v Edmondson*.⁴³ The case arose from drunken sexual assaults on a twelve year old Indigenous female by three non-Indigenous males in their twenties as they drove around the Saskatchewan country-side on a summer afternoon. Edmondson was tried and convicted by a jury. Brown and Kindrat, were tried together in a separate jury trial and acquitted. The trial judge in *George* also presided over both the *Edmondson* trial and the first *Brown and Kindrat* trial.⁴⁴

⁴² Cf Kate Manne, *Down Girl: The Logic of Misogyny*, (Oxford: Oxford University Press, 2018) at 62-67.

⁴³ *R v Edmondson*, (4 September 2003) JCM QBC No 1358/02 (Sask QB) [*Edmondson*].

⁴⁴ Following the acquittal of Brown and Kindrat and a Crown appeal in which the Crown

Here, however, my attention is not directed to this judge's conduct of those trials—in which he referred to the accused, all adults in their 20's, as “the boys”—but rather to his reasons for decision at the sentencing hearing in *Edmondson*. The sentence imposed in the *Edmondson* case was a conditional sentence of two years less a day to be served in the community and was widely criticized on the ground that such a sentence was shockingly lenient in the circumstances of the case.⁴⁵ At the time, the bench-mark sentence in Saskatchewan for sexual assault was three years. Sentencing appeals followed. What, if anything, do those reasons reveal about the judge's beliefs and attitudes towards sexual assault, sexual assault complainants, and persons accused of sexual assault? Do those beliefs and attitudes undermine his ability to perform his duties impartially and with respect for equality consistent with the requirements of the law and fundamental principles of justice?⁴⁶ Are there similarities between the biased reasoning and bigotry apparent on the face of the reasons for decision in *George* and the reasoning the trial judge used to justify his sentencing decision in *Edmondson*?

There are indeed striking similarities between the reasons for these decisions. The twin themes of “willing participation” and “victim-blaming” found in the reasons for the trial decision in *George* are central to the sentencing decision in *Edmondson*. The sentencing decision included fourteen paragraphs (as well as extensive excerpts from testimony by an expert witness at trial) in which the judge reviewed his impressions of the twelve year old complainant's life history and personal circumstances at length. He concluded that she “chose” albeit “naively” to accept a ride with

obtained an order from the Saskatchewan Court of Appeal for a re-trial, the cases of Brown and Kindrat were severed and each accused was re-tried in separate jury trials with different judges presiding.

⁴⁵ For a more detailed examination of the criminal proceedings in these cases, see Lucinda Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 111.

See also Kathleen Ward, *Land of Rape and Honey: Settler Colonialism in the Canadian West* (PhD Thesis, University of Edinburgh, 2014); James McNinch, “‘I thought Pocahontas was a movie’: using critical discourse analysis to understand race and sex as social constraints” in Carole Schick & James McNinch, eds, *‘I Thought Pocahontas was a Movie’: Perspectives on Race/culture Binaries in Education and Service Professions*, (Regina: CPRC Press, 2009) 151.

⁴⁶ Cf Camp Report, *supra* note 40 at para 249.

the three young adults, she drank beer they offered her, she was a “willing” participant in the sexual activity and she may have even been the sexual aggressor in the incident in question.

In support of the latter proposition, the sentencing judge referred to the expert witness’s testimony at trial suggesting that children who have previously been sexually abused may be precociously sexually aggressive. The sentencing judge explained that:

There is a difference from a sentencing perspective, in my opinion, between a situation where a 12-year-old is picked up off the street walking home from school against his or her will and forcibly sexually assaulted, and a situation where that same 12-year-old, for whatever complex set of reasons may be operative, while attempting to act or appear older than he or she really is, naively but willingly enters into a motor vehicle with three older male strangers, accepts and consumes a significant amount of alcohol, and subsequently becomes involved in sexual activity with at least one and possibly more of those individuals.⁴⁷

He then described further aspects of the complainant’s personal life experience, labeled them as “tragic,” and continued:

That being said, and to the extent that what happened to her life prior to September 30, 2001 may have affected what she did or how she may have reacted to a situation on that date, is, in my opinion, at least a relevant consideration or relevant information for a court to consider in sentencing.⁴⁸

In the remainder of the sentencing decision the judge relied heavily on his personal observations about the extent to which the complainant’s choices contributed to her own victimization and again intimated that she might have been the sexual aggressor. The net effect within the context of decision is to deflect responsibility from the accused to the victim, treating the twelve-year-old victim’s personal history and life-experience as if it constituted a mitigating factor in sentencing the twenty-four-year-old accused.

By contrast, the judge’s observations in the sentencing decision about Edmondson’s life-experience and situation were markedly different in tone. The judge mentioned a variety of facts personal to Edmondson and his family, including fifty-three letters of support from members of the community in Tisdale, Saskatchewan, as mitigating factors for sentencing purposes. The accused’s alcohol consumption was identified as a factor that contributed to commission of the offence. However, Edmondson’s alcohol

⁴⁷ *Edmondson*, *supra* note 43 at para 11.

⁴⁸ *Ibid* at para 13.

use was not taken to form part of a pattern of personal and community social dysfunction that shaped the personal history and life experience of the accused and merited sustained rehabilitative attention in the context of sentencing. Instead Edmondson was simply required to abstain from the possession and consumption of alcohol and non-prescription drugs and comply with such treatment programs as might be proposed by his probation supervisor. Similarly, the decision did not acknowledge any need to provide Edmondson with educational experiences and opportunities designed to help him become more aware of learned biases and attitudes that may have limited his ability to avoid actions that were discriminatory and had misogynist and racist effects.

The judge's review of sentencing decisions in Saskatchewan showed that the sentence he imposed in Edmondson's case was exceptionally lenient. He acknowledged this and clearly intended the rationale offered in his decision to explain why he believed leniency was appropriate in this case. But at no point in the reasons for sentence does the judge acknowledge that the complainant child was Aboriginal or Indigenous and the accused was not. Nor is reference made to the concerns about the case and its handling by the criminal justice system that Indigenous individuals and groups in the community and across the country had raised.⁴⁹

The readily apparent similarities between the fundamental flaws in the reasoning used in the *Edmondson* sentencing decision and the reasons for decision at trial in *George* show that any continuing judicial education programs this judge may have attended since 2003 have not brought his approach to legal reasoning into line with national standards of judicial conduct. If members of the legal profession in Saskatchewan assume that the conduct of the trial judge in *George* does comply with national standards of judicial conduct, what is the effect on *de facto* standards of conduct for legal professionals in the province generally? Left unchallenged, are decisions such as these taken as licence by other judges and legal professionals in the province to engage in similar types of discriminatory reasoning? What direct and indirect cumulative impact does such conduct have on public confidence in the judiciary? On the police and Crown prosecutors?

⁴⁹ The *Edmondson*, *Brown* and *Kindrat* cases "touched off a firestorm in several Saskatchewan communities as [A]boriginal people accused the justice system of racism. The jury at Kindrat's first trial was all white, as it was for the retrial." Darren Bernhardt "Not guilty verdict draws protest", *The Star Phoenix* (27 March 2007).

The similarities in the abuse of the judicial role in these two cases suggest that discriminatory reasoning may be a persistent pattern of judicial misconduct by this judge, not an aberration.⁵⁰ If it is, this indicates that this judge—and any other judge whose conduct in exercise of the judicial function repeatedly exhibits similar flaws despite participation in continuing judicial education programs—either refuses or is incapable of executing judicial functions in a lawful manner and in either case must resign or be removed from the bench.⁵¹ The public must be able to have confidence in the judiciary's ability and commitment to rendering rulings and decisions that are impartial and respect the equal right of all persons to the protection and benefit of the law. Vulnerable and marginalized individuals need to have confidence in the administration of justice and must be able to anticipate that members of the judiciary will preside over legal proceedings and engage in legal analysis and legal reasoning in a manner that is free of discriminatory beliefs and attitudes, myths and stereotypes, and does not have misogynist or racist effects. A person's vulnerability or marginalization is not, and cannot be, permitted to function as an excuse to harm her.

IV. CONCLUSION

In undertaking a close examination of the *George* case, initially I did not realize that doing so would lead me to revisit the cases of *Edmondson*, *Brown*, and *Kindrat*, and review the evidence of misogyny and racism found in the records of those cases. But when I did look at these cases, with particular attention to the approach and reasoning process used in the sentencing decision in *Edmondson*, I found strikingly similar forms of discriminatory beliefs and argumentation in *George* (2015, SKQB) and *Edmondson* (2003, SKQB) even though the decisions were drafted more than a decade apart. As recently as 2015, this superior court judge continued to work under the influence of deeply misogynist beliefs, assumptions, and patterns of reasoning that rendered him incapable of executing the judicial role in the

⁵⁰ A judicial investigatory committee would undoubtedly review decisions and rulings by this judge in addition to the two discussed here before making a disciplinary recommendation to the Canadian Judicial Council.

⁵¹ The *Judges Act*, RSC 1985, c J-1, s 65(2) specifies the criteria for removal of superior court judges following an inquiry or investigation by the Canadian Judicial Council as provided in s 65(1) of the Act.

administration of justice in sexual assault cases impartially and in a manner that respected the principles of fundamental justice and equality.⁵² In 2019 the judge continues to sit as a member of the Saskatchewan Court of Queen's Bench.

Research shows that law enforcement and the criminal justice process continue to be strongly influenced by outmoded beliefs, attitudes, and assumptions in handling of sexual offences.⁵³ This is now widely recognized and steps are currently being taken by law enforcement agencies in many jurisdictions across Canada to address problems of inadequate investigation and the erroneous classification of sexual assault cases. The United Nations has proposed the creation of specialized tribunals to handle the prosecution and trial of sexual assault cases⁵⁴ and that approach is presently under active consideration by a non-partisan Committee of legislators in Quebec.⁵⁵ In a period in which the courts are over-worked and one cause of poor enforcement in sexual assault cases is budgetary—resulting in the lack of sufficient resources to investigate, analyse and prosecute sexual assault cases

⁵² Evidence of the continuing significance of racism for public confidence in the administration of justice in Saskatchewan is seen in the recent case of *R v Stanley* (9 February 2018), Battleford CRIM 40/2017 (Sask QB). See Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019).

⁵³ The reasons for judgment in appeals from trial and appellate decisions in sexual assault cases provide ample evidence in support of this assertion; for example, see the reasons for judgment by the Supreme Court of Canada in cases involving sexual assault from *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, [1991] SCJ No 62 (QL) to *R v Barton*, 2019 SCC 33.

⁵⁴ United Nations, *Handbook for Legislation on Violence Against Women*, (New York: United Nations, 2010), online (pdf): <www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> [perma.cc/9VEF-D85D].

⁵⁵ The Committee has a broad mandate, the support of all four parties in the provincial legislature, and one year to produce a report. Quebec Justice, Press Release, "Formation d'un comité d'experts sur l'accompagnement des victimes d'agressions sexuelles et de violence conjugale" (18 March 2019) online: <www.newswire.ca/fr/news-releases/formation-d-un-comite-d-experts-sur-l-accompagnement-des-victimes-d-agressions-sexuelles-et-de-violence-conjugale-821349374.html> [perma.cc/UPR9-9FG2]; "Quebec looks at better ways to support victims of sexual assault", *CBC News* (18 March 2019), online: <www.cbc.ca/news/canada/montreal/quebec-sexual-assault-committee-1.5050305> [perma.cc/MLJ8-FNK5]. See also Toulia Drimonis "Proposed sexual assault court in Quebec long overdue", *Canada's National Observer*, (28 January 2019), online: <www.nationalobserver.com/2019/01/28/opinion/proposed-sexual-assault-court-quebec-long-overdue> [perma.cc/PD7T-V7QU].

properly and in a timely manner—the handling of the *George* case is particularly noteworthy. Were the decisions taken by the Crown in *George* the result of law enforcement zeal enflamed and blinded by misogyny and outmoded myths and stereotypes? Or is the case instead a leading example of the effects of poor administration, lack of supervision and review, and the misallocation of prosecutorial resources and priorities? Or were all of these factors in play and mutually reinforcing?

The *George* case arguably does illustrate how easily the exercise of discretion in law enforcement decisions can be distorted by confirmation bias and tunnel vision. Priority was accorded to: 1) the protection of minors from sexual interference and assault, and 2) the development of jurisprudence with respect to the interpretation and application of *Criminal Code* provisions that affect the prosecution of assailants who assault minors. Other important policy objectives were ignored. The consequences for Barbara George were severe. What about protection of the equal right of all persons, including Barbara George, not to be sexually assaulted? To enjoy equal protection by law of the right to sexual integrity and self-determination? To have complaints investigated and assessed in a manner that is free of discriminatory attitudes, beliefs, and stereotypes that have misogynist effects? Are women who are assaulted by minors or adults much younger than themselves and, unlike George, report it to the police, to have their complaints simply ignored or not selected for prosecution on the ground that conviction is unlikely?⁵⁶ What if the assailant sexually assaults the same complainant more than once?⁵⁷

At present the investigation, analysis, and prosecution of sexual assault and other sexual offences takes place in a politically fraught climate. Few decision-makers would claim that their experience with and understanding of sexual assault law is anything other than a work in progress.⁵⁸ Under these conditions, the exercise of discretion, if it is not strictly constrained by the limits imposed by requirements of justice and legality, is easily influenced by prejudice, whether due to misogyny, racism, or other explicit or implicit

⁵⁶ Are one or more classic “rape-myths” to continue to shape the exercise of discretion in law enforcement in such cases?

⁵⁷ Does the report of multiple assaults against one individual constitute grounds for investigation of the alleged assailant as a potential serial offender? Or will it be believed to be “obvious” that both reports are “false”? The shift from the second response to the first has the potential to make a significant difference and is over-due.

⁵⁸ The same may be said of most members of the public.

discriminatory attitudes and beliefs. Accordingly, analysis of sexual assault cases requires painstakingly scrupulous attention to fundamental legal principles. In the end, cases must be and be seen to be decided on the basis of the law and the facts as proven by the evidence. When it becomes apparent that fundamental principles of justice and standards of legality are not and cannot be met, charges should not be laid or should be withdrawn by the Crown, as needed. Similarly, cases ought to be prosecuted when there is evidence, which the trier of fact could find credible, that supports all elements of the offence as defined in law.⁵⁹ Failure to prosecute such cases is a selective suspension of the rule of law. Enforcement followed by a constructive sentencing decision is the better alternative by far.

In *George*, when the Crown prosecutors—despite being in possession of the entire trial record, transcripts of the preliminary hearing, and interviews with the complainant and accused—chose to appeal the acquittal and request a re-trial, they ignored fundamental legal requirements and principles of justice. The evidence adduced and admitted at trial placed ordinary assumptions and presumptions about voluntariness and deliberate action by the accused in doubt. This is patently obvious. In the absence of evidence to prove the contrary beyond a reasonable doubt—to prove that George voluntarily and deliberately committed the criminal acts with which she was charged and thereby establish the *actus reus*—the decision to seek a re-trial was an illegitimate use and abuse of prosecutorial discretion and led to the misallocation of prosecutorial resources.

The measure of the quality of justice available from the Canadian criminal justice system lies in its handling of cases at the pre-trial and trial levels. That is where most criminal matters are decided, many, arguably far too many, on the basis of guilty pleas. Few cases are appealed. If the legal system is to have the capacity to produce sound decisions in sexual assault and sexual interference cases, the resources allocated to the investigatory, pre-trial and trial stages of the criminal justice system must be sufficient to ensure that all essential tasks can be performed expertly and effectively even when the case-load fluctuates.⁶⁰

⁵⁹ Police and prosecutors who base their decisions about whether to charge or proceed to trial on a prediction about whether the trier of fact will find a witness credible at trial arguably act in excess of jurisdiction. Credibility is for the trier of fact to assess at trial; that assessment is only possible in the context of the whole of the evidence actually adduced and admitted at trial.

⁶⁰ The proportion of sexual offences that are reported to the police increases and decreases in response to current events and changes in the law. Following the explosion of

On reading the reasons for decision and the transcripts in *George*, one might easily conclude that in Saskatchewan, anyone under the age of 16 may sexually assault adults who are at least five years older than they are with impunity. Such assaults will generally not come to the attention of the police due to low rates of reporting. When such cases are reported, the working precedent set by the *George* case may suggest that whenever a minor sexually assaults an adult in Saskatchewan, it is the adult, not the minor, who will be viewed as the responsible party and charged, regardless of the factual circumstances. Yet Statistics Canada reports that in 13% of the sexual assault cases reported to the police in Canada, a minor or young adult is alleged to have sexually abused an “older” complainant.⁶¹ Such cases are thus not rare. Moreover, where the assailant is sixteen years or more younger than the victim, the charging, conviction, and incarceration rates for Canada as a whole are all higher than the average rates for sexual assault cases generally.⁶²

widespread public awareness of and participation in the #MeToo movement in October 2017, Saskatchewan was one of the few jurisdictions in Canada in which there was only a modest increase but no spike in the number of complainants reporting sexual assault to the police. It is unclear whether this signified lack of confidence in the criminal justice process or other factors, such as lack of access to support services and legal advice. See Cristine Rotenberg & Adam Cotter, “Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017” (2018) 38:1 Juristat 1 online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2018001/article/54979-eng.pdf?st=k49Ft6q> [perma.cc/7TMH4B8N].

⁶¹ See also Cristine Rotenberg, “Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile” (2017) 37:1 Juristat 1, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/54866-eng.pdf?st=1VLN5PJp> [perma.cc/W4T5-9GQ9] at 14-16 for Charts 5 and 6 on age disparities and note, at 14, that 83% of accused are older than their victim, 4% are the same age, and 13% are younger.

⁶² Cristine Rotenberg, analyst with Statistics Canada, explains: Notwithstanding that most sexual assaults involve an accused several years older than their victim (Rotenberg 2017), incidents involving an accused who was far younger than their victim had the greatest chance of conviction: three in five (61%) cases where the accused was 16 or more years younger than the victim were convicted compared with less than half (46%) of cases where the accused was either the same age or within 1 to 5 years younger than the victim (Chart 11, primary axis).

Upon sentencing, the greater the age difference between the victim and the accused, the more likely the accused was sentenced to custody (Table 3). This was true in either direction, whether the accused was significantly older than the victim or whether the accused was far younger, in both adult and youth court.

To simplify and contextualize the findings, it may be suggested that middle-aged to older women sexually assaulted by young men were most likely to see their assailant go to court and be convicted, whereas younger female and male victims of sexual assault (including children) who were victimized by middle-aged to older men many years older

The age difference between CD and George was twenty-one years. The failure to even charge CD is therefore quite anomalous when compared with the treatment of similar cases nationally.

CD openly acknowledged that this was not the first time he had engaged in sexual intercourse with “older women.” In his trial testimony CD agreed that he was “Good with the ladies” and then immediately asserted, without prompting, “I still am.” He explained that he had used the same techniques “lots of times before.”⁶³ CD’s assault on George was likely not the last time CD seized an opportunity to demonstrate his sexual “prowess” by engaging in non-consensual sexual intercourse with a casual acquaintance.⁶⁴ Apparently no one had explained to CD that striking up a lengthy conversation with someone, then kissing them, uninvited and without their agreement, and then, again without their invitation or agreement, lying on top of them and moving your penis in and out of the other person’s mouth, vagina, or anus, does not signify that the other party consents to the physical contact. Then again, perhaps none of the professionals involved with the case, including the police, the prosecutors and the trial judge, appreciated that what the trial evidence shows CD did to Barbara George, was done without her consent and therefore was a “crime.”

In the end, the *George* case does indeed raise extremely troubling questions about the administration of justice in sexual assault cases in Saskatchewan, questions that are far broader than any single judge’s conduct on the bench.⁶⁵

than them were less likely to see the same course of justice.

In “From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014: A Statistical Profile” (2017) 37:1 *Juristat* 1 at 30-31, online: <www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm#a10> [perma.cc/F5CU-QMNB] [emphasis added].

⁶³ Examination in Chief and Cross-Examination of CD in *George*, “Trial Transcript”, *supra* note 12 at T111-T138, T138-T165.

⁶⁴ CD is not the only sexual assailant who has held fond albeit self-serving, delusional beliefs about his victim’s attitude toward the sexual activity and the assailant. Some even send flowers to their new “loves”/“conquests.” In *Rape: the Price of Coercive Sexuality*, (Toronto: The Women’s Press, 1977) at 105, Lorenne MG Clark & Debra J Lewis suggest, with reference to one such accused, “this is the sort of action one would expect from a man who feels pleased with himself at having accomplished a seduction, and not from someone who feels sorry about having raped a woman.”

⁶⁵ Domestic and intimate personal violence cases raise similar questions about the effects of misogyny on legal reasoning in Saskatchewan. Consider, for example, *R v Fontaine* 2017 SKCA 72, in which the Court of Appeal held that an alleged assault was a “reflex

action,” not a voluntary act. The accused’s common-law partner, standing at the foot of their bed, violently shook the accused’s leg to wake him up. Suddenly aroused, the accused did not simply jerk his leg in response and happen to hit his partner because she was standing close by. Instead he “got up off the bed ‘quite quickly’,” (at para 7), and hit his partner in the face with his hand. Ordinarily, actions of that sort are taken to be voluntary acts, committed deliberately. By contrast, the term “reflex” has traditionally been used to signify lack of conscious control over one’s bodily movements, as when a leg jerks in response to a physician’s hammer tap just below the knee-cap or one is startled, jerks or whirls around, and accidentally collides with someone or something. However the ruling in *Fontaine* appears to approve use of the term to include any bodily movement the decision-maker decides to characterize as a “reflex.” The legal effect is to transform the “act” in question into a “non-act” for which the accused (in the absence of proof of contributory negligence) is not criminally liable. Expert evidence is not required, even where, as in *Fontaine*, the act in question may appear to be voluntary and deliberate. It seems obvious that the ruling in *Fontaine* invites highly discretionary enforcement of the laws prohibiting assault and may seriously impede the prosecution of domestic violence cases. Police who are aware of the *Fontaine* case may be less likely to lay assault charges in cases involving domestic or intimate personal violence.

The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong

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ABSTRACT

When instructing juries on the law they must use to decide cases, judges commonly rely on published “standard” charges. This article argues that standard charges for the offence of sexual assault contain a crucial legal error: they identify “knowledge that the complainant did not consent” as an essential element of the offence, when that is not an element of the offence at all. More, that part of the standard charges wrongly asks, in effect, what the complainant did to say “no”, rather than looking to the proper question for the issue of honest but mistaken belief in consent: what the complainant did or said to communicate “yes”. The issue of honest but mistaken belief in consent has its own instruction, to be used when there is an air of reality to require it. Otherwise, the only element of *mens rea* is the intent to touch.

The *Criminal Code* was amended in 1992 to change the legal approach to consent from a negative approach to a positive one. In 1999, the Supreme Court of Canada definitively set out the essential elements of sexual assault, in *R v Ewanchuk*. But the published standard charges have not changed in response to those two foundational moments in the evolution of the law of consent in Canada. This paper examines statute and jurisprudence,

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including *R v Ewanchuk*, to establish this crucial flaw, and the need for change in standard charges to avoid what can fairly be called wrongful acquittals in cases of sexual assault.

Keywords: Barton; Ewanchuk; Robertson; Jury instructions; Sexual assault; Mens Rea; Consent; Wrongful Acquittal; Rape Myths; Elements of the offence

I. INTRODUCTION

The last thing a jury hears before retiring to decide an accused's conviction or acquittal is the judge's "charge," or instructions, a review of the evidence and the law applicable to the case that the jury must decide. It is hard to imagine that the substance of that charge is anything but important in shaping the ultimate verdict. When composing their charge, the vast majority of judges rely heavily on "standard" jury charges, often simply adopting them entirely.¹ This article identifies and addresses a significant problem with the central "standard" charge employed in sexual assault cases.

While the law surrounding sexual assault changed significantly over 25 years ago, the standard jury instruction for the offence has not changed.² A recent Alberta Court of Appeal decision, *R v Barton*,³ called for a review of

¹ In Ontario, at least, the collection published by Justice Watt is likely the most commonly used source of standard instructions: The Honourable Mr Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2d ed (Toronto: Carswell, 2015) [Watt's]. The other main source of standard instructions is the set published online by the Canadian Judicial Council, "Model Jury Instructions" (June 2012), online: <www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en> [perma.cc/CYD6-CDK3] [CJC instructions]. For simplicity of writing, this article will focus on Watt's. The CJC instructions in the area with which this article is concerned differs from Watt's in a number of ways, but only one way is significant for the issue addressed in this paper.

² The relevant sections of *The Criminal Code of Canada*, RSC, 1985, c C-46 [Criminal Code] were amended significantly in 1992. The leading case on the elements of sexual assault, *R v Ewanchuk*, [1999] 1 SCR 330, [1999] SCJ No 10 (QL) [Ewanchuk] was decided by the Supreme Court of Canada in 1999. Watt's (*supra* note 1) was last updated in 2015 but that edition, the second, made no changes to the charge on sexual assault found in the 1st edition (2005).

³ *R v Barton*, 2017 ABCA 216 at paras 1, 8, 155-159 [Barton]. Barton was appealed to the Supreme Court of Canada and a decision in that appeal was released after this article

the standard jury instructions given in sexual assault cases, identifying many possible problems. In *Barton*, the jury was asked to decide whether the victim died as the result of an accident during consensual sex, or from murder or manslaughter during a sexual assault. The Court of Appeal overturned Barton's acquittal, citing numerous errors of law in the jury's instructions, including problems relating to implicit myths and stereotypes and to meaningful though stylistic issues, such as whether the word "force" is, while legally correct, ultimately misleading to a jury. More generally, the Court of Appeal observed a disjunction between the standard charges that are still in use, and the current state of Canadian law, expressing concern that "[k]ey provisions in some jury charges have fossilized concepts Parliament sought to remove a quarter century ago."⁴

This article echoes *Barton's* call to reconsider the standard instructions in cases of sexual assault, and argues, more specifically, that the most fundamental failing in the standard jury charge is that it misdescribes the essential elements of the offence. More than being unclear or overly legalistic, the standard jury charge has at its core an erroneous instruction that includes two fundamental problems: it actively instructs the jury that the Crown must prove, beyond a reasonable doubt as an essential element of the offence, something that is not an element of the offence at all, and it implicitly but importantly misinstructs the jury as to the very nature of consent by emphasizing the absence of resistance to sexual contact instead of the need to obtain positive consent in advance of sexual contact. Such essential and substantive problems must be corrected for juries to adjudicate sexual assault cases properly.

This double-barrelled error inevitably courts what can fairly be called unjust acquittals. Once this problem is properly understood, however, and the reluctance to accept that courts have been in error for a quarter century or more has been overcome, it becomes fairly easy to construct a proper instruction to the jury, as we will show. As soon as they accept the need for

was submitted for publication: *R v Barton*, 2019 SCC 33. The issues raised in *Barton* on which this article focuses were not grounds of appeal or the subject of argument by counsel at either level. Rather, they were raised by the Alberta Court of Appeal on its own initiative. The Supreme Court, in turn, focused its judgment on s 276 of the *Criminal Code* and on related errors with respect to honest mistaken belief in communicated consent. At paragraph 209, the majority expressly declined to comment on other issues dealt with by the Court of appeal "in admirable detail." The questions addressed by this article, consequently, are not resolved by the Supreme Court in its judgment in *Barton*.

⁴ *Ibid* at para 8.

long over-due change, a change within their grasp if only they will make it, there is good reason to think our courts will become just a little more effective and just in prosecuting sexual offences. The first step on that road, though, is understanding just how essential the need is.

II. THE CHALLENGED INSTRUCTION – WATT’S

The standard instruction from Watt’s for sexual assault cases, Final Instruction 271, describes the essential elements of the offence (for cases not involving a claim of honest but mistaken belief in consent),⁵ as follows:

[2] For you to find (NOA) [name of accused] guilty of sexual assault, Crown counsel must prove *each* of these essential elements beyond a reasonable doubt:

- i. that (NOA) *intentionally* applied force to (NOC) [name of complainant];
- ii. That (NOC) did *not* consent to the force that (NOA) *(intentionally) applied*;
- iii. that (NOA) knew that (NOC) did *not* consent to the force that (NOA) *(intentionally) applied*; and
- iv. that the force that (NOA) *(intentionally)* applied took place in circumstances of a sexual nature.

...

[6] Did (NOA) *know* that (NOC) did *not* consent to the force that NOA *(intentionally) applied*?

This element requires Crown counsel to prove knowledge, a state of mind, (NOA)’s state of mind. Crown counsel must prove beyond a reasonable doubt that (NOA) *knew* that (NOC) did *not* consent to the force that (NOA) *(intentionally) applied*. To “know” something is to be aware of it, at the time you do it.⁶

The assertion of this article is that the parts of the standard charge underlined above, (collectively, the “challenged instruction”), both describe an essential element of the offence of sexual assault that does not, in fact, exist, and mischaracterize the essential nature of consent in Canadian law. They should not be included in the charge to the jury. Instead, the jury

⁵ Watt’s, *supra* note 1, instruction Final 271. This instruction changes significantly, however, for cases in which there is an air of reality to “honest but mistaken belief” or, as Watt’s refers to it, “apprehended belief,” in consent. The specifics of the changes will be addressed below.

⁶ *Ibid*, instruction Final 271 [italics & bolding in original; underlining added]. The CJC instructions (*supra* note 1) outline essentially the same elements for cases not involving a claim of honest but mistaken belief in consent. The relevant text of the CJC charge is provided in Appendix 2.

should be instructed that the only intent they need to consider is the intent to touch.

The challenged instruction tells the jury that the Crown must prove knowledge of a lack of consent when that is not, in fact, a requirement of Canadian law. This cannot be overemphasized. If it follows this misdirection, a jury that finds beyond a reasonable doubt that the other listed elements of the offence (voluntary application of force in a sexual context without consent) have been proved, but still has a doubt about whether the accused knew the complainant was not consenting, will acquit, when it should, and would if properly instructed, convict. Put another way, some people charged with sexual assault, who should and would be properly convicted by juries under Canadian law as it actually exists, are improperly acquitted as a result of this incorrect, frequently used, instruction. This article considers statute and jurisprudence to establish this troubling truth and argue that the standard jury charge needs to be changed.

III. THE CHALLENGED INSTRUCTION – CJC VERSION

The CJC instruction on the elements of the offence of sexual assault was revised in June of 2018, in part, at least, in response to *Barton*.⁷ This revision made a number of laudable changes, such as the use of the language of “touch” instead of “force” and an increased emphasis on consent as relating to “the sexual activity in question.” Retained, however, are both the problematic requirement already described in *Watt*’s that the Crown prove that the accused knew the complainant did not consent to the sexual activity in question and a difference between the CJC standard instruction and *Watt*’s that aggravates the problem argued in this paper.

This difference, which relates to the subject of this paper, is found in the effect of footnotes 3 and 4 in *Watt*’s instruction Final 271. Those footnotes apply only where the question of honest but mistaken belief in consent, or, as *Watt*’s refers to it, apprehended consent, is raised.⁸ In such

⁷ Endnote 11 of the revised CJC instruction raises an argument based on *Barton* that is very much relevant to the subject of this paper, however, and it will be addressed directly below.

⁸ *Watt*’s, *supra* note 1, instruction Final 271, n 3-4. In this context, “is raised” must be taken to mean, is raised by the evidence to a level that gives the question an air of reality. Honest but mistaken belief in consent is often called a “defence,” but it is not, in law, something with respect to which the accused bears any burden. Where there is an air of reality to the issue such that it should be considered by the jury, the burden remains

a case, footnote 3 would change the opening wording of Watt's element iii from "that (NOA) knew that (NOC) did not consent to the force..." to "that (NOA) did not honestly believe that (NOC) consented to the force..."⁹ Footnote 4, then, removes paragraph 6 and substitutes for it the instruction on honest but mistaken belief, instruction Final 65-D.¹⁰ For a case where honest mistaken belief is to be considered, the resulting Watt's charge does not carry the flaw with which this article is concerned.

The CJC instruction, in contrast, for cases in which the accused advances a claim of honest but mistaken belief, simply adds instructions relating to that issue, without removing the CJC version of the challenged instruction. Consequently, the CJC instruction would maintain the problem with which this article is concerned in every case, whether honest but mistaken belief is to be considered or not. For cases where honest but mistaken belief is not to be considered, Watt's instruction and the CJC instruction, while differing in some aspects of wording, will still describe in effect the same essential elements of the offence. But for cases where honest mistaken belief is to be considered, Watt's removes the challenged instruction and substitutes the instruction for honest mistaken belief, but

with the Crown to disprove honest but mistaken belief in consent beyond a reasonable doubt. Nor does the accused bear any burden of calling evidence with respect to honest but mistaken belief in consent. Though it will often be to the accused's advantage to call evidence, the question may be raised in some cases by the evidence called by the Crown, without any defence evidence being called. The only sense in which the defence bears a burden with respect to honest but mistaken belief in consent is the application of the air of reality test. If the defence wishes to argue to the jury, or to a judge sitting alone for that matter, that the accused should be acquitted because the Crown has failed to disprove honest but mistaken belief in consent, then the defence must persuade the judge as trier of law that there is evidence, either Crown or defence or some combination of both, that makes that an issue worth considering. The air of reality test is not onerous, but it does exist. If there is no air of reality to honest but mistaken belief, for instance in the clearest of cases, where the complainant's evidence is that the accused was a complete stranger who grabbed her off the street and sexually assaulted her and the accused's evidence is that he was not even in that part of town at the time, then the issue is not even considered. Even where the victim and accused are known to each other but her evidence is that she was saying no and physically resisting and his evidence is that she initiated the sexual activity and was clearly and obviously stating her consent, honest but mistaken belief in consent is not considered by the trier of fact, as the issue clearly is not raised. That trial would be about the credibility of the witnesses and whether there was actual consent: *Ewanchuk*, *supra* note 2 at para 30.

⁹ *Ibid.*

¹⁰ Watt's, *supra* note 1, instructions Final 65-D and Final 271. The relevant text of these instructions is provided in Appendix 1.

the CJC instruction gives both the challenged instruction and the honest but mistaken belief instruction. The jury would, in those cases, be told that they must find beyond a reasonable doubt that “[the accused] knew that [the complainant] did not consent...or, that [the accused] did not honestly believe that [the complainant] consented...”¹¹ This double instruction, then, at best simply retains the flaws of which this article complains: misdescribing the nature of consent and requiring the Crown to prove an essential element that does not exist in law.

But, more problematically than in *Watt’s*, the CJC instruction risks confusing juries in cases in which honest mistaken belief is to be considered. Two mental states are described, honest belief in consent and ignorance of a lack of consent. A jury would reasonably think that they must be different and must both be proven. Where *Watt’s* substituted one element for another, the CJC adds the elements together, describing more things the Crown must prove and aggravating the basic problem about which this paper complains. The rest of this paper will attempt to explain and defend that complaint.

IV. STATUTE – THE *CRIMINAL CODE*

There are a number of sections relating to the offence of sexual assault in the *Criminal Code*. Related sentencing considerations and aggravating factors specific to sexual assault are provided in ss. 271-273. The defence of honest but mistaken belief in consent, in the context of sexual assault, is further explained and limited in ss. 273.1 and 273.2.¹² The most fundamental section, in terms of the elements of the offence, however, is section 265, reproduced here:

- 265 (1) A person commits an assault when
- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
 - (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
 - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

¹¹ CJC instructions, *supra* note 1 at Offence 271: Sexual Assault.

¹² *Criminal Code*, *supra* note 2, ss 273.1, 273.2.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.¹³

The language of the *Criminal Code* thus requires the intentional application of force, without the consent of the complainant. Section 271 adds the requirement of a sexual context for sexual assault.¹⁴ At no point do these sections mention as an element of the offence that the accused must know that the complainant is not consenting.

By way of contrast, s. 162.1 sets out the elements for the offence of publishing an intimate image in a way that explicitly includes such knowledge:

Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty...¹⁵

This section clearly shows that, when Parliament wishes to make knowledge of a lack of consent an element of an offence, Parliament uses words to make that clear and explicit. No such words being used in s. 265, it follows that knowledge of a lack of consent is not an element of the offence of assault, including sexual assault. The contrast between these two sections cannot be reconciled without accepting that knowledge of a lack of consent is not an element of assault or sexual assault. The offence is defined by statute, and the statute is clear.

¹³ *Ibid*, s 265.

¹⁴ *Ibid*, s 271. This addition is effected simply by using the word “sexual”: “Everyone who commits a sexual assault is guilty of....”

¹⁵ *Ibid*, s 162.1 [emphasis added].

Moreover, if knowledge of a lack of consent were included as an element of the offence, the explicitly codified honest but mistaken belief in consent provisions would be redundant. An accused who knows that the complainant is not consenting cannot simultaneously believe that she is. If knowledge of a lack of consent were an element of the offence, why would there ever be a need for the Crown to establish, also, the absence of a belief in consent? Explicitly saying that honest but mistaken belief in consent is exculpatory would be tautological if the more onerous burden of showing knowledge of a lack of consent already existed. Any accused who would be acquitted based on an honest but mistaken belief in consent also would be acquitted based on the Crown's inability to prove knowledge of a lack of consent. Parliament must be presumed to have crafted the sections with respect to honest but mistaken belief in consent in order to have an effect. If the challenged instruction accurately describes the elements of the offence, that legislative intent makes no sense.

Further, the codified limitations on honest but mistaken belief in consent would be meaningless. For instance, the *Criminal Code* requires that an accused relying on honest but mistaken belief in consent must have taken reasonable steps to ascertain consent.¹⁶ Effectively, the *Criminal Code* identifies a particular state of mind, which has been reached in a particular way, as negating liability. This would make no sense at all, if the *Code* also defined the *mens rea* in terms that negated liability regardless of the way in which that mental state was reached. That is, an accused who is unable to rely on the defence of honest but mistaken belief in consent because he did not take reasonable steps to ascertain consent could nonetheless rely on his lack of knowledge, since the statutory conditions and exclusions in s. 273.2 are not put before a jury except when s. 265(4) is in issue. The result would be that it would be easier for a jury to acquit in cases without an air of reality to honest but mistaken belief in consent, than in cases with one, because there would be no consideration of what reasonable steps had or had not been taken. Such an absurdity cannot be taken as the intention of Parliament and should not be preferred to a tenable reading that achieves the recognized legislative purpose.

¹⁶ *Ibid*, s 273.2(b).

V. JURISPRUDENCE – *EWANCHUK*

*R v Ewanchuk*¹⁷ continues to be the leading case on the elements of sexual assault. In *Ewanchuk*, the teenaged complainant was sexually assaulted during a job interview. The accused argued that the complainant consented, or that he acted on the belief that she consented, putting both the *actus reus* and the *mens rea* in issue. A close reading of this and related cases both supports the interpretation of the *Criminal Code* advanced above, and provides independent authority for the proposition that the challenged instruction about the *mens rea* of sexual assault is wrong in law and ought not to be put to the jury.

Ewanchuk is explicit on the issue of *mens rea*: “Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement.”¹⁸ This is a simple and direct statement by the Supreme Court of Canada that includes nothing like a burden on the Crown to prove that the accused knew that the complainant was not consenting. At the same time, the term “basic” *mens rea* suggests that there may be more than is explicit in this paragraph. The case explains what that something more is, in the very next paragraph:

However, since sexual assault only becomes a crime in the absence of the complainant’s consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent [citation omitted]. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.¹⁹

From this explanation, it becomes clear that, when the Court refers to knowledge of the lack of consent, what is actually meant is the defence of mistake of fact, now called honest but mistaken belief in consent. In other words, in order to avoid convicting the morally innocent, we must allow for such an exculpatory claim of honestly held mistaken belief about consent; as such, and only as such, is there an element of the offence that is more

¹⁷ *Ewanchuk*, *supra* note 2.

¹⁸ *Ibid* at para 41 [emphasis added].

¹⁹ *Ibid* at para 42 [emphasis added].

than the basic *mens rea* described in the previous paragraph: the intention to touch.

Perhaps confusingly, the Court in *Ewanchuk* uses two different phrases to refer to the same thing: “a defence of mistake of fact” and “knowing of, or being reckless of or wilfully blind to, a lack of consent.” However, there is no other way to read the two paragraphs cited above, except as using those phrases to refer to the same thing. This alternate wording can also be observed in an earlier paragraph, which serves as a general introduction to the case’s review of the elements of sexual assault:

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.²⁰

Notably in this connection, however, this paragraph relates the phrase “knowing of” to “words or actions,” which are at the core of an assertion of honest but mistaken belief in consent, as can be seen by the contrast made between consent in the context of the *actus reus* and consent as part of the *mens rea*:

There is a difference in the concept of “consent” as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus*, “consent” means that the complainant in her mind wanted the sexual touching to take place.

In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – “consent” means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.²¹

The references to “words and actions” and to “words and conduct” are clearly intended in the same way. Similarly, the discussions of “knowing” and “honest but mistaken belief in consent” are also referring to the same thing. Read this way, the cited paragraphs are coherent and consistent. Any attempt to read them as including a *mens rea* element of knowledge of lack of consent apart from an honest but mistaken belief in consent relies on reading specific passages in isolation from the judgement as a whole.

Another helpful paragraph in *Ewanchuk* in this regard is paragraph 30:

²⁰ *Ibid* at para 23 [emphasis added].

²¹ *Ibid* at paras 48-49.

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief is raised in the mens rea stage of the inquiry.²²

This paragraph, though found in the part of the judgement that is focused on the elements of the *actus reus* rather than the *mens rea*, looks ahead to the *mens rea* analysis. Logically it follows from the assertion in this paragraph that the accused's perception of the complainant's state of mind is only relevant when the defence of honest but mistaken belief is raised, that if honest but mistaken belief is not raised, then the accused's perception of the complainant's state of mind is not relevant, i.e., is not relevant at all. That could not be so if knowledge that the complainant was not consenting were an element of the offence apart from honest but mistaken belief.

Paragraphs 41 and 42 of *Ewanchuk* are referred to in *Barton*, where the Alberta Court of Appeal adverts to this question: "What must the Crown prove where there is no live issue of mistaken belief in consent?"²³ The Alberta Court does not offer an opinion, however, simply calling for "further consideration" in the next paragraph:

If the Crown must prove the *mens rea* that applies for the purposes of the honest but mistaken belief in consent defence regardless of whether mistaken belief in consent is even a live issue, then that would lead to this result. The Crown would bear the burden of disproving mistaken belief in consent in every sexual assault case even where mistaken belief is not a live issue whether because the air of reality threshold has not been met or the accused has advanced no such defence. This is another area in which we would invite further consideration by the national jury committee on how best to instruct jurors in this instance.²⁴

In turn, the revised CJC instruction refers to a possible interpretation of *Ewanchuk* raised by these paragraphs of *Barton*, that "intent to touch is the only requirement for *mens rea*, except in those cases where there is an air of reality to the defence of honest belief in consent."²⁵ The CJC does not adopt this approach, though, for its standard instruction, pointing to *R v*

²² *Ibid* at para 30 [emphasis added].

²³ *Barton*, *supra* note 3 at para 238.

²⁴ *Ibid* at para 240.

²⁵ CJC instructions, *supra* note 1 at Offence 271: Sexual Assault, n 11.

JA,²⁶ specifically to paragraph 24 of that case, the opening sentence of which is, “A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or willfully blind to the absence of consent.”²⁷ There are a number of reasons, however, for discounting this passage of JA that are not addressed in the CJC endnote.

First, it must be remembered that JA was a case about sexual choking. The legal issue was whether consent in fact (that is, as an element of the *actus reus*), could be given in advance for sexual activity to take place when the “complainant” was unconscious.²⁸ *Mens rea* was not an issue before the court.

Second, as already argued, and as will be further argued below, the Court had used that phrase, “knowledge of...” and honest mistaken belief to refer to the same thing. That this sentence was not simply continuing that, no doubt unfortunately confusing, equivalence of language is not clear by any means.

Third, the Court in JA also wrote:

The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering those provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*. Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established.²⁹

Paragraph 37 of JA, when read along with the referred to paragraphs in *Ewanchuk*, excerpted above, reads very much in line with the position in this paper and contrary to the reading of paragraph 24 of JA relied on by the CJC. Notably, paragraph 49 from *Ewanchuk* about *mens rea* is referred to both by the Court in JA at paragraph 37 and the Alberta Court of Appeal in *Barton* at paragraph 238. *Barton* relates paragraph 49 of *Ewanchuk* to paragraph 42 in a way that is consistent with the position taken in this paper and inconsistent with the CJC’s reading of paragraph 24 of JA. The CJC

²⁶ R v JA, 2011 SCC 28 [JA].

²⁷ *Ibid* at para 24.

²⁸ *Ibid* at para 1.

²⁹ *Ibid* at para 37 [citation omitted; emphasis in original].

endnote, in turn, while relying on paragraph 24 of *JA* does not advert to paragraph 37 and does not, in any substantive way, respond to the point made in *Barton*. Ultimately, when read as a whole and considered in light of what was in issue in the case, *JA* does not provide any helpful authority with respect to the interpretation of *Ewanchuk*'s description of the *mens rea* of sexual assault.

Ewanchuk, itself, however, read properly, as a whole and as argued above, actively denies a mental element of the offence of sexual assault such as the one described by the challenged instruction. As a final illustration of this reading of *Ewanchuk*, it is worth looking at the summary paragraphs of the majority judgment, paragraphs 61-66. Those paragraphs directly refer to honest but mistaken belief but make no reference to knowledge of the absence of consent. If the Court in *Ewanchuk* had intended the latter to be an independent element of the offence, they would be expected to mention it in the summary of the case. The absence of any such mention supports the reading proposed here. The challenged instruction, therefore, incorrectly tells the jury that the Crown must prove something that is not part of the prosecution's burden. Absent an air of reality to an assertion of honest but mistaken belief in consent, the Crown need only prove the "basic" *mens rea* of the intention to touch.

VI. JURISPRUDENTIAL CONTEXT: CASES BEHIND *EWANCHUK*

For some, reading isolated sentences in *Ewanchuk*, such as the one discussed above, or reading paragraph 24 of *JA* in isolation, will still generate discomfort with abandoning the challenged instruction. As well, some may feel that the criminal law requires that every element of the *actus* must be mirrored by a corresponding element of *mens rea*.³⁰ It is useful, in addressing these concerns, to look at some of the cases to which *Ewanchuk* refers in this connection, to see whether they support one reading or another.

³⁰ See e.g. David M Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995), 59 Sask L Rev 271; Brian Rolfes, "The Golden Thread of Criminal Law – Moral Culpability and Sexual Assault" (1998), 61 Sask L Rev 87.

A. *Robertson*

*R v Robertson*³¹ is the case most directly on point. In that case, the complainant was sexually assaulted in her apartment by a stranger who pretended to be a friend of her roommate. The accused did not testify and there was no evidence on the record to support his claim to have believed that the complainant consented. The trial judge gave what this article would adopt as the correct instruction (absent an air of reality to an assertion of honest but mistaken belief in consent).³² The judge instructed the jurors that, to convict, they “must conclude that the Crown had proved beyond a reasonable doubt that the accused engaged in intentional touching of a sexual nature without the consent of the complainant” and further that “the only intent, the only mental element you need consider is the accused’s intention to touch the complainant.”³³ The accused was convicted. The accused appealed, arguing essentially that the challenged instruction should have been given. The Court of Appeal agreed with the accused and ordered a new trial. But, on further appeal by the Crown, the Supreme Court rejected the accused’s argument and reversed the Ontario Court of Appeal, finding “there was no error in the trial judge’s charge to the jury.”³⁴

On one level, *Robertson* is simply authority for the proposition that the trial judge in that case did not err. There are, however, broader implications that follow logically and necessarily from that finding. Nothing in the judgement attempts to limit the Supreme Court’s decision to the specific case, based on, for instance, unusual facts or other case-specific factors. So, if the trial judge in *Robertson* did not err in instructing a jury that the only mental element it needed to consider was the intention to touch, then another trial judge instructing a jury in a case not involving honest but mistaken belief in consent would not err in using the same instruction. In essence, it follows that the negative phrasing, “no error” carries here also the positive meaning of “was correct.”

But if the instruction in *Robertson* was correct, it is correct to omit the challenged instruction that the Crown must prove knowledge that the complainant was not consenting. This cannot be reconciled with the claim that such knowledge is actually an element of the offence. It follows, then,

³¹ *R v Robertson*, [1987] 1 SCR 918, [1987] SCJ No 33 (QL) [*Robertson*].

³² As must always be kept in mind, honest but mistaken belief in consent is only the subject of a jury instruction when there is an air of reality.

³³ *Robertson*, *supra* note 31 at 928 [emphasis added].

³⁴ *Ibid* at 940 [emphasis added].

from the Court's statement that the trial judge in *Robertson* made "no error," that knowledge that the complainant did not consent is not, actually, an element of the offence distinct from honest but mistaken belief in consent. Taking the next step, if knowledge that the complainant is not consenting is not an element of the offence, then it follows that a jury should not be instructed that it is. In other words, it is an error to give the challenged instruction in any case.³⁵

Further support for the proposition that knowledge of the absence of consent is not an element of the offence can be found elsewhere in *Robertson*. For instance, when discussing the defence of honest but mistaken belief in consent, Wilson J wrote for the Court:

The previous decisions of this Court, in particular *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 and *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, establish several propositions. First, the *mens rea* for rape includes knowledge that the woman is not consenting or recklessness as to whether she is consenting or not.

Traditionally the Court has described this *mens rea* requirement as a defence of mistake of fact available to the accused. This is how McIntyre J, speaking for the majority described it in *Pappajohn*.³⁶

³⁵ This article focuses on Supreme Court of Canada jurisprudence, for obvious reasons. It is worth mentioning, still, that, in *R v Skeddon*, 2013 ONCA 49, the Ontario Court of Appeal relied directly on *Robertson* as "clear authority contrary to the position that such an instruction [essentially, the challenged instruction] is always required in a sexual assault case" (at paras 7-8). The same logic articulated with respect to the finding in *Robertson* would apply to the finding in *Skeddon*. This article argues that it is an error in law to ever give the challenged instruction. If the challenged instruction describes, as it purports to do, an essential element of the offence, it cannot be optional. It either is an element, and so must always be given, or it is not, in which case it should never be given. Remember that there is never discussion of applying an air of reality gatekeeper test to the challenged instruction; that is always discussed in the context of honest but mistaken belief in consent. But the challenged instruction cannot be referring to honest but mistaken belief in consent, if for no other reason than that both Watt's and the CJC instructions have separate, other, instructions that are engaged when honest but mistaken belief in consent is in issue. Courts are often hesitant to express themselves in terms beyond the single case in front of them, and make the bare minimum finding necessary, hence the use of language such as "not always required." In this instance, the logic of the issue requires this to be understood more broadly, however. Any other understanding, for all the reasons argued in this article, would be incorrect and incoherent.

³⁶ *Robertson*, *supra* note 31 at 930-932 [citation & case excerpt omitted].

Consider how this last paragraph reads if one simply substitutes into it the full phrase from the preceding paragraph that is referred to by “this mens rea”:

Traditionally the Court has described this *mens rea* requirement [knowledge that the woman is not consenting or recklessness as to whether she is consenting or not] as a defence of mistake of fact available to the accused. This is how McIntyre J., speaking for the majority described it in *Pappajohn*.

This substitution makes it clear that what might appear to be a statement that knowledge of a lack of consent is an element of the offence is, in fact, intended as a reference to the issue of honest but mistaken belief in consent. Such a reading of these paragraphs is made all the more necessary by the actual finding in the case, as described above. Read together, these passages are clear that, while an honest but mistaken belief in consent can be asserted, (where, only where, there is an air of reality to the issue),³⁷ the proper instruction to the jury otherwise is that “the only mental element you need consider is the accused’s intention to touch the complainant.”

Robertson is thus authority, by the Supreme Court, for the proposition that knowledge of the absence of consent is not an element of the offence. Additionally, the Supreme Court relies on *Robertson* in *Ewanchuk*, which militates strongly in favour of the interpretation of *Ewanchuk* that is advanced above. Similarly, the references in *Ewanchuk*, and in *J.A.* for that matter, to knowledge that the complainant did not consent can comfortably be seen as references, in fact, to an assertion of honest but mistaken belief in consent, paralleling the equivalent use of those phrases in *Robertson*.³⁸

Moreover, *Robertson* provides authority for the argument made above with respect to redundancy. The defence had argued “that the accused’s knowledge that the complainant is not consenting is an essential element of the offence. Therefore, the trial judge must in every case tell the jury that the Crown must satisfy them beyond a reasonable doubt that the accused knew that the complainant was not consenting or was reckless as to whether she was consenting or not before they can convict.”³⁹ This was argued as being in addition to a codified defence of honest but mistaken belief in

³⁷ *Ibid* at 933.

³⁸ This equivalency of language, repeated as we have seen in *Ewanchuk*, further erodes any reliance placed on paragraph 24 of *JA*, such as is employed by the CJC in its endnote 11.

³⁹ *Robertson*, *supra* note 31 at 930.

consent, provided at the time by the then s. 244(4), (now, s. 265(4), excerpted above). Wilson J, writing for a unanimous court, observed: “It is self-evident that if the accused’s counsel is correct, s. 244(4) is rendered redundant. If the issue of honest but mistaken belief is always going to reach the jury as an element of the offence, what does it matter if sometimes it will also reach the jury as a defence?”⁴⁰

The Court’s subsequent analysis of the defence of honest but mistaken belief in consent, and the need for an “air of reality” to be present for the issue to be put to a jury, must be understood in the context of this concern, and, at least in part, as an attempt to avoid this redundancy. The Court found that “where there is sufficient evidence for the issue [of an honest but mistaken belief in consent] to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not consenting or was reckless as to whether she was consenting or not.”⁴¹ In other cases, this is not to be identified as part of the Crown’s burden: “the inclusion of s. 244(4) in the *Code* makes it clear that the trial judge should not in every case instruct the jury to consider whether the accused had an honest, though mistaken, belief in consent. The trial judge should only give such an instruction when certain threshold requirements have been met.”⁴²

Taken as a whole, it is clear that *Robertson* shows the Court grappling with the question of what function the defence of honest but mistaken belief in consent is supposed to have in the law surrounding sexual assault, and what the difference is supposed to be between cases in which it is in play, and cases in which it is not. That difference is defined in terms of whether or not the judge instructs the jury to consider the accused’s mental state with respect to consent. Such an instruction is to be given in cases in which there is an “air of reality” to ground the codified defence, and only in those cases. Further, the substance of the instruction must represent the law as it exists in relation to honest but mistaken belief, not to any other distinct element, such as the one the challenged instruction purports to describe. To do otherwise is to render honest but mistaken belief in consent a meaningless legal concept and nullify Parliament’s intention to distinguish between cases in which it is in issue and cases in which it is not in issue.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 933 [emphasis added].

⁴² *Ibid* at 938.

B. *Creighton*

*R v Creighton*⁴³ is helpful in addressing the concern that knowledge of a lack of consent is necessary in the *mens rea* to mirror the “without consent” element in the *actus reus*. In *Creighton*, the accused injected the victim with cocaine, and she died as a result. *Creighton* directly addresses this general desire for symmetry between the *mens rea* and the *actus reus*:

It is important to distinguish between criminal law theory, which seeks the ideal of absolute symmetry between *actus reus* and *mens rea*, and the constitutional requirements of the *Charter*. As the Chief Justice has stated several times, “the Constitution does not always guarantee the ‘ideal’”.

I know of no authority for the proposition that the *mens rea* of an offence must always attach to the precise consequence which is prohibited as a matter of constitutional necessity. The relevant constitutional principles have been cast more broadly. No person can be sent to prison without *mens rea*, or a guilty mind, and the seriousness of the offence must not be disproportionate to the degree of moral fault. Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied.⁴⁴

Creighton is not a case about sexual assault, but about whether a conviction for manslaughter required foreseeability of death rather than merely foreseeability of bodily harm, and, specifically, about the “thin skull” rule. In the paragraph above, the court answers, no. Exact symmetry between *actus reus* and *mens rea* is not necessary, as long as there is a proportionate guilty mind. Proportionality was relevant in *Creighton* because the symmetry or lack of symmetry in question related to the degree of foreseen consequence. It is worth noting that *Creighton* is relied on by *Ewanchuk* for essentially this principle – that the morally innocent must be protected.⁴⁵ In the context of sexual assault, the issue is not degree of foreseen consequence, but the kind of knowledge of circumstance, specifically the circumstance of lack of consent, that is required to protect the morally innocent. The Court in *Ewanchuk* explicitly found that the availability of the defence of honest but mistaken belief in consent achieves that goal:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her

⁴³ *R v Creighton*, [1993] 3 SCR 3, [1993] SCJ No 91 (QL).

⁴⁴ *Ibid* at 53-54 [citations omitted].

⁴⁵ *Ewanchuk*, *supra* note 2 at para 42.

own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the Code by Parliament in 1992 is consistent with the common law.⁴⁶

In light of such comments, there can be no doubt that the availability of honest but mistaken belief in consent is all that is needed to protect the morally innocent, and consequently, all that is needed to comply with the requirements of the *Charter* in this regard.

More, the element of *mens rea* described in the challenged instruction does not, in fact, protect the morally innocent, or at least, it does not protect only the morally innocent. First, the route to acquittal based on the challenged instruction focuses on the double negative of not knowing that the complainant did not consent. But that is not enough to achieve moral innocence. The law requires that to successfully claim moral innocence, an accused must have taken reasonable steps in the circumstances known to them to have obtained consent through words and actions in advance of sexual touching. The morally innocent must do more than not know the complainant was not consenting, or did not say "no"; they must believe the complainant did say "yes."⁴⁷

Further, the common law and the *Criminal Code* circumscribe the availability of a claim of honest but mistaken belief. To make that claim, the belief cannot be, for instance, based in ambiguous or passive conduct by the complainant. Nor can it be based in the self-induced intoxication of the accused.⁴⁸ Failure to respect these and other requirements is a failure to be,

⁴⁶ *Ibid* at paras 45-46 [emphasis added].

⁴⁷ Nor is this fundamental problem with the challenged instruction solved by adding in references to recklessness or willful blindness. Even if such lower *mens rea* options are included, the focus is still on the absence of a "no": was the accused reckless or willfully blind about the complainant's lack of consent. The focus, on any proper analysis, needs to be on the belief in the presence of a "yes" in words or actions. Recklessness and willful blindness instructions may be appropriate, in turn with respect to the legitimacy of that belief, but that is a different matter.

⁴⁸ *Ewanchuk*, *supra* note 2 at paras 50-51; *Criminal Code*, *supra* note 2, s 273.2. The statutory restriction in s 33.1 of the *Criminal Code* with respect to self-induced intoxication may present separate constitutional challenges, but those do not affect the present argument. Section 33.1 relates to a more general defence where self-induced intoxication creates a state akin to automatism. This relates in turn to the voluntariness of the act, which

in fact, morally innocent. But, unlike the instruction on honest but mistaken belief, the challenged instruction includes no such restrictions. Consequently, the challenged instruction would acquit people who are not morally innocent. It follows, in turn, that the challenged instruction cannot be defended as necessary for the protection of the morally innocent.

Alternatively, if the asymmetrical structure of the offence is theoretically troubling, a legal purist could simply view honest but mistaken belief in consent as the element of *mens rea* that mirrors the *actus reus* element of “without consent.” That honest but mistaken belief in consent is not the subject of any instruction unless there is an air of reality to it does not change its existence as one of the elements of the offence. There is some support for this approach in paragraphs 48 and 49 of *Ewanchuk*, excerpted above, which parallel the *actus reus* element of consent in fact with the *mens rea* element of consent communicated by words or actions in relation to honest mistaken belief.

Whether one views the theoretical structure of the offence as being acceptably asymmetrical, or as being symmetrical but with an element that is only referred to when raised by the evidence, it makes no difference to the error of the challenged instruction.

C. *Pappajohn*

This understanding of the *mens rea* of sexual assault is further supported by consideration of another case referred to by both *Ewanchuk* and *Robertson*: *R v Pappajohn*.⁴⁹ In *Pappajohn*, the accused was convicted of raping a real estate agent in his home, which he had listed for sale. The issue at the Supreme Court of Canada was whether the trial judge erred by not instructing the jury on mistake of fact with respect to whether the complainant consented to the sexual activity. The decision in *Pappajohn* is split, and it is particularly important to begin this analysis with the passage on which *Ewanchuk* relies:

Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed

nothing in this paper rejects as an element of the offence, and which is very different from the restriction in 273.2 in relation to mistaken belief in consent.: see *R v McCaw* 2018 ONSC 3464 and *R v Chan*, 2019 ONSC 783.

⁴⁹ *R v Pappajohn*, [1980] 2 SCR 120, [1980] SCJ No 51 (QL) [*Pappajohn*].

perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.⁵⁰

This passage is from a two-judge minority judgement, authored by Dickson J (as he then was). Notably, this passage is in the section of that judgement under the heading “Mistake of Fact.” That section is adopted by McIntyre J writing for the majority: “I am in agreement with that part of [Justice Dickson’s] judgement dealing with the availability as a defence to a charge of rape in Canada of what is generally termed the defence of mistake of fact.”⁵¹ Thus, this passage is part of what is adopted by the majority in *Pappajohn*, and is further endorsed by being cited in *Ewanchuk*.

Importantly, other parts of Dickson J’s minority judgement were not adopted in this way. In particular, the passages before the heading “Mistake of Fact” are not adopted, including the assertion that “intention or recklessness must be proved in relation to all elements of the offence, including absence of consent. This simply extends to rape the same general order of intention as to other crimes.”⁵² That is, in *Pappajohn* a description of the element of the offence in essentially the terms set out in the challenged instruction was supported by the minority, and rejected by the majority. The majority adopted mistake of fact, now honest but mistaken belief in consent, and not any further mental element. This decision, explicitly relied on by both *Ewanchuk* and *Robertson*, is clear support for the argument advanced in this article that the challenged instruction is inconsistent with a proper reading of *Ewanchuk*.

D. *Park*

In *R v Park*,⁵³ the case focused, at the Supreme Court, on whether there existed an “air of reality” sufficient to require that the issue of honest but mistaken belief in consent be put before the jury. The complainant had testified that the accused overpowered her despite his awareness of her religious objections to premarital sex; the accused claimed that the complainant had willingly participated in the sexual activity. As with

⁵⁰ *Ibid* at 148, cited in *Ewanchuk*, *supra* note 2 at para 43.

⁵¹ *Pappajohn*, *supra* note 49 at 134.

⁵² *Ibid* at 146.

⁵³ *R v Park*, [1995] 2 SCR 836, [1995] SCJ No 57 (QL) [*Park*].

Pappajohn, it is a passage from a minority judgement in *Park* on which the Court relies in *Ewanchuk*:

As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park*, *supra*, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:

. . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no,” but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes.”⁵⁴

However, unlike in *Pappajohn*, the majority in *Park* did not adopt the passage on which *Ewanchuk* relies.⁵⁵ Thus, it is only when adopted by *Ewanchuk* that this passage becomes law. The principle is elaborated in the next two paragraphs in *Ewanchuk*, cited above in connection with *Creighton*, and again here:

In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said “yes” through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law...⁵⁶

Here, again, the analysis of the *mens rea* focuses on the issue of honest but mistaken belief in consent and not on anything that corresponds to the element purportedly identified by the challenged instruction.

Further, this demonstrates the transition in the law marked by the Court's decision in *Ewanchuk* to adopt the position it had rejected in *Park*: that the focus of the analysis is not on whether the complainant said “no” (or whether the accused knew she had) but on whether the accused honestly believed that the complainant had said “yes” by words or actions. As the Court of Appeal in *Barton* observed, Parliament changed the *Criminal Code*

⁵⁴ *Ewanchuk*, *supra* note 2 at para 45, citing *Park*, *supra* note 53 at para 39.

⁵⁵ The majority in *Park* did adopt L'Heureux-Dubé's judgment, except the section on “Mistake of Fact and Consent,” in which section the passage excerpted in *Ewanchuk* appears: *Park*, *supra* note 53 at paras 1-2.

⁵⁶ *Ewanchuk*, *supra* note 2 at paras 46-47 [emphasis in original].

in the 1992 to give effect to this positive view of consent. The offence in *Park*, however, had occurred before those changes, on December 25, 1991. Here, the minority decision of L'Heureux-Dubé' J anticipated the statutory change,⁵⁷ described in *Barton* as follows:

[I]t is incontrovertible that Parliament's 1992 Code Amendments on sexual offences contained in Bill C-49 were intended to be substantive in content and material in effect...Bill C-49 was intended to reform the law in Canada, especially on the issue of consent – and did. Parliament explicitly changed the law in Canada on consent from a negative notion to a positive notion of sexual mutuality and agreement. However, a strong substantive definition of consent means little if it is not implemented. As the law on sexual offences changes – statutorily and jurisprudentially – jury instructions must change too.⁵⁸

The focus of the challenged instruction on the negative question of whether the complainant said “no” rather than the positive question of whether the complainant conveyed “yes” though words or actions is, in essence, a hold-over from a legal context that has not existed in statute since 1992, nor in the clear common law of the land since (at least) 1999. In this way, the problem of instructing the jury on an element of the offence that does not exist is compounded by actively misinstructing the jury as to the proper legal focus of the concept of consent.

Put another way, the challenged instruction imports implicitly what *Barton* calls the “ghost element” of resistance.⁵⁹ This idea, that we would expect a victim of sexual assault to cry out, or fight, or resist in some way, is one of the myths and stereotypes that continue to “stalk the halls of justice.”⁶⁰ In court, the onus is on the Crown to prove the essential elements of a given offence beyond a reasonable doubt; in life and law, the onus is on the one who touches to obtain consent by words or actions before touching. The challenged instruction flies in the face of that onus.

E. Conclusions About the Cases Behind *Ewanchuk*

Concerns based on reading some sentences in *Ewanchuk* in isolation from the rest of the judgement are inconsistent with the jurisprudential foundations of the case. *Robertson* illustrates that the reading of the elements

⁵⁷ It would be natural to wonder whether and to what extent this minority decision actually influenced the statutory change but that inquiry is beyond the scope of this article.

⁵⁸ *Barton*, *supra* note 3 at para 157.

⁵⁹ *Ibid* at para 156.

⁶⁰ *Ibid* at para 8.

of sexual assault proposed by this article, and inconsistent with the challenged instruction, was not novel to *Ewanchuk*, but was already established law. *Creighton* dismisses the academic desire for perfect symmetry between the *actus reus* and the *mens rea* and reemphasizes the purpose of protecting the morally innocent. *Pappajohn* illustrates that the Supreme Court of Canada had previously rejected a *mens rea* such as the one contained in the challenged instruction. *Park* illustrates the need to focus on consent as a positive, not negative, concept. The cumulative effect of this support from the cases that provide the jurisprudential foundation for *Ewanchuk* is clearly in support of the reading advanced in this article and is opposed to any view of the offence of sexual assault that accords with the challenged instruction.

F. Jurisprudence – Cases Following *Ewanchuk*

While this article has, so far, focused on the cases that came before and underpinned the lead case, *Ewanchuk*, it is acknowledged that the more usual legal approach is to consider cases after the leading case. However, here, there are surprisingly few cases at the Supreme Court of Canada in which the *mens rea* elements of sexual assault are in issue. Virtually all the cases referring to *Ewanchuk* are focused on other issues: the *actus reus*,⁶¹ the question of what constitutes an “air of reality” in contexts other than sexual assault,⁶² concerns about stereotypes in the context of sexual assault but in relation to issues other than the *mens rea*,⁶³ and various other issues that do not impact the analysis presented here.⁶⁴ That said, there are two cases that

⁶¹ *R v Handy*, 2002 SCC 56 (similar fact evidence); *R v Williams*, 2003 SCC 41 (consent in the context of HIV disclosure); *R v Mabior*, 2012 SCC 47 (effect of fraud, in the context of HIV, on consent); *R v Hutchinson*, 2014 SCC 19 (effect of tampering with condoms on consent).

⁶² *R v Cinous*, 2002 SCC 29 (self-defence in the context of murder); *R v Fontaine*, 2004 SCC 27 (automatism in the context of murder); *R v Gunning*, 2005 SCC 27 (whether shooting was accidental); *R v Tran*, 2010 SCC 58 (provocation in the context manslaughter).

⁶³ *R v GW*, [1999] 3 SCR 597, [1999] SCJ No 37 (QL) (sentencing issue); *R v AG*, 2000 SCC 17 [AG] (scope of appeal); *R v Find*, 2001 SCC 32 (challenge for cause issue); *R v Regan*, 2002 SCC 12 (stay issue); *JW v Canada (Attorney General)*, 2019 SCC 20 (application of criminal definition of sexual assault in context of residential schools class action settlement).

⁶⁴ *R v Araujo*, 2000 SCC 65 (availability of Crown appeal in drug crime context); *R v RAR*, 2000 SCC 8 (seriousness of sexual assault in sentencing context); *R v GR*, 2005 SCC

might be seen as potentially helpful, if only in passing or indirectly. One, JA, has already been discussed and found unhelpful.

The other potentially useful case is *R v Davis*,⁶⁵ a case released only nine months after *Ewanchuk*. *Davis* was concerned with the air of reality test as it relates to the assertion of honest but mistaken belief in consent. In that case, the accused was convicted of sexual assault after persuading several complainants to pose nude for photographs, ostensibly to secure modelling contracts, then threatening to publicly reveal those images. The trial judge did not discuss the issue of an honest but mistaken belief in consent in his reasons, and it was argued on appeal that this can be deemed a failure to consider the defence and an error of law. Lamer CJ, writing for the Court, found that there was no air of reality to ground such a defence on the facts of the case and thus no reversible error in not explicitly negating it in the reasons.

While the decision in *Davis* does not directly discuss the issue of *mens rea* outside of the context of an honest but mistaken belief in consent, the Court's reasoning can be seen as instructive in a number of respects. In this context, it should be noted that the panels in the two cases are overwhelmingly similar. The seven judges who sat for *Davis* were all part of the panel of nine that sat for *Ewanchuk*. The author of the unanimous decision in *Davis*, Lamer CJ, concurred in the majority decision of Major J in *Ewanchuk*. Only Justices Iacobucci and Bastarache were present for *Ewanchuk*, and not for *Davis*, and they both concurred in Major J's majority decision.⁶⁶ It follows that insight into the Court's thinking in *Ewanchuk* may be gleaned from its approach to a related though distinct issue in *Davis*. In *Davis*, Lamer CJ specifically identified a distinction between a "belief in consent" and an "honest but mistaken belief in consent,"⁶⁷ confirming the settled standard for the application of the defence. Moreover, the Chief

45 (whether sexual assault included offence in incest); *R v Quesnelle*, 2014 SCC 46 (disclosure issues).

⁶⁵ *R v Davis*, [1999] 3 SCR 759, [1990] SCJ No 67 [*Davis*].

⁶⁶ While we have referred to Major J's decision as the majority decision, it should be noted that Justices L'Heureux-Dubé and Gonthier generally agreed with Major J, and McLachlin J agreed with Major J. The minority judgements in *Ewanchuk* were more about emphasizing the need to reject stereotypical thinking as the underpinning of a wrongheaded claim to implied consent than broader disagreements about the nature of the elements of the offence of sexual assault.

⁶⁷ *Davis*, *supra* note 65 at para 84 [emphasis in original].

Justice explained that that defence “is simply a denial of the *mens rea* of sexual assault.”⁶⁸

Notably, the *mens rea* was not discussed as anything other than the absence of an honest but mistaken belief in consent; having found the necessary air of reality did not exist to give rise to the defence, the Court did not then consider separately whether the Crown had proved that the accused “knew” that the complainants did not consent. The analysis of the honest but mistaken belief in consent defence appears to have covered the field. This is consistent with the position articulated in this article: the accused’s knowledge of a lack of consent is not an element of the offence of sexual assault, and the Crown accordingly need not prove such knowledge, and need only address the accused’s mental state with respect to the complainant’s lack of consent in cases in which the issue of honest but mistaken belief in consent is properly in play, and according to the settled jurisprudence on that issue.

That said, there is no case of which the authors are aware, subsequent to *Ewanchuk*, in which the Supreme Court of Canada has directly and explicitly revisited the fundamental definition of the *mens rea* for the offence of sexual assault. It follows that, as is generally accepted in any event, *Ewanchuk* remains the leading and binding authority on the issue. And that authority, read as this article suggests it should be, is contrary to the use of the challenged instruction.

VII. THE EFFECT OF THE CHALLENGED INSTRUCTION

As the preceding legal analysis has demonstrated, it simply is not an element of the offence of sexual assault that the accused know that the complainant was not consenting to the sexual activity in question. It follows that the Crown does not need to prove it. Where there is an air of reality to raise it, the Crown must disprove an honest mistaken belief in consent, but that is a very much different element and issue.⁶⁹

On its face, it must be an error to tell a jury that the Crown must prove something that the Crown does not need to prove. Further, the only logical consequence of adding an element that does not exist in law is that some number of accused who otherwise would, and should, have been convicted

⁶⁸ *Ibid* at para 80.

⁶⁹ *Ewanchuk*, *supra* note 2 at para 63.

were, instead, acquitted. The logic of this is fairly straight-forward, given that juries are required to come to one of two verdicts: guilty or not guilty.⁷⁰ Since those two verdicts are in a zero-sum relationship, only three results are possible from the use of the challenged instruction: it could increase, decrease, or have no effect on the number of convictions. Two of those possibilities can be excluded. It is not logically possible that adding an additional element could increase the number of convictions. Watt's instruction Final 271 lists four elements (including the one challenged here). If all four are proven, then the three unchallenged elements necessarily have been proven along with the one challenged element; no one convicted on a charge employing the challenged instructions would have been acquitted if it were omitted. The first possibility must therefore be excluded. Moreover, it is difficult to believe that the challenged instruction has no effect at all on the general result across all sexual assault jury trials. At issue is a standard instruction, purporting to be necessary in every case and describing what it calls essential for there to be a conviction. To suggest that the addition of an extra requirement in such circumstances would have no effect in any trial requires a belief that juries are universally not listening to, or not bothering to follow, a judge's instructions. We must therefore exclude the third possibility, unless we are to conclude that charging a jury at all is wholly unnecessary.

It follows, then, that the result of including the challenged instruction is to decrease convictions.⁷¹ It must be concluded that some number of juries that found beyond a reasonable doubt that the accused had intentionally touched the complainant in a sexual manner without consent, and so should have convicted, instead acquitted because they had a

⁷⁰ Verdicts such as *autrefois* or not criminally responsible do not engage the issue addressed in this article and can be ignored for present purposes. Similarly, there are some cases in which it might be available to a jury to convict on the lesser included offence of assault *simpliciter*, but that decision would necessarily hinge on whether or not the jury found the force applied without consent to be of a sexual nature. It would not, absent truly exceptional circumstances, turn on the issue of lack of consent or mistaken belief in consent and, therefore, can also be ignored for present purposes. The question of how to deal with exceptional cases could, if necessary, be addressed after the proper approach in ordinary circumstances is established. Finally, the possibility of a hung jury is not relevant here, since that is not a verdict at all and suggests a retrial (subject to the Crown's discretion not to proceed) to reach a verdict.

⁷¹ For juries whose judges faithfully followed the instructions in Watt's, this will follow in cases in which honest but mistaken belief in consent was not raised; for juries whose judges followed the CJC instruction, this will follow in all cases.

reasonable doubt that the accused knew the complainant was not consenting. Accused who would properly be convicted without the challenged instruction are being, instead, acquitted.

It should also be noted that this is not necessarily a problem restricted to jury trials. Certainly, jury trials are the main focus of any problem with standard jury instructions, but it should be remembered that the same judges who sit for jury trials and read these instructions to juries over and over again, trial after trial, will also sit on a large number of sexual assault trials without a jury, judge alone. It is not difficult to imagine that they will be influenced in their own thinking about conviction and acquittal by the instructions they have repeatedly given juries. Nor is it difficult to imagine a judge turning to a source like Watt's or the CJC instructions as part, in essence, of the process of self-instruction. To the extent that judges sitting alone are influenced in thought directly or indirectly by the challenged instruction, they will be influenced in the direction of (improper, unjust) acquittal.

If, as this article argues, it is an error to give or follow the challenged instruction, then those acquittals, by jury or by judge alone, are improper. Virtually all jury trials that deal with sexual assault concern the more serious forms of sexual assault, what formerly was called rape, as do many judge alone trials in the Superior Courts. So, to put it bluntly, the consequence of improperly including or relying on the challenged instruction is that rapists, in some number, have been, and continue to be, improperly acquitted.

The scale of the problem is difficult or impossible to know, given the secrecy that Canadian law imposes on jury deliberations. It is not permitted to ask jurors whether any given acquittal is the result of the challenged instruction. It is worth noting, however, that the element added by the challenged instruction is a difficult element to prove. It is a mental element, which is always difficult to prove. Moreover, it is a mental element about another person's mental state, increasing that difficulty. The instruction is phrased in the negative; negatives are more difficult than positives to prove. Finally, it uses the word "know," which is a stronger mental state in common usage than "suspected" or "believed." Indeed, Watt's *Manual* italicizes the word "know," essentially telling the judge to emphasize it to the jury. This effectively creates a higher burden for the Crown in cases without an air of reality to support a defence of honest but mistaken "belief" in consent. Logically, the more difficult something is to prove, the less likely

it is to be proved; the assertion that the challenged instruction imposes a particularly onerous burden on the Crown supports a real concern that significant numbers of verdicts are thereby affected. It is not necessary to rely on the “one is too many” form of rhetoric to suggest that the problem represented by the challenged instruction is significant and pressing in terms of numbers of cases.

It is also important to consider the broader social consequences of getting this wrong. L’Heureux-Dubé J often wrote explicitly about the importance of Parliament’s objectives in reframing the law in 1992. For instance, in *Park*, she said that “the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in.”⁷² Elsewhere, she specifically identified one objective of the legislative and jurisprudential changes made to the law of sexual assault as “the need to affirm the principles of equality and human dignity in our criminal law by addressing the problems of myths and stereotypes about complainants in sexual assault cases.”⁷³ Nearly two decades later, the Alberta Court of Appeal identified the same sorts of concerns in *Barton*, finding it “an affront to the will of Parliament” that the same problems continue.⁷⁴

Professor Lucinda Vandervort has argued that “erroneous interpretations and applications of the law of consent” combined with police and prosecutorial discretion predicated on such mistakes, continue to reinforce and perpetuate those myths and stereotypes.⁷⁵ Moreover, Vandervort argues, an “approach that gives ‘belief in consent’ a pivotal role in analysis of the evidence will tend to evoke the old paradigms and will

⁷² *Park*, *supra* note 53 at para 42.

⁷³ AG, *supra* note 63 at para 1. For the historical development of the law of rape/sexual assault in Canada, and the policy context of the 1992 revisions to the *Criminal Code*, see Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill-49” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293; Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill LJ 243; Lucinda Vandervort, “Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory” (2012) 23 Colum J Gender & L 395 [Vandervort, “Affirmative Consent”]; Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution” (2014) 52 Alta L Rev 127.

⁷⁴ *Barton*, *supra* note 3 at para 9.

⁷⁵ Vandervort, “Affirmative Consent,” *supra* note 73 at 438.

often result in truncation of the analysis of mens rea.”⁷⁶ In this context, it is particularly significant that the standard jury instruction for sexual assault, in cases lacking an air of reality for an assertion of honest but mistaken belief in consent, has not changed significantly in the last quarter century despite intervening changes in social and jurisprudential awareness of the outdated normative assumptions that informed the historical law of rape. It must therefore be recognized that continuing to use the challenged instruction, by incorrectly articulating the elements required to be proved for a conviction, undermines the legislative intention behind the *Criminal Code* provisions that it purports to explain.

VIII. CONCLUSION

Change is hard. Change is slow. Parliament attempted change in the 1992 amendments to the *Criminal Code*. *Ewanchuk*, embracing what had previously been a dissent in *Park*, embraced change.

It is time for the change initiated by Parliament in 1992 to reach the day to day life of Canadian courts. Long past time, really. For over a quarter of a century, the criminal justice system has been improperly acquitting people of one of the most repugnant of crimes, sexual assault. And, as *Barton* points out, sexual assault is largely a gender based crime.⁷⁷ Overwhelmingly, the accused are men, and the complainants are women. It follows that, to the extent that (as this article argues) we have been improperly acquitting some accused, we have been acquitting men at the expense of women.

There is no basis in statute or common law to require the Crown to prove what the challenged instruction purports to require. More, by focusing on consent as a negative concept, the challenged instruction invites juries and judges to follow a stereotypical and prejudicial kind of thinking, in a way that adds insult to the injury of the improper acquittal. The challenged instruction is not just an error, it is a wrong.

It is, no doubt, difficult to face the idea that Canadian courts have been misinstructing juries for 25 years or more. No judge, no lawyer, no Canadian, will find that a comfortable idea. “We’ve always done it this way” and “we can’t all have been doing it wrong” are twin sides of the inertia that has been frustrating the changes that *Barton* reminds us Parliament sought

⁷⁶ Vandervort, “Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault” (2004) 42 Osgood Hall LJ 625 at para 44.

⁷⁷ *Barton*, *supra* note 3 at para 8.

to make in 1992. But, inertia is not a legal argument. Inertia is an argument for laziness or cowardice.

Over the last year or so, society has experienced significant changes in attitudes around sexual assault and has seen more open and louder challenges to the widespread complacency with which inappropriate sexual behaviour has been viewed. Cultural change is, of itself, also not a legal argument. However, cultural change might help us find the courage to face the legal reality that has been avoided for too long.

There are no doubt many other changes to the standard jury charge for sexual assault that are needed, but none so much as the core error of law that this article identifies. What should the change be? What should the charge be? As far as the one problem addressed by this article is concerned, and absent an air of reality to the defence of an honest but mistaken belief in consent, the simple charge used in *Robertson* is as good as any that can be suggested: “the only intent, the only mental element you need to consider is the accused’s intention to touch the complainant.” Canadian courts should start using it.

Appendix 1 – Watt’s Final 271 and Final 65 – D

FINAL 271

SEXUAL ASSAULT (*CODE*, s. 271)¹

[1] (*NOA*) is charged with sexual assault. The formal charge reads:

(Read applicable parts of indictment or count)

(Where there is an issue whether the offence ever occurred, Final 76 should be given *before* [2].)

[2] For you to find (*NOA*) guilty of sexual assault, Crown counsel must prove *each* of these essential elements beyond a reasonable doubt:

- i. that (*NOA*) *intentionally* applied force to (*NOC*);
- ii. that (*NOC*) did *not* consent to the force that (*NOA*) (*intentionally*)² applied;
- iii. that (*NOA*) *knew*³ that (*NOC*) did *not* consent to the force that (*NOA*) (*intentionally*) applied; and
- iv. that the force that (*NOA*) (*intentionally*) applied took place in circumstances of a sexual nature.

If Crown counsel has *not* satisfied you beyond a reasonable doubt of *each* of these essential elements, you must find (*NOA*) *not* guilty of sexual assault.

¹ This instruction covers *only* assault as defined in s. 265(1)(a).

² The *parenthetical* reference (*intentionally*) here and elsewhere may be unnecessary in many cases.

³ Where *apprehended consent* is raised, this element should begin:
“that (*NOA*) did *not* honestly believe that (*NOC*) consented ...”.

If Crown counsel *has* satisfied you beyond a reasonable doubt of *each* of these essential elements, you must find *(NOA)* *guilty* of sexual assault.

[3] Each essential element may be made into a question for you to consider carefully and answer.

...

[6] Did *(NOA)* know that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied?⁴

This element requires Crown counsel to prove knowledge, a state of mind, *(NOA)*'s state of mind. Crown counsel must prove beyond a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied. To "know" something is to be aware of it, at the time you do it.

(Where Crown counsel relies on more than one basis to establish knowledge, add [6-A]; the applicable basis, ([6-B] (actual knowledge), [6-C] (recklessness) or [6-D] (wilful blindness)); followed by [6-E].)

[6-A] There is more than one way for Crown counsel to prove that *(NOA)* *knew* *(NOC)* did not consent to the force that *(NOA)* (*intentionally*) applied.

(Where Crown counsel relies on actual knowledge:)

[6-B] *(NOA)*'s knowledge that *(NOC)* did *not* consent is proven if you are satisfied beyond a reasonable doubt that *(NOA)* was actually aware that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied.

⁴ Where *apprehended consent* is raised, this instruction should read: "Did *(NOA)* *honestly* believe that *(NOC)* consented?" followed by the appropriate Final 65-C or 65-D, including the consequences of each available finding. Later instructions should be renumbered accordingly.

***(Where Crown counsel relies on recklessness,
add:)***

[6-C] *(NOA)*'s knowledge that *(NOC)* did not consent is proven if you are satisfied beyond a reasonable doubt that *(NOA)* was aware that there was a risk that *(NOC)* was *not* consenting to the force that *(NOA)* applied, but *(NOA)* went ahead anyway, *not* caring whether *(NOC)* consented or not. In other words, *(NOA)* was aware of the risk that *(NOC)* did not consent, but went ahead anyway and *(intentionally)* applied force, despite the risk.

***(Where Crown counsel relies on wilful blindness,
add:)***

[6-D] *(NOA)*'s knowledge that *(NOC)* did not consent is proven if you are satisfied beyond a reasonable doubt that s/he knew s/he should inquire whether *(NOC)* consented to the force that *(NOA)* *(intentionally)* applied, but did *not* make the inquiry because s/he did not want to know the truth about *(NOC)*'s consent. In other words, *(NOA)* deliberately failed to inquire about *(NOC)*'s consent even though s/he knew that there was reason to do so.

***(In all cases where more than one basis of knowledge is relied
on, add:)***

[6-E] To prove that *(NOA)* *knew* that *(NOC)* did *not* consent, Crown counsel does *not* have to prove each basis of knowledge that I have described. One, any one, is enough. All of you don't have to agree that knowledge has been established on the same basis, as long as everyone is sure, on one basis or another, that Crown counsel has proven beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did *not* consent to the force that *(NOA)* *(intentionally)* applied

(In all cases)

To determine *(NOA)*'s state of mind, what s/he *knew* about *(NOC)*'s consent or lack of it, you should consider all the evidence. Take into account:

- what *(NOA)* and *(NOC)* did/did not do
- how *(NOA)* and *(NOC)* did/did not do it
- what *(NOA)* and *(NOC)* said/did not say.

You should look at their words and conduct before, at the time and after *(NOA)* (*intentionally*) applied force to *(NOC)*. Take into account the nature of what happened or didn't happen between *(NOA)* and *(NOC)*, any words/gestures that may have accompanied it (including any alleged threats) and anything else that indicates *(NOA)*'s state of mind at the time s/he (*intentionally*) applied force to *(NOC)*.

(Review relevant evidence and relate to issue)

If you have a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied, you must find *(NOA)* *not* guilty. Your deliberations would be over.

If you *are* satisfied beyond a reasonable doubt that *(NOA)* *knew* that *(NOC)* did *not* consent to the force that *(NOA)* (*intentionally*) applied, you must go on to the next question.

...

Notes on Use

Section 271 creates the offence of sexual assault. Somewhat unusually, sexual assault is both a crime itself and an essential element of the more serious offences for which ss. 272 and 273 provide.

In the second paragraph, the offence is divided into four elements:

- i. application of force;
- ii. absence of consent;
- iii. knowledge of absence of consent; and
- iv. circumstances of a sexual nature.

Other divisions are possible.

...

The third element, discussed in paragraph [6], also has to do with state of mind, but this time it is D's state of mind. As the instruction points out, P may establish this element by proof of actual knowledge, recklessness or wilful blindness. Any inapplicable basis should be deleted to avoid confusion. Where more than one basis remains, an instruction about unanimity, like [6-E] is advisable. Before the evidentiary review, jurors should be reminded how they can determine D's state of mind from the evidence introduced at trial.

Knowledge of the absence of consent is the essential element of P's case to which any claim of *apprehended consent* relates. It follows that instructions on apprehended consent should be included here and the issue left for the jurors to decide. Final 65-D is the appropriate instruction. It is critical that jurors understand that there is *no* burden on D to prove apprehended consent. The onus is on P to negate apprehended consent and the final instructions should leave no doubt about it.

...

FINAL 65-D

MISTAKEN BELIEF IN
(APPREHENDED) CONSENT⁵

(CODE, s. 273.2)

[1] It is (*NOA*)’s position that s/he *honestly* believed that (*NOC*) voluntarily agreed to participate in the sexual activity with which (*NOA*) is charged (or, *specify*).

[2] (*NOA*) does *not* have to prove that s/he *honestly* believed that (*NOC*) voluntarily agreed to participate in the sexual activity with which s/he is charged (or, *specify*). It is Crown counsel’s task to prove beyond a reasonable doubt that (*NOA*) had no such belief. If you have a reasonable doubt about whether (*NOA*) *honestly* believed that (*NOC*) consented to the sexual activity with which (*NOA*) is charged, you must find (*NOA*) *not* guilty. Your deliberations would be over.

[3] A belief is a state of mind, (*NOA*)’s state of mind. To determine whether (*NOA*) *honestly* believed that (*NOC*) voluntarily agreed to participate in the sexual activity with which (*NOA*) is charged (or, *specify*), you should consider *all* the circumstances surrounding that activity. Take into account

- *what* (*NOA*) and (*NOC*) did or did not do;
- *how* (*NOA*) and (*NOC*) did or did not *do* it; and
- *what* (*NOA*) and (*NOC*) said or did not say.

[4] You should look at their words and conduct before, at the time, and after the sexual activity (or, *specify*) occurred. Take into account the *nature* of what happened or didn’t happen between (*NOA*) and (*NOC*), any *remarks* or *gestures* that either one made

⁵ The precise relationship between apprehended consent under ss. 273.2 and 265(4) is unclear. This is the specific instruction that applies to the sexual assault offences in ss. 271, 272 and 273. The general instruction is Final 65-A.

or attempted at the time of the activity (or, *specify*), and any other circumstance that indicates what *(NOA)* *honestly* believed at the time of this sexual activity (or, *specify*).

[5] *(NOA)* must *honestly* believe that *(NOC)* voluntarily agreed to participate in the sexual activity charged (or, *specify*). An honest belief cannot be based on *(NOA)*'s intoxication. There is no honest belief if *(NOA)* saw the risk that *(NOC)* would *not* voluntarily agree to participate in the sexual activity, but went ahead anyway in spite of that risk. Similarly, there can be no honest belief if *(NOA)* was aware that s/he needed to find out whether *(NOC)* would agree to participate in this activity, but did nothing about it because *(NOA)* didn't want to know the truth. Nor can there be an honest belief in *(NOC)*'s voluntary agreement to participate in the sexual activity unless *(NOA)* took the steps a *reasonable* person would take in the circumstances as *(NOA)* knew them, to find out whether *(NOC)* agreed, to participate in the activity.

[6] *(NOA)*'s belief must be honest, but it does *not* have to be reasonable. The *reasonableness* of *(NOA)*'s belief, however, may be an important factor for you to consider in deciding whether s/he *actually* had the honest belief s/he claims. For example, if you consider that *(NOA)*'s belief was reasonable, one that a reasonable person would have in the same circumstances, you may think that is a factor that favours a conclusion that *(NOA)* *honestly* held that belief. On the other hand, if you consider *(NOA)*'s belief was *unreasonable*, one that no reasonable person would have in the circumstances, you may think that is a factor that favours a conclusion that his/her belief was *not* honestly held.

[7] Look at *all* the circumstances in deciding this issue. Do not focus on only one and ignore the rest. Use your good common sense.

*(Review relevant evidence and relate to
issue)*

[8] If you have a reasonable doubt whether *(NOA)* honestly believed that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*), you must find *(NOA)* not guilty. Your deliberations would be over.

If you are satisfied beyond a reasonable doubt that *(NOA)* did *not* honestly believe that *(NOC)* voluntarily agreed to participate in the sexual activity with which *(NOA)* is charged (or, *specify*), you must (*specify applicable consequence*).

Notes on Use

The scope of this “defence” of mistaken belief in consent requires consideration of several statutory provisions.

This instruction is limited to *sexual assault* offences under ss. 271, 272, and

273 of the *Criminal Code*. Consent in sexual assault cases means V’s voluntary agreement to engage in the sexual activity that forms the subject-matter of the charge: *Criminal Code*, s. 273.1(1). In the result, mistaken belief in consent *requires* an honest belief that V voluntarily agreed to participate in the sexual activity charged, as paragraph [1] instructs the jurors.

Section 273.1(2) makes it clear that consent obtained in any circumstances listed there is legally ineffectual. Section 273.1(3) has the effect of converting s. 273.1(2) into a series of vitiated consents that are *not* exhaustive of the circumstances in which consent may be legally flawed. For its part, s. 273.2 limits mistaken belief in consent by declaring legally ineffectual any apprehended consent based on listed sources of belief or not reasonably grounded. When all is said and done, the

consent about which D holds a mistaken belief must not be one that falls outside s. 273.1(1), or is vitiated by s. 273.1(2) or the residual effect of s. 273.1(3). The mistaken belief in consent must *not* be extinguished by s. 273.2.

This specimen starts out with a statement of D's position: mistaken belief in consent. The instruction explains what is required. D must *honestly* believe that V voluntarily agreed to participate in the sexual activity charged. Despite the focus of the instruction on D's state of mind, more accurately on his or her belief, rather than on the essentials of consent, it may be prudent to expand paragraph [1] or add as separate paragraphs the substance of paragraphs [2] and [3] of Final 65-B to ensure adequate understanding of what amounts to consent.

The second paragraph is critical because it assigns the burden and expresses the standard of proof required. Whether in closing argument, final instructions, or both, someone will refer to mistaken belief in consent whether expressly or in other terms as a "defence". It would not be illogical or unreasonable for jurors to think that for a "defence", the defence has to prove something. Paragraph [2] puts paid to any such conclusion.

Specific references to the subject-matter of consent (voluntary agreement to participate in the sexual activity charged) aside, the third and fourth paragraphs are duplicates of the same paragraphs in Final 65-C, and require no further comment.

The fifth paragraph explains to jurors the effect of *Code* s. 273.2. It should be given when there is an evidentiary basis to put apprehended consent in play,

as well as evidence that *requires* jurors to decide whether the belief D claims is flawed under s. 273.2. The vitiating factors include the failure to take reasonable steps to determine whether V was voluntarily agreeing to participate in the charged sexual activity, and a belief rooted in self-induced intoxication, recklessness, or wilful blindness. Each vitiating element is explained in plain language.

Paragraph [6] returns to the nature of D's belief: the belief must be *honestly* held, but need *not* be reasonable. But reasonableness or its lack plays a role, as the paragraph explains before the instruction returns to an emphasis on a consideration of *all* the evidence to resolve the apprehended consent issue.

Appendix 2 – CJC Instruction

Offence 271: Sexual Assault

Note⁶

Note⁷

Note⁸

(s. 271)

(Last revised June 2018)

(NOA) is charged with sexual assault. The charge reads:

(Read relevant parts of indictment or count.)

You must find (NOA) not guilty of sexual assault unless the Crown has proved beyond a reasonable doubt that (NOA) is the person who committed the offence on the date and in the place described in the indictment.⁹ Specifically, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

⁶ This instruction does not address cases in which assault as an included offence is a live issue. In cases where the jury has to be instructed on the included offence of assault, this instruction will have to be modified accordingly.

⁷ This instruction uses the language of “touching” rather than “force” to make it consistent with the language of ss. 151-153 of the *Criminal Code*. This language also avoids the potential for inconsistent verdicts: See: *R v Tremblay*, 2016 ABCA 30, 334 CCC (3d) 520; *R v S.L.*, 2013 ONCA 176, 300 (3d) 100; and *R v Tyler*, 2016 ONCA 599. In cases involving violence, it may be appropriate to revert to the language of “force”.

⁸ Sexual offences underwent major revisions in the *Criminal Code* in 1983 (and 1992). For offences that are alleged to have occurred before 1983, instructions must conform with the law as it then stood (e.g., rape, indecent assault, etc.).

⁹ Where identity is an issue, remember to include any further instructions that may be relevant (e.g., eyewitness identification, alibi, similar fact, etc.). Where date is an issue, the jury must be told that the Crown must prove that the offence occurred within the

1. That (*NOA*) touched (*NOC*) directly or indirectly;
2. That the touching by (*NOA*) was intentional;
3. That the touching by (*NOA*) took place in circumstances of a sexual nature;
4. That (*NOC*) did not consent to the touching by (*NOA*); and
5. That (*NOA*) knew that (*NOC*) did not consent to the touching by (*NOA*).

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find (*NOA*) not guilty of sexual assault.

If you are satisfied beyond a reasonable doubt of all these essential elements [and you have no reasonable doubt¹⁰ after considering the defence(s) (*specify defences*) about which I will instruct you], you must find (*NOA*) guilty of sexual assault.

I now want to remind you not to approach the evidence with unwarranted assumptions as to what is or is not sexual assault, what is or is not consent, what kind of person may or may not be the complainant of a sexual assault, what kind of person may or may not commit a sexual assault, or what a person who is being, or has been, sexually assaulted will or will not do or say. There is no

time frame indicated in the indictment. Where place is an issue, the jury must be told that the Crown must prove that some part of the offence occurred in the place indicated in the indictment.

Generally, the Crown must prove the date and place specified in the indictment.

However, where there is a variation between the evidence and the indictment, refer to s. 601(4.1) of the *Criminal Code* and the jurisprudence following *R v B(G)*, [1990] 2 SCR 3.

¹⁰ Insert the bracketed words if appropriate. This instruction will have to be modified where the accused has a legal burden of proof, such as for mental disorder or automatism.

typical victim or typical assailant or typical situation or typical reaction. My purpose in telling you this is not to support a particular conclusion but to caution you against reaching conclusions based on common misconceptions.

You must approach the evidence with an open mind and without preconceived ideas. You must make your decision based solely on the evidence and in accordance with my instructions on the law.

To determine whether the Crown has proved the essential elements, consider the following questions:

...

Fifth – Did (NOA) know that (NOC) did not consent to the sexual activity in question?¹¹ [CJC Note 11]

The Crown must prove beyond a reasonable doubt that (NOA) was aware that (NOC) did not consent to the sexual activity in question.

¹¹ On one interpretation of *R v Ewanchuk*, [1999] 1 SCR 330, knowledge of the accused (or recklessness or wilful blindness) that there was no consent is a component of the *mens rea* that the Crown must prove in every sexual assault case. See also *R v JA*, 2011 SCC 28 at para 24. This is the approach taken here. However, the other possible interpretation of *Ewanchuk*, raised as a question in *R v Barton*, 2017 ABCA 216 at para 239, is that intent to touch is the only requirement for *mens rea*, except in those cases where there is an air of reality to the defence of honest belief in consent, and then knowledge becomes a component of the *mens rea*. Otherwise, the argument goes, the Crown would carry the burden of disproving honest belief in consent even where it is not a live issue (either because it was not raised or does not meet the air of reality threshold). See the suggested jury instruction on the latter approach at footnote 105 of *Barton*: “If you are satisfied that the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual activity, you should have little difficulty in concluding that the accused knew or was wilfully blind to the fact that the complainant was not consenting to the sexual activity in question or was reckless and chose to take the risk.”

To prove that *(NOA)* was aware of *(NOC)*'s lack of consent, the Crown must prove one of the following¹²[CJC Note 12] :

1. that *(NOA)* actually knew that *(NOC)* did not consent to the sexual activity in question; or
2. that *(NOA)* knew there was a risk that *(NOC)* did not consent to the sexual activity in question and *(NOA)* proceeded in the face of that risk; or
3. that *(NOA)* was aware of indications that *(NOC)* did not consent to the sexual activity in question, but deliberately chose to ignore them because *(NOA)* did not want to know the truth.

Any one of these is sufficient to establish *(NOA)*'s awareness of *(NOC)*'s lack of consent. You do not all have to agree on the same one. If each of you is satisfied about any one of them beyond a reasonable doubt, the Crown will have proved the essential element of knowledge.

Where there is an air of reality to the defence of honest but mistaken belief in consent, add this instruction:

(NOA)'s position is that s/he was unaware that *(NOC)* did not consent. In fact, it is his/her position that s/he honestly believed that *(NOC)* communicated his/her consent to the sexual activity in question.

A belief is a state of mind, in this case, *(NOA)*'s state of mind. Ask yourselves whether *(NOA)* honestly believed that *(NOC)* effectively said yes through his/her words or actions.

¹² See: *R v JA*, 2011 SCC 28 at para 24.

A belief by the person charged that the complainant, in his/her own mind, wanted him/her to touch him/her but did not express that desire, is not a defence. Mere speculation on the part of the person charged as to what was going on in the complainant's mind provides no defence .

To determine whether *(NOA)* honestly believed that *(NOC)* consented to the sexual activity in question, you must consider all the circumstances surrounding that activity. Take into account any words or gestures, whether by *(NOA)* or *(NOC)*, and any other indication of *(NOA)*'s state of mind at the time.

NOA must honestly believe that *(NOC)* communicated his/her consent to the sexual activity in question. An honest belief cannot be based on *(NOA)*'s self-induced intoxication . There is no honest belief if *(NOA)* saw a risk that *(NOC)* would not consent to the physical contact, but went ahead anyway despite that risk. Similarly, there can be no honest belief if *(NOA)* was aware of indications that *(NOC)* did not consent, but deliberately chose to ignore them because *(NOA)* did not want to know the truth.

Nor can there be an honest belief in *(NOC)*'s consent to the physical contact unless *(NOA)* took reasonable steps in the circumstances known to *(NOA)* at the time to find out whether *(NOC)* consented. In order to determine whether *(NOA)* took reasonable steps, first determine what were the circumstances known to *(NOA)*. Then ask yourselves whether a reasonable person with that knowledge would make further inquiries to ensure *(NOC)* was consenting. If the answer is yes, ask whether *(NOA)* made those inquiries. If s/he did not, then s/he cannot claim s/he honestly believed *(NOC)* was consenting.

If a reasonable person would not have made further inquiries in the circumstances known to *(NOA)*, *(NOA)* may claim s/he honestly believed *(NOC)* was consenting. What a reasonable person would do depends entirely on the circumstances of the case.

(NOA)'s belief must be honest, but it does not have to be reasonable. However, you must consider whether there were reasonable grounds for *(NOA)*'s belief; the presence or absence of reasonable grounds may help you decide whether *(NOA)*'s belief was honest. Look at all the circumstances in deciding this issue. You must consider all the evidence, including anything said or done in the circumstances.

(NOA) does not have to prove that s/he honestly believed that *(NOC)* consented to the physical contact. Rather, the Crown must prove beyond a reasonable doubt that *(NOA)* had no such belief.¹

(Review relevant evidence and relate to issue.)

Unless you are satisfied beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did not consent (or, that *(NOA)* did not honestly believe that *(NOC)* consented)¹³[CJC Note 13] to the physical contact in question, you must find *(NOA)* not guilty.

If you are satisfied beyond a reasonable doubt that *(NOA)* knew that *(NOC)* did not consent (or, that *(NOA)* did not honestly believe

¹³ Include the bracketed words if the jury has been instructed on mistaken belief in consent.

that *(NOC)* consented)¹⁴[CJC Note 14] to the sexual activity in question, you must find *(NOA)* guilty.

You must not find *(NOA)* guilty of sexual assault unless you are satisfied beyond a reasonable doubt:

1. That *(NOA)* touched *(NOC)*, directly or indirectly; and
2. That *(NOA)* intentionally touched *(NOC)*; and
3. That the touching by *(NOA)* took place in circumstances of a sexual nature; and
4. That *(NOC)* did not consent to the touching by *(NOA)*; and
5. That *(NOA)* knew that *(NOC)* did not consent or *(NOA)* did not honestly believe that *(NOC)* consented)¹⁵[CJC Note 15] to the touching by *(NOA)*).

If any one of these essential elements has not been proved beyond a reasonable doubt, [or if you have a reasonable doubt with respect to *(specify defence)*] your verdict must be not guilty.

You must find *(NOA)* guilty of sexual assault if you are satisfied beyond a reasonable doubt:

1. That *(NOA)* touched *(NOC)*, directly or indirectly; and
2. That *(NOA)* intentionally touched *(NOC)*; and
3. That the touching by *(NOA)* took place in circumstances of a sexual nature; and
4. That *(NOC)* did not consent to the touching by *(NOA)*; and

¹⁴ Include the bracketed words if the jury has been instructed on mistaken belief in consent.

¹⁵ Include the bracketed words if the jury has been instructed on mistaken belief in consent.

5. That (NOA) knew that (NOC) did not consent (or, (NOA) did not honestly believe that (NOC) consented)¹⁶[CJC Note 16] to the touching by (NOA).

¹⁶ Include the bracketed words if the jury has been instructed on mistaken belief in consent.

Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law

DAVINDER SINGH *
AND KAREN BUSBY **

ABSTRACT

Canada prosecutes more people, in absolute numbers, for non-disclosure of HIV status than any other country in the world except the United States and Russia. This paper analyses the Supreme Court of Canada's decisions that, effectively, created the criminal offence of HIV non-disclosure with a particular focus on how these decisions fundamentally misunderstood the science on HIV transmission. It then considers how HIV non-disclosure prosecutions have contributed to arbitrary, unjust and stigmatized treatment of people living with HIV and have undermined public health interventions. Finally, we evaluate a recent Directive issued by the federal Justice Minister and Attorney-General of Canada to the federal Director of Public Prosecutions concerning HIV non-disclosure prosecutions against the science and public health standards.

Keywords: HIV disclosure laws; people living with HIV; prosecutorial directives; public health

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I. INTRODUCTION

Public fear of the human immunodeficiency virus (HIV), stems back to the 1980's when HIV affected mostly gay men, and the crisis was even referred to as "the gay plague."¹ In 1987, writer and cofounder of Gay Men's Health Crisis, Larry Kramer, told the *New York Times*, "You don't know what it's like to be gay and living in New York...It's like being in wartime. We don't know when the bomb is going to fall. I've had 18 friends die in the last year and a half from AIDS."² Now acquired immunodeficiency syndrome (AIDS) is the name given to a collection of symptoms and serious medical consequences in those affected with HIV after their immune systems have been incapacitated by the virus, but in the early days of HIV research, the terms AIDS and HIV were used interchangeably.

In the early 1980s, people living with HIV were only identifiable at the extremely advanced stages of disease: when the person's immune system had been completely destroyed.³ When this happened, those with HIV would become ill very quickly, usually from infection by another organism, and die rapidly. United States (U.S.) Senator Jesse Helms called for a quarantine of everyone with HIV.⁴ U.S. Education Secretary William Bennet said prisoners who test positive for HIV should be kept in prison beyond the end of their sentences.⁵ Those with HIV were seen as evil people who might "take revenge on society" by spreading the disease to the "general population."⁶

Living with HIV is very different in 2019 than it was in 1987. Most people are diagnosed early, the medications are very effective, sexual transmission of HIV can be prevented with near total certainty, and people infected with HIV can achieve a similar life expectancy as those without.⁷

¹ Robin Marantz Henig "AIDS A New Disease's Deadly Odyssey", *The New York Times Magazine* (6 February 1983), online: <www.nytimes.com/1983/02/06/magazine/aids-a-new-disease-s-deadly-odyssey.html> [perma.cc/J6V4-RAVP].

² *Ibid.*

³ *Ibid.*

⁴ United Press International "Helms Calls for AIDS Quarantine on Positive Tests", *Chicago Tribune* (16 June 1987), online: <www.chicagotribune.com/news/ct-xpm-1987-06-16-8702140384-story.html> [perma.cc/Z9TH-YW5R].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Francoise Barré-Sinoussi et al, "Expert consensus statement on the science of HIV in

While once a fatal infection, HIV has become a chronic condition which is manageable through antiretroviral medication (ART). Yet even now, with so much known about the virus, the stigma of having an HIV diagnosis is still significant and trusted institutions still cling to myths. Until 2013, Canadian Blood Services (CBS) refused to allow any man to donate blood if he had ever had sex with another man after 1977.⁸ There was no defensible reason for the CBS policy, since all blood is automatically tested for HIV using a laboratory test that, since the late 1990s, approaches 100% sensitivity and detects infection 20 days post exposure. This means, using the normal exclusion criteria applied to everyone else, there is no realistic chance of missing an infection.⁹ Even today, CBS does not allow a man to donate blood if he has had sex with another man within the last three months.¹⁰

Irrational fears are not confined to the health system; these fears have also deeply influenced how judges have interpreted *Criminal Code* provisions in order to criminalize HIV non-disclosure. (“HIV non-disclosure” describes criminal cases where a person, who knows they are HIV positive, does not disclose or misrepresents their HIV status prior to sexual activity, and exposes others to a realistic possibility of HIV transmission.) While the *Criminal Code* does not contain any explicit provisions on HIV status disclosures, judges have interpreted the code to support aggravated sexual assault charges against persons living with HIV who do not disclose their status on the ground that the non-disclosure is found to invalidate their partner’s consent to engaging in sexual activity. Canadian authorities prosecute more HIV non-disclosure cases (in absolute numbers) than all but two other countries (Russia and the U.S.).¹¹ In consequence (and as will be

the context of criminal law” (2018) 21:7 J Intl AIDS Society 1.

⁸ Canadian Blood Services, “Men who have sex with men” (6 December 2018), *Canadian Blood Services*, online: <blood.ca/en/blood/am-i-eligible/men-who-have-sex-men> [perma.cc/G6HG-MQDT].

⁹ Paul E Sax, “Screening and diagnostic testing for HIV infection” (last modified 3 July 2019), online: *UpToDate* <www.uptodate.com/contents/screening-and-diagnostic-testing-for-hiv-infection> [perma.cc/33YB-ZCBZ]; Thomas S Alexander, “Human Immunodeficiency Virus Diagnostic Testing: 30 Years of Evolution” (2016) 23:4 *Clinical & Vaccine Immunology* 249.

¹⁰ Canadian Blood Services, *supra* note 8.

¹¹ Canadian Coalition to Reform HIV Criminalization, “Community Consensus Statement” (November 2017), online: <www.hivcriminalization.ca/community-consensus-statement/> [perma.cc/EBH8-GPLQ] [Canadian Coalition].

discussed), Canada's current criminal justice approach to HIV non-disclosure has been described as unscientific, arbitrary and unjust, detrimental to public health, and in need of significant reform.¹²

In this paper, we begin with a review of the science on HIV transmission. We then examine how the Supreme Court of Canada's (SCC) decisions on the criminalization of non-disclosure of HIV status demonstrate serious misunderstandings about the science of HIV transmission. The consequences stemming from the SCC's decisions have been significant for those living with HIV in Canada, so we examine some ways that the law could be brought into line with public health principles. In late 2018, Jody Wilson-Raybould (then-federal Justice Minister and Attorney-General of Canada) issued a "Directive" to the federal Director of Public Prosecutions concerning HIV non-disclosure prosecutions. In the last part of the paper we evaluate this Directive against the science and public health standards.

II. THE SCIENCE ON HIV TRANSMISSION

HIV is a virus that can be transmitted from person to person, usually in one of three ways: through sexual intercourse, exposure to infected blood, or transmission from mother to child in pregnancy (perinatal).¹³ The most common forms of sexual intercourse that result in transmission are anal and vaginal intercourse.¹⁴ Only a very small portion of the people who are exposed to the virus will become infected. The risk of transmission from sexual intercourse depends on several factors, including viral load, sexual actions and personal health status.¹⁵ Viral load refers to the number of copies of the HIV virus in every millilitre (mL) of blood and can be thought of as the "concentration" of HIV in the blood. After a person is infected with HIV, the virus will keep producing more copies of itself (replicate) until something stops it, either the immune system or medications.¹⁶ For all forms of transmission (sexual, blood, and perinatal) of HIV, a higher viral load in

¹² *Ibid.*

¹³ Paul E Sax, "The natural history and clinical features of HIV infection in adults and adolescents" (last modified 24 July 2018), online: *UpToDate* <www.uptodate.com/contents/the-natural-history-and-clinical-features-of-hiv-infection-in-adults-and-adolescents> [perma.cc/E637-LSVY] [Sax, "clinical features of HIV"].

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

the person with HIV is associated with a greater risk of transmission.¹⁷ The viral load is measured with one of several commercially available tests. All these tests have a lower limit of detection below which they cannot count the number of copies of the virus. Anything below this lower limit is referred to as an “undetectable viral load.” This lower limit has decreased over time. In 1997, the lower limit of detection was 200 copies per mL.¹⁸ The lower limit of detection was 40 copies per mL in 2007, and today the lower limit is usually 20 copies per mL.¹⁹ At each of these points in time, a viral load below those levels would be classified by the developers of the tests as “undetectable.”

Different sexual actions also pose different risks for sexual transmission of HIV. Assuming that one’s partner has HIV, is not using a form of barrier protection such as a condom (so-called “unprotected sex”), does not have a concurrent sexually transmitted infection (STI) or immune system impairment, and is not on treatment, the average risk of transmission of HIV for each sex act is as follows²⁰:

Sexual act	Risk of transmission
Receptive anal intercourse	1 in 72
Insertive anal intercourse	1 in 900
Receptive penile-vaginal intercourse	1 in 1,250
Receptive or insertive penile-oral sex	0 to 4 in 10,000

Transmission risk can be lowered by the use of male condoms. A review in 1997 of all the studies published up to that date suggested that consistent

¹⁷ *Ibid.*

¹⁸ Michael D Hughes et al, “Monitoring Plasma HIV-1 RNA Levels in Addition to CD4+ Lymphocyte Count Improves Assessment of Antiretroviral Therapeutic Response” (1997) 126:12 *Annals Internal Medicine* 929 at 931.

¹⁹ Kimberly A Sollis et al, “Systematic Review of the Performance of HIV Viral Load Technologies on Plasma Samples” (2014) 9:2 *PLoS One* 1.

²⁰ Myron S Cohen, “HIV infection: Risk factors and prevention strategies” (last modified 13 May 2018) online: *UpToDate* <www.uptodate.com/contents/hiv-infection-risk-factors-and-prevention-strategies/print> [perma.cc/3AVK-TU59] [Cohen, “Risk factors”].

condom use can reduce the risk of HIV transmission by 90-95%.²¹ However, a similar review conducted in 2002 suggested that consistent condom use only reduced the risk by 80%.²² Note that the authors of these reviews could not assess if the condoms were used correctly.²³ Therefore, the reduction in risk presented in each review would represent average condom use, including those who applied the condom incorrectly. Proper condom use would likely lead to a greater reduction in risk.

The risk of transmission of HIV is also affected by the personal health status of both the person without HIV and the person with HIV. If either partner has another STI, the risk of HIV transmission is increased approximately 3-4 times.²⁴ The risk of transmission would also increase if the person without HIV was taking any medication or had any medical condition that impaired his or her immune system.

The most effective way of preventing sexual transmission of HIV is by decreasing the viral load of the person with HIV. Viral load is the most important risk factor for transmission of HIV.²⁵ For each 10-fold decrease in the viral load, the risk of transmission is lowered 2.5-fold.²⁶ A person's viral load is decreased when on ART treatment for HIV. Without treatment, the viral load at the early stage of infection can often be greater than 1 million copies per mL.²⁷ However, with ART the viral load should decrease by 10-fold after one to two weeks, 100-fold after four weeks, and be undetectable (less than 50 copies per mL in this study) after 8 to 24 weeks.²⁸ So if a person is on ART and able to decrease his viral load from 1 million copies per mL to 10 copies per mL over 8 to 24 weeks, this would decrease the risk of infection 100 times. However, even this may

²¹ *Ibid.*

²² *Ibid.*

²³ Steven D Pinkerton & Paul R Abramson, "Effectiveness of Condoms in Preventing HIV Transmission" (1997) 44:9 Soc Science & Medicine 1303; S Weller & K Davis, "Condom effectiveness in reducing heterosexual HIV transmission" (2002) 1:CD003255 Cochrane Database Systematic Reviews 1.

²⁴ Cohen, "Risk factors", *supra* note 20.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Sax, "Clinical features of HIV", *supra* note 13.

²⁸ Paul E Sax, "Patient monitoring during HIV antiretroviral therapy" (last modified 7 May 2018), online: UpToDate <www.uptodate.com/contents/patient-monitoring-during-hiv-antiretroviral-therapy> [perma.cc/NT2D-BDDN].

underestimate the risk reduction from ART; there is evidence that below a certain viral load threshold HIV may not even be transmissible.

Studies often estimate risk of HIV transmission by following HIV-serodiscordant couples; that is, relationships where one person is infected with HIV and the other person is not infected with HIV. There are no confirmed cases of sexually transmitted HIV to an HIV-negative partner when the HIV-positive partner was continuously on ART with sustained viral suppression. In one study with 415 heterosexual HIV-serodiscordant couples in Uganda, followed for an average of two years, despite 89% of them never wearing condoms, no transmissions of HIV occurred when the viral load was less than 1,500 copies per mL.²⁹ In the HPTN 052 trial, involving 1,763 HIV-serodiscordant couples, 97% of which were heterosexual, randomized to receive early or delayed treatment, and with 95-96% of them always using condoms, there were no transmissions of HIV when the viral load was less than 400 copies per mL.³⁰ In the PARTNER study of 888 HIV-serodiscordant couples (548 heterosexual and 340 same-sex male couples) who chose not to use condoms, there was no documented HIV transmission when the partner with HIV was virally suppressed on ART (less than 200 copies per mL in this study), after an average of 1.5 years of follow-up.³¹ Finally, in the PARTNER2 study, 779 HIV-serodiscordant, same-sex, male couples were followed for an average of 1.6 years, and after 74,567 sex acts without a condom, again there was no documented HIV transmission when the partner with HIV was virally suppressed on ART (less than 200 copies per mL). It is also important to note that the threshold at which there was no HIV transmissions may have been higher than 400 and 200 copies per mL, but those were the pre-determined levels at which the viral load was considered “suppressed.”

Taken together, these studies show that with a viral load of less than 200 copies per mL, the risk of transmission of HIV, even without a condom, is less than 1 in 100,000, and may not even be possible. This risk is in the same realm as the average yearly risk of being injured by a lightning strike

²⁹ TC Quinn et al, “Viral Load and Heterosexual Transmission of Human Immunodeficiency Virus Type 1” (2000) 342:13 *New England J Medicine* 921.

³⁰ Myron S Cohen et al, “Antiretroviral Therapy for the Prevention of HIV-1 Transmission” (2016) 375:9 *New England J Medicine* 830.

³¹ AJ Rodger et al, “Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy” (2016) 316:2 *J American Medical Assoc* 171.

in Canada (1 in 300,000), and lower than the average yearly risk of death from a motor vehicle collision in Canada (1 in 19,000 in 2015).³² Most of this evidence was known by the early 2000s, although some has been published in the last few years. These findings were confirmed with another systematic review published in late 2018 in the *Canadian Medical Association Journal*.³³ The authors concluded that “there is a negligible risk of sexually transmitting HIV when an HIV-positive sex partner adheres to antiretroviral therapy and maintains a suppressed viral load of less than 200 copies/mL on consecutive measurements every 4 to 6 months.”³⁴ But as we will now discuss, the case law on non-disclosure of HIV status has misunderstood or not kept up with the science.

III. HIV SCIENCE AND THE SUPREME COURT OF CANADA

A. *Cuerrier*: Fraud and “Significant Risk”

In September 1998, the SCC released its decision in the case of *R v Cuerrier* and criminalized the non-disclosure of HIV status prior to sexual activity by modifying the interpretation of fraud as it related to consent to sexual intercourse.³⁵ Henry Cuerrier, who had been diagnosed with HIV, was charged with two counts of aggravated assault for having unprotected (no condom) vaginal intercourse (UVI) with two women without disclosing his HIV status before those sexual interactions.³⁶ He had sex with the first woman approximately 100 times, and sex with the second woman approximately 10 times.³⁷ Neither woman contracted HIV.³⁸ The SCC did not note whether the defendant was on any treatment for HIV; a telling

³² Government of Canada, “Lightning in Canada: frequently asked questions” (last modified 13 August 2018), online: <www.canada.ca/en/environment-climate-change/services/lightning/frequently-asked-questions.html> [perma.cc/ZW6G-EF2Z] [*Lightning*]; Government of Canada, “Canadian Motor Vehicle Traffic Collision Statistics: 2015” (last modified 26 May 2017), online: <www.tc.gc.ca/eng/motorvehiclesafety/tp-tp3322-2015-1487.html> [perma.cc/T6A4-ZWM5] [*MVC*].

³³ Jennifer LeMessurier et al, “Risk of sexual transmission of human immunodeficiency virus with antiretroviral therapy, suppressed viral load and condom use: a systematic review” (2018) 190:46 *Can Medical Assoc J* E1350 at E1358.

³⁴ *Ibid.*

³⁵ *R v Cuerrier*, [1998] 2 SCR 371, [1998] SCJ No 64 [*Cuerrier* cited to SCJ].

³⁶ *Ibid.*

³⁷ *Ibid* at paras 79, 82.

³⁸ *Ibid* at para 83.

omission given the correlation between viral load and risk of transmission cannot be understated. Other risks related to transmission, such as concurrent STIs, and other medical conditions of the defendant or the partners were also not mentioned in the decision. Before *Cuerrier*, the SCC used a narrow interpretation for actions that would vitiate consent to sexual intercourse. As Justice McLachlin stated, the law had been settled for more than a century that:

[F]raud does not vitiate consent to assault unless the mistake goes to the nature of the act or the identity of the partner. Fraud as to collateral aspects of a consensual encounter, like the possibility of contracting serious venereal disease, does not vitiate consent.³⁹

However, Justice Cory, delivering the decision for the majority, expanded the definition of fraud for consent to sexual intercourse. Fraud for those living with HIV now included not disclosing one's HIV status.⁴⁰ More specifically, fraud included any action, or inaction, that was considered "deceptive" and resulted in "deprivation."⁴¹ For the criterion of deception, theoretically the Crown still needed to prove that the sexual partner would not have consented to sexual intercourse if the defendant had disclosed his HIV status before sexual intercourse.⁴² However, Justice Cory considered this basically a given, at least in the case of UVI, as he said that it is unlikely anyone would agree to this.⁴³ Deprivation, as Justice Cory defined it, is "a significant risk of serious bodily harm."⁴⁴ Unfortunately, the Court did not define either "significant risk" or "serious bodily harm." Justice Cory did go on to say:

The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm.⁴⁵

He also qualified "significant risk" by saying:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be

³⁹ *Ibid* at para 25.

⁴⁰ *Ibid* at para 127.

⁴¹ *Ibid* at paras 126-128.

⁴² *Ibid* at para 130.

⁴³ *Ibid*.

⁴⁴ *Ibid* at para 128.

⁴⁵ *Ibid* at para 137.

found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation.⁴⁶

“Significant risk” and “serious bodily harm” stood as the legal definition of risk and harm for HIV non-disclosure until 2012, the year the SCC decided the case of *R v Mabior*.

The SCC made two other important determinations in *Cuerrier*. First, the defendant was not charged with simple assault, or sexual assault, but instead with aggravated assault and the SCC suggested that their analysis also applied to aggravated sexual assault.⁴⁷ Aggravated assault and aggravated sexual assault are reserved for the most severe acts of assault. They apply to someone “who wounds, maims, disfigures or endangers the life of the complainant.”⁴⁸ Aggravated assault carries a maximum penalty of 14 years in prison,⁴⁹ and aggravated sexual assault carries a maximum penalty of life in prison,⁵⁰ the same sentence as for someone convicted of murder.⁵¹ Since the SCC believed that HIV infection could result in death, it decided that the defendant endangered the life of his sexual partners. The SCC failed to consider the effectiveness of HIV treatment or any modifying factors other than condom use. There had already been significant advancements in treatment for HIV by 1998, the year *Cuerrier* was decided. ART was used to treat people with HIV, and between 1995 and 1997, the life expectancy lost for the average gay or bisexual man living with HIV in Vancouver’s West End was 10 years.⁵² To put this into perspective, the life expectancy lost for the average 40-year-old, non-smoking man is three years if he is overweight, and 6 years if he is obese (compared to someone of ideal bodyweight).⁵³ Second, the Court decided that there was no requirement of actual harm to the sexual partners, as in this case neither of the defendant’s sexual partners acquired HIV.⁵⁴ Simply exposing someone to the risk of acquiring HIV was enough to establish the charge of aggravated sexual assault.

⁴⁶ *Ibid* at para 129 [emphasis added].

⁴⁷ *Ibid* at para 14.

⁴⁸ *Criminal Code*, RSC 1985, c C-46, s 268(1).

⁴⁹ *Ibid*, s 268(2).

⁵⁰ *Ibid*, s 273(2).

⁵¹ *Ibid*, s 235(1).

⁵² Evan Wood et al, “Modern Antiretroviral Therapy Improves Life Expectancy of Gay and Bisexual Males in Vancouver’s West End” (2000) 91:2 Can J Public Health 125.

⁵³ A Peeters et al, “Obesity in adulthood and its consequences for life expectancy: a life-table analysis” (2003) 138:1 Annals Internal Medicine 24.

⁵⁴ *Cuerrier*, *supra* note 35 at para 95.

B. *Mabior*: “Realistic Possibility”

Criminalization of HIV in Canada was supposed to be clarified in 2012 by the SCC in *R v Mabior*.⁵⁵ Clato Mabior was charged with six counts of aggravated sexual assault for having vaginal intercourse (VI) with six women without disclosing his HIV diagnosis.⁵⁶ He engaged in both unprotected (no condom) vaginal intercourse (UVI) and protected (with a condom) vaginal intercourse (PVI). During sexual encounters with some of the women, he was on ART, including times when his viral load was undetectable (less than 40 copies per mL using the tests at that time).⁵⁷ Chief Justice (CJ) McLachlin stated for the SCC that, after *Cuerrier*, the circumstances where non-disclosure of HIV vitiated consent and converted sexual activity into aggravated sexual assault were unclear.⁵⁸ The SCC tried to clarify the circumstances by saying that one only need disclose that one is living with HIV if there is a “realistic possibility that HIV will be transmitted.”⁵⁹ The SCC went on to say that there would not be a requirement to disclose if two criteria were met: “the HIV-positive person has a low viral count as a result of treatment and there is condom protection.”⁶⁰ The term low viral load is used by the SCC to define less than 1,500 copies per mL. This is not a commonly used medical or scientific threshold and it is unclear why it was used by the SCC.

When it considered the *Mabior* case, the Manitoba Court of Appeal (MBCA) had unanimously decided that the threshold of less than “a realistic possibility” of transmission is met with one of: undetectable viral load (below 40 copies per millilitre (mL); the threshold given to the MBCA for detection at the time) or careful and consistent condom use.⁶¹ The SCC rejected this definition of “a realistic possibility” asserted by the MBCA. Unfortunately, McLachlin CJ did not go further to clarify what “a realistic possibility” of transmission means. This failure to clarify is inexplicable given her earlier comments in the decision:

⁵⁵ *R v Mabior*, 2012 SCC 47 [*Mabior* SCC].

⁵⁶ *R v Mabior*, 2010 MBCA 93 [*Mabior* CA].

⁵⁷ *Ibid* at paras 119-137.

⁵⁸ *Mabior* SCC, *supra* note 55 at para 3.

⁵⁹ *Ibid* at para 4.

⁶⁰ *Ibid* [emphasis added].

⁶¹ *Ibid* at paras 93-103; *Mabior* CA, *supra* note 56 at para 103.

About "significant risk", some people say that virtually any risk of serious bodily harm is significant. Others argue that to be significant, the risk must rise to a higher level. These debates centre on statistical percentages. Is a 1% risk "significant"? Or should it be 10% or 51% or, indeed, .01%? How is a prosecutor to know or a judge decide? And if prosecutors, defence counsel and judges debate the point, how – one may ask – is the ordinary Canadian citizen to know?⁶²

C. Where the SCC Got the Science Wrong

In contrast to the SCC, the MBCA went through a very detailed scientific analysis for risk of HIV transmission based on expert witness testimony provided by Dr. Richard Smith, an expert in the area of HIV and AIDS who testified for the Crown in the original trial. The MBCA decided that either an undetectable viral load or careful and consistent condom use would remove the obligation to disclose that one is living with HIV.⁶³ The MBCA determined that without ART and without using a condom, the average risk of HIV transmission from a single event of receptive vaginal intercourse (RVI) was 1 in 1,250, and that it was significant enough to require disclosure.⁶⁴ The MBCA accepted that condom use in general decreased the risk of transmission of HIV by 80%, though careful and consistent condom use would likely be even more effective.⁶⁵ It therefore determined that the risk of transmission for RVI with condom use, but without being on ART, would be approximately 1 in 10,000.⁶⁶ This level of risk, the MBCA said, was low enough that there was not a significant risk of transmission.⁶⁷ However, the MBCA did go on to say that if the condom broke, this would be equivalent to UVI, so the person living with HIV would have to disclose his status so the partner could obtain post-exposure prophylaxis for HIV.⁶⁸ With this decision, the MBCA established a risk threshold of somewhere between 1 in 1,250 to 1 in 10,000 as the point at which disclosure of HIV status would be required.

The MBCA applied the same type of logic when it considered the issue of viral load and ART for HIV. According to the evidence considered by the MBCA, the risk of transmission of HIV for RVI with an undetectable

⁶² *Mabior SCC*, *supra* note 55 at para 16.

⁶³ *Mabior CA*, *supra* note 566.

⁶⁴ *Ibid* at para 77.

⁶⁵ *Ibid* at para 86; Cohen, "Risk factors", *supra* note 20.

⁶⁶ *Mabior CA*, *supra* note 566 at para 86.

⁶⁷ *Ibid* at para 89.

⁶⁸ *Ibid* at para 97.

viral load (below 40 copies per mL) was somewhere between 1 in 100,000 and 1 in 1,000,000.⁶⁹ Therefore, a single event of RVI would be low enough to not pose a “significant risk” of transmission.⁷⁰

Using this risk threshold of somewhere between 1 in 1,250 to 1 in 10,000, consent would not be vitiated without disclosure from one sexual encounter if a condom was used, but it may be vitiated if there were several sexual encounters, even with a condom. As well, consent would not be vitiated if the viral load was less than 40 copies per mL, regardless of the number of sexual encounters, but higher viral loads could vitiate consent if the risk of transmission of HIV was greater than 1 in 10,000. While it is difficult to be precise when estimating these types of risks, especially since there are other factors that can affect HIV transmission, this framework could have informed concrete legal information for people living with HIV.

The SCC did not analyse the evidence on transmission as carefully as the MBCA, and even misquoted and misunderstood parts of the MBCA decision. First, the SCC said that the MBCA used a threshold of “high risk” of transmission of HIV before the MBCA considered the risk significant enough to vitiate consent.⁷¹ This is incorrect. The MBCA used the ambiguous “significant risk” threshold provided by the SCC in *Cuerrier* and decided that 1 in 10,000 was below that threshold. Second, the SCC insinuated that when Dr. Smith stated “it is highly advisable that persons even with an undetectable viral load who are having sex with more than one partner unfailingly and correctly use a condom” in the original trial, he was referring to the risk of transmission of HIV to the person without HIV.⁷² However, as noted by the MBCA:

[Dr. Smith’s] reason was not because it affected the risk of transmission to other people, but rather because it affected the accused’s own risk. If he did not wear a condom and had multiple partners, even though he was on antiretroviral therapy, he was at risk of getting STDs and would be opening himself to the possibility of exacerbating the course of his own disease by infecting himself with a strain of uncontrolled HIV from another person.⁷³

Third, the SCC made a serious error in misquoting a study on ART effectiveness, also showing a lack of understanding of the scientific

⁶⁹ *Ibid* at para 106.

⁷⁰ *Ibid* at para 155.

⁷¹ *Mabior* SCC, *supra* note 55 at para 84.

⁷² *Ibid* at para 101.

⁷³ *Mabior* CA, *supra* note 56 at para 110 [emphasis added].

information. Referencing research done by M. S. Cohen and others,⁷⁴ McLachlin CJ stated that:

The most recent wide-scale study on this issue, relied on by a number of interveners, concludes that the risk of HIV transmission is reduced by 89 to 96% when the HIV-positive partner is treated with antiretrovirals, irrespective of whether the viral load is low or undetectable.⁷⁵

However, the authors of that study actually said:

[There] was a relative reduction of 96% in the number of linked HIV-1 transmissions resulting from the early initiation of antiretroviral therapy, as compared with delayed therapy. There was a relative reduction of 89% in the total number of HIV-1 transmissions resulting from the early initiation of antiretroviral therapy, regardless of viral linkage with the infected partner.⁷⁶

This is a serious error by the SCC. Viral load is the most important risk factor for transmission of HIV.⁷⁷ Every reference to risk of transmission of HIV includes viral load. For the SCC to say that the risk of transmission of HIV is reduced, irrespective of whether the viral load is low or undetectable, means that the SCC did not understand what that article said and that the SCC had a fundamental misunderstanding of the scientific evidence in this case. Viral linkage is the process of confirming that the HIV virus in the partner who was initially infected is the same as the HIV virus in the other partner. The HIV virus can mutate over time, so different people can have slightly different strains of the HIV virus. Using viral linkage is a way of confirming that the newly infected person received the virus from her partner rather than from someone else. It has nothing to do with viral load.

As well, the SCC did not seem to understand how to interpret another key piece of scientific evidence: the combination of two factors that reduce risk. The SCC found that even though a low viral load would reduce the risk of transmission of HIV by 89 to 96% from the baseline risk of transmission from RVI, this reduction was not enough to justify non-disclosure.⁷⁸ If a man living with HIV has RVI with a woman, the average risk of transmission is 1 in 1,250, without a condom and without being on ART.⁷⁹ Therefore, combining these two statistics, a risk reduction of 92.5%

⁷⁴ Myron S Cohen et al, "Prevention of HIV-1 Infection with Early Antiretroviral Therapy" (2011) 365:6 New England J Medicine 493 [Cohen, "Prevention of HIV"].

⁷⁵ *Mabior SCC*, *supra* note 55 at para 101 [emphasis added].

⁷⁶ Cohen, "Prevention of HIV", *supra* note 744 at 503 [emphasis added].

⁷⁷ Cohen, "Risk factors", *supra* note 20.

⁷⁸ *Mabior SCC*, *supra* note 55 at paras 100-101.

⁷⁹ Cohen, "Risk factors", *supra* note 20.

(halfway between the 89 to 96% range the SCC accepted) after starting ART to achieve a low viral load (less than 1,500 copies per mL) means the average risk of RVI in this case falls to 1 in 16,667, without using a condom.⁸⁰ If we add the 80% risk reduction from condom use discussed above, the average risk from RVI in this situation drops to 1 in 83,333. The SCC did not perform these calculations or demonstrate any understanding of multiplication of risk, a standard method for assessing risk. McLachlin CJ simply states that the standard for vitiating consent without disclosure is “a realistic possibility of transmission of HIV,” and that this is negated by the combination of a low viral load (less than 1,500 copies per mL) and condom use, but not by an undetectable viral load alone.⁸¹ There is no comment on why 1 in 83,333 (RVI on ART with a condom) is not “a realistic possibility of transmission” but 1 in 16,667 (RVI on ART with no condom) falls above this threshold. Again, for comparison, the average yearly risk of death from a motor vehicle collision each year in Canada is approximately 1 in 19,000.⁸²

So, despite the SCC stating that its decision in *Mabior* would clarify the law surrounding non-disclosure of HIV, it simply went from the standard of “significant risk” in *Cuerrier* to “a realistic possibility of transmission of HIV” without any explanation of what a “realistic possibility” actually means. The standard is arguably even more confusing after *Mabior* than after *Cuerrier* since the SCC said the risk of transmission from an undetectable viral load was too high, but the risk from a low viral load with condom use was acceptable. This is incomprehensible since an undetectable viral load likely poses a lower risk than the combination of a viral load of 1,500 copies per mL (the SCC threshold for a low viral load) and condom use.⁸³

The SCC also made one other important decision in *Mabior*. It stated that if the Crown establishes that a defendant living with HIV did not disclose his status to his partner, and engaged in sexual intercourse without a condom, there was a *prima facie* case of deception and deprivation.⁸⁴ Then,

⁸⁰ Note: A 92.5% risk reduction means that the new risk is only 7.5% that of the original risk (or 7.5/100). Therefore, a 92.5% reduction in risk for RVI from condom use can be calculated by multiplying the original risk, 1 in 1,250, by 7.5%, or 7.5/100, which equals 1 in 16,667.

⁸¹ *Mabior* SCC, *supra* note 55 at paras 100, 104.

⁸² MVC, *supra* note 32.

⁸³ Cohen, “Risk factors”, *supra* note 20.

⁸⁴ *Mabior* SCC, *supra* note 55 at para 105; Canada, Department of Justice, *Criminal Justice System’s Response to Non-Disclosure of HIV*, (Ottawa: DOJ, 2017) at 12, online (pdf):

it was up to the defence to show that there was no realistic possibility of transmission, which the SCC referred to as a “tactical burden.”⁸⁵ Due to the SCC’s misapplication of the scientific evidence, and not understanding that a viral load of less than 200 copies per mL results in a risk of HIV transmission, even without a condom, of less than 1 in 100,000,⁸⁶ this essentially shifts the burden of proof to the defence. The defendant must call evidence of his medical record and expert witnesses to establish the actual risk of transmission of HIV. However, the Crown is allowed to establish a *prima facie* case without actually proving that there was any risk. This is a fundamental flaw in the decision and, probably (although it is beyond the scope of this paper to permit further exploration) a breach of one of the core principles of the Canadian justice system: the presumption of innocence.

In *Mabior*, the Court was given the opportunity to clarify the ambiguous definition of “significant risk” of HIV transmission that the justice system was left with after *Cuerrier*. The MBCA went through a careful and rigorous appraisal of the scientific evidence presented at the original trial, most of which the SCC ignored, misrepresented, or misinterpreted. After the SCC *Mabior* decision, lawyers, judges, and the public across Canada are left with contradictory and ambiguous messaging regarding when a person with HIV may be charged for HIV non-disclosure.

D. HIV Non-disclosure post-*Cuerrier* and *Mabior*: Case Law and Prosecutorial Directives

The *Cuerrier* decision had significant consequences for those living with HIV in Canada. Between 1998 and 2012, more than 130 people living with HIV were charged for allegedly not disclosing their HIV status to a sexual partner.⁸⁷ In a 2017 review by the Department of Justice Canada (DOJC), of 59 criminal cases between 1998 and 2017 with HIV non-disclosure charges that did not involve any forced sexual contact, 45 (or 76%) resulted in findings of guilt.⁸⁸ Twenty-three of those findings of guilt were from

<www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/hivnd-vihnd.pdf>
[perma.cc/Y586-BSHE] [DOJC].

⁸⁵ *Ibid.*

⁸⁶ Cohen, “Risk factors”, *supra* note 20.

⁸⁷ *R v Mabior*, 2012 SCC 47, (Factum of the Interveners at para 6).

⁸⁸ DOJC, *supra* note 84 at 14.

trial.⁸⁹ In 26 of those 45 cases (58%), there was no transmission of HIV to any partners.⁹⁰ Aggravated sexual assault or aggravated assault accounted for 85% of the charges laid for those 45 findings of guilt.⁹¹ The other 15% involved a range of charges, from attempted murder to common nuisance.⁹² Sentencing information was available for 43 of the 45 cases. In 20 of those cases, the defendant was sentenced to imprisonment for 5 years or longer: 6 people were sentenced to 10-15 years, 2 people were sentenced to 18 years, and 1 person was sentenced to life imprisonment.⁹³

Lower courts have responded differently to the uncertainty of “significant risk” and “realistic possibility of transmission of HIV.” As summarized by the DOJC, the 2013 *Felix* decision by the Ontario Court of Appeal upheld the defendant’s conviction for aggravated sexual assault where the defendant did not use a condom and no evidence of transmission risk or viral load was introduced.⁹⁴ It stated that the defendant’s viral load and the degree of risk were not relevant since there was sexual intercourse without a condom.⁹⁵ Following *Felix*, in the 2013 *Murphy* decision, the Ontario Superior Court of Justice found that engaging in sexual intercourse once without a condom where HIV was not transmitted and viral load was less than 50 copies per mL was enough to convict the defendant of aggravated sexual assault.⁹⁶ Again, there is no documented evidence that it is even possible to transmit the virus with a viral load of less than 200 copies per mL. In the 2017 *Schenkels* decision, the MBCA upheld a conviction of aggravated sexual assault for three acts of sexual intercourse without a condom, despite no evidence being introduced of the defendant’s viral load or specific risk of transmission.⁹⁷

Courts in other provinces have interpreted *Mabior* differently. Nova Scotia courts, starting in 2013 with the *JTC* decision, have found that the realistic possibility of transmission test is not met when there is sex without

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 15.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid* at 12.

⁹⁵ *Ibid* at 12-13.

⁹⁶ *Ibid* at 13.

⁹⁷ *R v Schenkels*, 2017 MBCA 62.

a condom and a viral load of less than 500 copies per mL.⁹⁸ Ontario courts have also changed their standard since 2017, following the lead of Nova Scotia, saying that a viral load of less than 60 copies per mL was low enough to remove a realistic possibility of transmission.⁹⁹ Only two provinces, Ontario and British Columbia (BC), have established prosecutorial directives for HIV non-disclosure. These two directives are not consistent with each other. Ontario's directive states that:

[I]f a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months, there is also no realistic possibility of transmission. In these circumstances a failure to disclose does not result in criminal liability for exposure to HIV.¹⁰⁰

The BC Directive takes a very different approach.¹⁰¹ According to a submission made by the Canadian HIV/AIDS Legal Network, it suffers from various deficiencies including: no guidance on limiting prosecutions, a bias toward prosecuting widely, lack of guidance on the meaning of "realistic possibility of transmission," and a limited understanding of the "public interest."¹⁰²

The Canadian HIV/AIDS Legal Network and others¹⁰³ have been calling for reform of Canada's criminal HIV disclosure law for years. More recently, out of concern that "Canada's approach to HIV criminalization is unscientific, unjust and undermines public health,"¹⁰⁴ experts in medicine and law formed the Canadian Coalition to Reform HIV Criminalization

⁹⁸ DOJC, *supra* note 84 at 13.

⁹⁹ *Ibid* at 13.

¹⁰⁰ Ontario, Ministry of the Attorney General, *Crown Prosecution Manual*, (Toronto: MAG, 2017) at "Sexually Transmitted Infections and HIV Exposure Cases", online (pdf): <files.ontario.ca/books/crown_prosecution_manual_english_1.pdf> [perma.cc/H48T-GRJU].

¹⁰¹ BC Prosecution Service, "Sexual Transmission, or Realistic Possibility of Transmission, of HIV" in *Crown Counsel Policy Manual*, online (pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf> [perma.cc/7AFN-RSYB].

¹⁰² Canadian HIV/AIDS Legal Network, "Ending Unjust HIV Prosecutions in British Columbia: Modernizing prosecutorial policy" (January 2019), online at <www.aidslaw.ca/site/ending-unjust-hiv-prosecutions-in-british-columbia/?lang=en> [perma.cc/HA35-LR6C].

¹⁰³ Among others, HIV & AIDS Legal Clinic Ontario (HALCO), Positive Living Society of British Columbia, Canadian Positive Peoples Network (CPPN), Ontario Working Group on Criminal Law + HIV Exposure (CLHE), and, more recently, the Canadian Coalition to Reform HIV Criminalization.

¹⁰⁴ Canadian Coalition, *supra* note 11 at 2.

(CCRHC). While we have focused so far in this paper on the problems with misunderstandings about HIV science, there are other problems with the law especially from a public health perspective. We turn now to a brief examination of some of these problems.

IV. HOW HIV NON-DISCLOSURE LAWS UNDERMINE PUBLIC HEALTH

A. Arbitrariness, Discrimination and Stigmatization in HIV Prosecutions

People who have HIV are still stigmatized in Canada.¹⁰⁵ HIV is treated in criminal law in a fundamentally different way than other STIs or any other risk associated with sexual activity. When someone agrees to sexual activity, they agree to risk associated with transmission of chlamydia, gonorrhoea, syphilis, hepatitis B, hepatitis C, oral and genital herpes, and pregnancy. Depending on the sexual activity, they may also be agreeing to the risk associated with transmission of hepatitis A, hepatitis E, and other infectious organisms. Hepatitis C may be fatal, and until very recently was not consistently curable. However, in the 2002 *Jones* case, the New Brunswick Court of Queen's Bench decided that someone with hepatitis C does not need to disclose his condition to a sexual partner, even for anal sex without a condom.¹⁰⁶ In *Jones*, the risk of transmission considered by the Court for anal sex without a condom, 1-2.5% (which equated to a risk of 1 in 40 to 1 in 100), was low enough not to pose a significant risk of serious bodily harm.¹⁰⁷ Compare this risk threshold to the threshold of 1 in 83,333 that the SCC seemed to be saying was necessary for those with HIV to not pose a significant risk of serious bodily harm. Oral and genital herpes are not curable and can cause serious health risks in childbirth. Hepatitis B is

¹⁰⁵ See e.g. MA Kesler et al, "Prosecution of non-disclosure of HIV status: Potential impact on HIV testing and transmission among HIV-negative men who have sex with men" (2018) 13:2 PLOS ONE 1; Sophie E Patterson et al, "The Impact of Criminalization of HIV Non-Disclosure on the Healthcare Engagement of Women Living with HIV in Canada: a Comprehensive Review of the Evidence" (2015) 18 J Intl AIDS Society 1; Akim Adé Larcher & Alison Symington, *Criminals and Victims? The Impact of the Criminalization of HIV Non-Disclosure on African, Caribbean and Black Communities in Ontario*, (African and Caribbean Council on HIV/AIDS in Ontario, November 2017).

¹⁰⁶ *R v Jones*, 2002 NBQB 340.

¹⁰⁷ *Ibid* at 26.

not curable, can lead to liver cancer, and can be transmitted in pregnancy. Hepatitis A and E can be fatal. Syphilis can be transmitted in pregnancy and cause significant health consequences for newborns. Gonorrhea can cause septic arthritis and lead to joint destruction. Both chlamydia and gonorrhea can lead to pelvic inflammatory disease, which can cause infertility and can be life threatening. Yet prosecutions for non-disclosure of these other STI's are unheard of in Canada.¹⁰⁸

HIV may be treated differently from every other STI because it originally appeared to be uniformly fatal, but also perhaps because of its initial association with gay men. Canada has a significant history of discrimination against homosexuality, and gay men in particular. It is still illegal to have anal sex in Canada, unless you are "husband and wife," or over 18 years old and no more than two people are involved.¹⁰⁹ This provision is still contained in the *Criminal Code* and still applied.

Even after Ontario struck down the law in 1995, police continued to charge people with anal intercourse. Between 2008 and 2014 in Ontario, 22 people were charged with anal intercourse under Section 159. Two of those were youth. More than half of those charged in Quebec were youth.¹¹⁰

As already noted, even Canadian Blood Services still uses policies that discriminate against gay men donating blood, with no basis in science.¹¹¹ Police and prosecutors also seem to pursue charges more often when the couples are heterosexual. Eighty-nine percent of the 45 cases the DOJC reviewed that resulted in a conviction involved heterosexual partners.¹¹² However, in Canada 59% of those with HIV who were exposed through sexual contact are gay men.¹¹³ Speculating about the reason for this large discrepancy, perhaps the justice system feels more obligated to "protect" heterosexual "victims" from HIV than gay men.

Another explanation may be the higher prevalence of HIV among men of colour. Canada also has a significant history of discrimination against men of colour. The DOJC reported that in 2015, 18.7% of diagnoses of

¹⁰⁸ DOJC, *supra* note 84 at 17.

¹⁰⁹ *Criminal Code*, *supra* note 48, s 159.

¹¹⁰ Egale Canada Human Rights Trust, *The Just Society Report: Confronting the Legacy of LGBTQ2SI Discrimination in Canada*, (Toronto: Egale, 2016) at 40, online: <www.academia.edu/26229209/The_Just_Society_Report_Confronting_the_Legacy_of_LGBTQ2SI_Discrimination_in_Canada> [].

¹¹¹ Canadian Blood Services, *supra* note 8.

¹¹² DOJC, *supra* note 84 at 15.

¹¹³ *Ibid* at 4.

HIV were among “black” individuals.¹¹⁴ However, of the 121 people who were charged between 1989 and 2016 and whose ethnicity was known, 36% were identified as “black”;¹¹⁵ and since *Mabior* in 2012, 48% of people who have faced charges and whose ethnicity is known were “black.”¹¹⁶ There could be more reasonable explanations for the discrepancies noted for gay men and individuals identified as “black,” but without reviewing all the case files and interviewing all of those involved, it is impossible to say for certain.

The SCC has also chosen to use a practical public health approach rather than criminalizing non-disclosure of prior high-risk behaviour, like unprotected sex with sex workers or injection drugs, that likely pose a larger risk than many of the cases involving HIV non-disclosure. Manitoba sees approximately eight new infections of HIV for every 100,000 people in the province each year.¹¹⁷ Certain populations have a higher rate of new infections than the average. In 2010-2011, a study testing for new HIV infections in the emergency room at Winnipeg’s Health Sciences Centre, the largest tertiary-care hospital in the province, found seven new infections from 501 people tested.¹¹⁸ This translates to a rate of 1,400 new infections per 100,000 people per year, though with such small numbers the reliability of this rate is diminished. Individuals who inject drugs and those who participate in sex work are at a higher than average risk of acquiring HIV.¹¹⁹ An estimated 65,040 people were living with HIV in Canada in 2014, but approximately 20% of those people have yet to be diagnosed.¹²⁰ Those with undiagnosed HIV pose the highest risk of transmission and account for a

¹¹⁴ *Ibid.*

¹¹⁵ Canadian HIV/AIDS Legal Network, “HIV Criminalization in Canada: Key Trends and Patterns” by Colin Hastings, Cécile Kazatchkine & Eric Mykhalovskiy (March 2017), online at <www.aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en> [perma.cc/PBY9-LBNT].

¹¹⁶ *Ibid.*

¹¹⁷ Manitoba, Department of Health, Seniors and Active Living, *2016 Annual Statistical Update: HIV and AIDS* (Winnipeg: DHSAL, 2018) at 17.

¹¹⁸ Marissa L Becker et al, “Feasibility and Success of HIV Point-of-Care Testing in an Emergency Department in an Urban Canadian Setting” (2013) 24:1 *Can J Infectious Diseases & Medical Microbiology* 27.

¹¹⁹ Manitoba, Communicable Disease Control, *Communicable Disease Management Protocol: Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS)* (Winnipeg: CDC, 2010).

¹²⁰ *DOJC, supra* note 84 at 3.

disproportionate number of HIV transmission cases.¹²¹ Therefore, choosing to engage in sexual intercourse without a condom, especially with someone who engages in sex work or uses injection drugs, poses a risk of acquiring HIV. However, someone who has not been tested for STIs can engage in unprotected sex with sex workers without telling their partner, thus exposing the partner to all STIs, without facing the risk of criminal charges from vitiating consent. The way the law has been applied in Canada incentivises not getting tested for HIV by providing real legal consequences to testing. The criminalization of non-disclosure adds to the already significant stigma surrounding HIV testing, and does real harm to efforts to identify and treat those living with undiagnosed HIV.

B. Advising Clients

McLachlin CJ stated in *Mabior*:

It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done. Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system.¹²²

The tests of “significant risk” and “realistic possibility of transmission of HIV” have created uncertainty for those counselling people with HIV about their disclosure obligations. For example, the Centre for Human Rights Research and Sex Workers of Winnipeg Action Coalition, in a pamphlet designed for sex workers, simply stated that “the law on HIV disclosure is unclear” but noted that one risked a conviction for failure to disclose unless viral load was low and a condom was used.¹²³ In its 2016 document, *Indigenous Communities and HIV Disclosure to Sexual Partners*, the Canadian HIV/AIDS Legal Network observes that it is uncertain if one needs to disclose if only oral sex is involved, or if there is anal sex with a condom and a low or undetectable viral load.¹²⁴

¹²¹ *Ibid* at 5.

¹²² *Mabior* SCC, *supra* note 55 at para 14 [citation omitted].

¹²³ Centre for Human Rights Research & Sex Workers of Winnipeg Action Coalition, “Canada’s New Sex Work Laws: Know the Law and Stay Safe” pamphlet (January 2018), online (pdf): <chrr.cc.umanitoba.ca/chrr/wp-content/uploads/sites/5/2018/04/sex-worker-pamphlet-170793.pdf> [perma.cc/A9VR-S4CG].

¹²⁴ Canadian HIV/AIDS Legal Network, “Indigenous Communities and HIV Disclosure

C. Last Resort: Intent to Transmit and Actual Transmission

In the 2017 DOJC review, stakeholders recommended that “the criminal law should only be used in limited circumstances for the most blameworthy conduct, where public health measures have been exhausted and have failed to change the behaviour of persons who engage in a pattern of non-disclosure that exposes others to risk.”¹²⁵ The CCRHC also asserts that the criminal law should be limited in its scope and application and only be used as a last resort in cases where there is no other option.¹²⁶ Otherwise people will avoid testing and treatment. They assert that the charges should only be laid in cases of intentional and actual transmission of HIV.¹²⁷ Specifically, it proposes any prosecution should require proof that the person intended to transmit HIV and engaged in sexual activity that was likely to transmit the virus, and that HIV was actually transmitted.¹²⁸ The CCRHC also listed circumstances where a conviction should not be possible, including where a person living with HIV:

- did not understand how the virus is transmitted;
- disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means;
- did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure;
- was forced or coerced into sex; or
- engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, including oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low viral load; and spitting and biting.¹²⁹

These reforms would create an environment that incentivizes safer sex practices of condom use, and testing and treatment of HIV. This approach is the most effective way of reducing the spread of HIV and eventually eliminating this public health threat.

The issue of intent is important and should be elaborated on. Does it mean intent according to the *Criminal Code*? If it does mean criminal intent,

to Sexual Partners” (April 2016) at 9, online: <www.aidslaw.ca/site/indigenous-communities-and-hiv-disclosure-to-sexual-partners-questions-and-answers/?lang=en> [perma.cc/EC9A-JGWL].

¹²⁵ DOJC, *supra* note 84 at 17.

¹²⁶ Canadian Coalition, *supra* note 11.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

is it general subjective intent, with a minimum standard of recklessness? Or does it have to be planned and deliberate, a much higher standard? For example, the *mens rea* standard for criminal negligence is: “wanton or reckless disregard for the lives or safety of other persons.”¹³⁰ For an action to be criminally reckless, it would generally mean that the negative outcome would need to be “likely.” Determining if an outcome is “likely” is again complex when it comes to transmission of HIV. Is UVI between a woman living with HIV who is not on treatment and a man without HIV reckless? There is an average risk of transmission of 1 in 2,500. How about anal intercourse where the person without HIV is the receiving partner and the partner living with HIV just started treatment and used a condom? If the viral load has come down 10-fold during the time on treatment, the average risk of transmission is approximately 1 in 900. Based on previous decisions, the Court would likely say that the woman from the first case was reckless, but the man in the second case was not reckless. However, this would not be logical based on the estimated risk of transmission. The Court does not seem equipped to interpret the scientific evidence on HIV and apply a consistent rational standard. As stated above, it is a fundamental requirement of the rule of law that a person should be able to predict what does and what does not constitute a crime. And this decision should be rational. For this process to be fair, the definition of intent would need to be very clear, and communicated in advance to the general public, before any HIV-related charges were considered.

Should those who engage in sexual activity likely to transmit the virus, but who do not end up transmitting it, face charges? After all, we charge people for driving under the influence of alcohol, even when no harm has occurred. And knowingly putting someone at risk of acquiring HIV does carry some moral blameworthiness. However, we do not criminalize all morally blameworthy actions. Lying to someone about your marital status, or your feelings for another person, in order to have sexual intercourse with that person, are both morally blameworthy actions. Courts and legislators have chosen not to criminalize those actions. Charging someone for risky sexual activity would not be consistent with the way the justice system has dealt with other STIs. As mentioned above, non-disclosure of hepatitis C and hepatitis B have not been criminalized despite higher risks of sexual transmission than with HIV and serious health effects should transmission

¹³⁰ Criminal Code, *supra* note 48, s 219(1).

occur. Hepatitis B and C are dealt with as public health issues rather than criminal justice issues. With the success and life expectancy associated with ART today, it does not make sense to treat non-disclosure of HIV status, especially when risk of transmission is very low, differently from other STI-status disclosures

D. Proof of Reciprocity

Finally, we would suggest Canada should consider one more requirement prior to prosecution: proof of reciprocity. The most common ethics framework used in public health for determining when to use legislation for coercive action is the 2002 Upshur framework.¹³¹ It contains four principles: the harm principle, least restrictive means, reciprocity, and transparency. The harm principle refers to the need for there to be a real risk of harm to another person before using coercive measures. Least restrictive means refers to the requirement to examine if a less restrictive measure can be used to accomplish the same goal. Reciprocity refers to the requirement of the state to help the individual fulfill any duties placed on him by the state, and compensate the individual if appropriate. Transparency is the requirement for state actors to be open about their decision-making processes, so their actions are clear and accountable.¹³²

If the state is going to continue to criminalize HIV non-disclosure to any degree, there should be proof that the person living with HIV was provided every support possible to reduce the risk of transmission. This support includes covering medication costs for those unable to afford them, providing immediate free addictions treatment for those suffering with addiction, covering transportation costs for those having difficulty accessing care, supplying free condoms, and providing immediate access to free counselling services to help adjust to living with HIV. This idea is neither radical nor novel; it is the same standard of care used by public health officials in Manitoba for other communicable diseases, like tuberculosis, before any coercive measures are used. If someone is diagnosed with tuberculosis in Manitoba, all tuberculosis medications are provided to that individual free of charge; a health professional will deliver the medications to the individual for every dose over the six to nine months required for

¹³¹ REG Upshur, "Principles for the Justification of Public Health Intervention" (2002) 93:2 Can J Public Health 101.

¹³² *Ibid.*

treatment; bus passes or other transportation expenses for attending medical appointments will be covered if necessary; and public health professionals will help address any other barriers to care.¹³³ Only after all options are exhausted, members of the public are at significant risk of being infected with tuberculosis, and the individual continues to refuse treatment for tuberculosis, are coercive legal powers considered.

In Manitoba, some of these services are currently unavailable for those diagnosed with HIV. Some people, especially the working poor, cannot afford the medications and do not qualify for government assistance.¹³⁴ Many people with addictions, especially those addicted to substances other than alcohol or opioids, are unable to access timely addictions treatment.¹³⁵ Free counselling services have long wait lists, especially in rural Manitoba. And some have difficulty taking time away from work and paying for transportation to attend the many medical appointments required to effectively manage their HIV. If the state is going to place the burden of possible criminal charges on someone, essentially for not medically managing their HIV, these barriers to treatment need to be addressed first, as they have been for other communicable diseases.

The Canadian justice system has treated HIV in a fundamentally different way than other serious and incurable STIs. It has incentivized avoiding testing for HIV, but it used a practical public health approach toward other sexual activities that may pose a high risk of transmission of all STIs. Canada needs to adopt a public health approach to those living with HIV and only consider using the criminal law as a last resort. Federal and provincial governments should use directives for prosecution, such as those suggested by the CCRHC, but further clarity needs to be added to these directives for the standard of intent required for criminal charges. The public health ethics principle of reciprocity should also be incorporated into any criminal justice approach to those living with HIV as it has for other communicable diseases like tuberculosis.

¹³³ Manitoba, Communicable Disease Control, *Communicable Disease Management Protocol: Manitoba Tuberculosis Protocol* (Winnipeg: CDC, 2014) at 4, online: <www.gov.mb.ca/health/publichealth/cdc/protocol/> [perma.cc/FJ8L-YT8C].

¹³⁴ Pierre Plourde, "HIV/AIDS, Harm Reduction and Criminalization", (21 November 2018) at 00h:31m:30s, online (podcast): <chrr.cc.umanitoba.ca/chrr/wp-content/uploads/sites/5/2018/11/Dr-P-part-one.mp3>.

¹³⁵ *Ibid.*

V. THE 2018 FEDERAL DIRECTIVE ON HIV NON-DISCLOSURE LAWS

In late 2016, Jody Wilson-Raybould (then-federal Justice Minister and Attorney-General of Canada) recognized that, “the over-criminalization of HIV non-disclosure discourages many individuals from being tested and seeking treatment, and further stigmatizes those living with HIV.”¹³⁶ A year later, the DOJC published its report, *Criminal Justice System’s Response to Non-Disclosure of HIV*, reviewing the *Cuerrier* and *Mabior* decisions, discussing the current state of the criminalization of HIV in Canada, and containing stakeholder recommendations for a new approach to criminal HIV disclosure laws in Canada.¹³⁷

In late 2018, Wilson-Raybould issued a Directive to the Director of Public Prosecutions.¹³⁸ The Directive’s preamble recognizes that “HIV is first and foremost a public health issue” and that “any future developments in the relevant medical science, should be considered before pursuing a criminal prosecution in HIV non-disclosure cases.”¹³⁹ It also acknowledges that the:

most recent medical science shows that the risk of HIV transmission through sexual activity is significantly reduced where: the person living with HIV is on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis.¹⁴⁰

The preamble also goes on to state that “the Supreme Court of Canada has stated that the criminal law has a role to play in cases involving sexual activity and non-disclosure of HIV where public health interventions have failed and the sexual activity at issue poses a risk of serious harm.”¹⁴¹

¹³⁶ Canada, Department of Justice, Press Release, “Minister Wilson-Raybould Issues Statement on World AIDS Day” (1 December 2016), online: <www.justice.gc.ca/eng/rp-pr/other-autre/hivnd-vihnd/p10.html> [perma.cc/P5V2-9N8Q]

¹³⁷ DOJC, *supra* note 84.

¹³⁸ Directive (Office of the Director of Public Prosecutions), (2018) C Gaz I, 4322, online (pdf): <www.gazette.gc.ca/rp-pr/p1/2018/2018-12-08/pdf/g1-15249.pdf> [perma.cc/FYN5-KCU7] [Directive].

¹³⁹ *Ibid* at 4322-4323.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* at 4322.

After the preamble, the Directive sets out four principles that should govern prosecutorial decision-making in criminal HIV non-disclosure cases:

(a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.

(b) The Director shall generally not prosecute HIV nondisclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.

(c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.

(d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.¹⁴²

We will now consider whether this Directive is responsive to the concerns we have raised about criminal HIV non-disclosure laws.

A. The Need for Federal Legislative Reform

Advocacy groups have been calling for clear prosecutorial directives to be developed in every province and territory in Canada to address the risk of over-criminalization,¹⁴³ curb arbitrary laying of charges, and achieve improved interaction between public health, criminal law and community-based organizations.¹⁴⁴ As prosecutorial decision-making is, for the most

¹⁴² *Ibid* at 4323.

¹⁴³ See e.g. Positive Living Society of British Columbia, "The Need for New Charge Assessment Guidelines: HIV Non-Disclosure in British Columbia" (11 June 2014), online (pdf): <positivelivingbc.org/wp-content/uploads/2015/03/new_charge_guidelines_-_position_paper_-_final_-_2014-06-11.pdf> [perma.cc/M3Z6-3EP4]; HIV & AIDS Legal Clinic Ontario (HALCO) & Canadian HIV/AIDS Legal Network, "The criminalization of HIV non-disclosure: Recommendations for police" (February 2013), online <www.aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-recommendations-for-police/?lang=en> [perma.cc/3QBR-BPN7].

¹⁴⁴ Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008) 31:1 Dal LJ 123; See also Isabel Grant, "The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink Cuerrier" (2011) 5:1 McGill JL & Health 7; Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013) 63:3

part, within provincial jurisdiction, the Directive only applies directly in the territories (Yukon, Northwest Territories and Nunavut). However as only two provinces have published prosecutorial directives addressing at least some of these concerns, the federal initiative is welcome especially if it encourages the development of policies that bring clarity and reflect public health concerns at the provincial level.

The federal government has the power to make criminal law which is applicable across the country and, as most criticisms made in this paper about the current law relate to the offence itself, it is disappointing not to see any movement on legislative reform. Without legislative reform, it may be difficult to displace the “realistic possibility of transmission” test developed by the SCC or to prosecute non-disclosure through a charge for an offence other than aggravated sexual assault. Legislative reform is also the most effective way to introduce the requirement of intention to transmit or actual transmission. Similarly, while defences to a non-disclosure charge, such as those advocated for by the CCHRC, (including for example, non-disclosure because the person feared violence would result from the disclosure) could be developed incrementally by courts, legislative reform would provide welcome clarity. Similarly, while the Directive states that “the Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness,” there are no precedents supporting such charges. The federal failure, at least to date, to deal legislatively with the “realistic possibility” test, charge type, defences, intention to transmit and actual transmission or blameworthiness is disappointing.

B. Curbing Over-Criminalization

The Directive has some clear strengths. It repeatedly uses the *Mabior* language of “realistic possibility of transmission of HIV.” In the absence of legislative reform, this usage is not surprising because, despite repeated criticism, the *Mabior* decision is still the authoritative decision. However, unlike the SCC decisions, the Directive makes some important qualifying remarks about determining if a “realistic possibility” exists. The Directive states that “the most recent medical science” should be used and notes that transmission is “significantly reduced” where the “person living with HIV is

on treatment; condoms are used; only oral sex is engaged in; the sexual activity is limited to an isolated act; or, the person exposed to HIV, for example as a result of a broken condom, receives post-exposure prophylaxis.”¹⁴⁵ It also clearly sets out situations where no charges should be laid; More specifically, it directs against prosecution “where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.”¹⁴⁶ Specification of a clear viral load provides is welcomed and is in line with current medical evidence. However, it is unfortunate that the language of “significantly reduced” is used in some places rather than “realistic possibility” as it is not clear if these standards are the same.

C. Avoiding Arbitrariness, Discrimination and Stigmatization

Does the Directive make it clear for those advising their patients, clients or the general public about the disclosure obligations for those living with HIV? Mabior indicated that both a “low viral load” and condom use were necessary to decrease the risk of transmission below the threshold of a “realistic possibility.” The Directive makes it clear that a viral load less than 200 copies per mL reduces the risk threshold to below a realistic possibility, but leaves a significant degree of ambiguity in most other circumstances as to whether an individual may be prosecuted. What factors change the circumstances from those which the Crown will “generally not prosecute HIV non-disclosure cases” to circumstances where they will prosecute? Even though the Directive indicates that the most recent medical science will be used to determine if a realistic possibility of transmission existed, the Directive does not state a general risk threshold by which to judge that science. Is a risk of 1 in 1000 low enough, or 1 in 10,000, or 1 in 100,000? As indicated above in section IV (c), the actual risk posed by sexual activity is not always intuitive. Vaginal intercourse without a condom may pose a lower risk of transmission of HIV than anal intercourse with a condom, depending on other circumstances. Unfortunately, Canadian courts do not have a good track record of interpreting this medical science in a consistent and logical way. Therefore, very clear risk thresholds need to be stated by the federal government to, as McLachlin stated in Mabior, meet the

¹⁴⁵ Directive, *supra* note 138 at 4323.

¹⁴⁶ *Ibid.*

“fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act.”¹⁴⁷ This Directive fails to meet that fundamental requirement.

The Directive also fails to include any safeguards against discrimination of gay men or ethnic minorities. We see continuing discrimination toward gay men in official government policies, such as those of the Canadian Blood Services, as noted in the Introduction. We also note the discrepancy between the proportion of diagnoses of HIV among “black” individuals and the proportion of charges “black” individuals have faced. As former Associate Chief Judge of the Manitoba Provincial Court, Murray Sinclair, and former Associate Chief Justice of the Manitoba Court of Queen's Bench, Alvin Hamilton, wrote in the *Report of the Aboriginal Justice Inquiry of Manitoba* when discussing the over-representation of Indigenous People in Manitoba's justice system:

A significant part of the problem is the inherent biases of those with decision-making or discretionary authority in the justice system. Unconscious attitudes and perceptions are applied when making decisions. Many opportunities for subjective decision making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not “benefit” from discretionary decision making, and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences.¹⁴⁸

Without safeguards to protect against discrimination, even a system full of well-intentioned people can lead to a disproportionate burden being placed on stigmatized or minority populations.

D. Does the Directive Improve Interaction with Public Health?

The Directive recognizes that “HIV is first and foremost a public health issue” and that “criminal law has a role to play...where public health interventions have failed.”¹⁴⁹ As already noted, the Directive is silent and no legislative action seems to be in the works respecting most of the steps

¹⁴⁷ *Mabior SCC*, *supra* note 55 at para 14.

¹⁴⁸ Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: AJIM, 1991) at chapter 4 “Systemic Discrimination”, online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/HUN8-38CN].

¹⁴⁹ Directive, *supra* note 138 at 4322.

towards improving interaction with public health systems and principles, such as a more detailed list of situations where charges should not be laid, and restriction of criminal charges to cases where intent to transmit can be established.

The Directive does provide that “the Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person.”¹⁵⁰ If this is an attempt to follow the principle of reciprocity discussed above, it is a severely impoverished attempt. The Directive does not specifically consider an individual’s ability to obtain HIV medication, or timely access to counselling, addictions, and public health services. It does not mention that these services are unavailable to many Canadians, especially marginalized populations, or provide any way forward for provinces to improve these services. When considered with the ambiguous language of the directive noted above, it is not clear that the Canadian government does recognize “HIV is first and foremost a public health issue,”¹⁵¹ or recognize the challenges facing a public health approach to HIV in Canada.

VI. CONCLUSION

Canada relies on a system of checks and balances to ensure that justice prevails. Unfortunately, the criminal justice systems across Canada have failed those living with HIV in Canada. It has misunderstood and ignored the science of HIV transmission, and pursued the prosecution of HIV non-disclosure in an arbitrary, discriminatory and stigmatizing manner. Canada’s Ministers of Health and Justice have both publicly acknowledged this failure; and while Minister Wilson-Raybould issued a Directive to address some ambiguities in the criminal law approach to non-disclosure created by the SCC, the federal response to HIV criminalization is, at best, a partial response. Canada should adopt a legislative response, which follows the four public health principles guiding use of coercive legislative powers: the harm principle, least restrictive means, reciprocity and transparency. Existing recommendations from organizations such as the CCRHC can be used for guidance, and thresholds for intent and risk, if

¹⁵⁰ *Ibid* at 4323.

¹⁵¹ *Ibid* at 4322.

they are used, should be very clear and evidence based. Wilson-Raybould has acknowledged that HIV is first and foremost a public health issue; now is the time to act like it.

Elements of Superior Responsibility for Sexual Violence by Subordinates

G U R G E N P E T R O S S I A N ^{*}

ABSTRACT

In certain circumstances, rape and other forms of sexual violence have already been recognised as international crimes (i.e. war crimes, crimes against humanity and genocide). International criminal tribunals usually prosecute those most responsible for the crimes, who are often military commanders or civilian superiors, and not low-level perpetrators. Once it has been established that a sexual crime amounting to an international crime has been committed, the accused can be held accountable for sexual violence perpetrated by his/her subordinates under the doctrine of superior responsibility, providing that certain requirements are met. This paper recalls the elements of crimes of sexual violence developed under international law and the elements of superior responsibility, which serves to draw attention to certain issues pertaining to superior responsibility for sexual violence committed by subordinates.

Keywords: sexual violence; victims; rape; command responsibility; superior responsibility, International Criminal Court, Jean Pierre Bemba

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Men's faults do seldom to themselves appear.
 Their own transgressions partially they smother
 This guilt would seem death-worthy in thy brother
 Oh, how are they wrapped in with infamies
 That from their own misdeeds askance their eyes.

-Rape of Lucretia, 631-637,
 Shakespeare 1594

I. INTRODUCTION

Almost every society in the world which has accepted the minimal standards of human rights includes in its penal code the protection of sexual self-determination, which is part of individual freedom, individual integrity, sexual development, honour and dignity. This guiding principle is one of the most important chapters of human rights that are violated from time to time. The most terrifying sex crimes are usually committed during an international or internal armed conflict or during political instability, when the government and appropriate bodies are not able to guarantee the minimal protection of basic rights. From the perspective of the perpetrator, the main purpose of sexual violence is to attain satisfaction by using war tactics, including aggression, force and violence with the aim of humiliating or dominating and subduing the victim.¹ The term sexual violence includes any act of a sexual nature perpetrated by force or by threat of force or coercion.² The sexual violence is a 'weapon' of war,³ and tool of terror and torture during armed conflict based on political and strategic motives in order to repress and to punish

¹ Marita Kieler, *Tatbestandsprobleme der Sexuellen Nötigung, Vergewaltigung sowie des Sexuellen Mißbrauchs Widerstandsunfähiger Personen. Tatbestandsprobleme der §§ 177 bis 179 StGB in der Fassung des 6. Strafrechtsreformgesetzes* (Birkenau, Berlin: Tenea Verlag, 2003), at 22.

² Cp. *Prosecutor v Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, (22 February 2001) at para 442 (International Criminal Tribunal for the Former Yugoslavia) [Kunarac (Trial Chamber Judgment)]; Juliane Kippenberg "Soldiers who Rape, Commanders who Condone. Sexual Violence and Military Reform in the Democratic Republic of Congo" (July 2009) at 12, online (pdf): *Human Rights Watch* <www.hrw.org/sites/default/files/reports/drc0709web.pdf> [perma.cc/8HN4-WHPN].

³ Cp. UNSC, *Resolution on Women and Peace and Security, Conflict-Related Sexual Violence* UN Doc S/RES/1820 (2008), 19 June 2008.

the opponents.⁴ On the other hand, complacency or tolerance of sexual violence as a method of warfare by superiors who either order such acts or allow them to occur without intervention risks the widespread perpetration of such acts. In order to punish the military and civil leaders for their failure to prevent and punish the atrocities conducted by their subordinates, the doctrine of superior responsibility was codified in the Statutes of International Tribunals. Pursuant to the doctrine, the superior is not directly responsible for the crimes committed by his/her subordinates, but for the omission and failure to properly discharge his/her duty.⁵ However, in almost every case brought before the International Tribunals and International Criminal Court (ICC) the prosecution of the superiors for the sexual violence of subordinates went unsuccessful.⁶ The recent appellate acquittal (2018) of Jean Pierre Bemba⁷ from the Democratic Republic of Congo (DRC) at the ICC stands as clear example that the doctrine of the superior responsibility is still under development.

This paper raises two issues 1) the mechanism of punishment of the superiors for their failure to act in order to stop the sexual violence committed by their subordinates and 2) the different legal definitions and forms of sexual violence which might be committed by the subordinates. The definitions of various sexual acts went a long way to be codified internationally. The meaning of sexual violence at the beginning of the work of the courts was restricted to the definition of rape. However, after the observation and examination of the cases, international society demanded

⁴ Nicole LaViolette, "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1998) 36 Can YB Intl L 93.

⁵ Article 6(3) ICTR Statute, Article 7(3) ICTY Statute, Article 28 ICC Statute.

⁶ See e.g. *Prosecutor v Katanga*, ICC-01/04-01/07, Trial Chamber: Judgment pursuant to article 74 of the Statute (7 March 2014) at para. 1648.

⁷ Jean-Pierre Bemba Gombo is Congolese politician; he was vice-president of the DRC until 2006. In 2002 the president of Central African Republic (CAR) invited his troops to support him in the fight against coup attempt. In the course of the conflict the Congolese soldiers have committed various crimes against the civilians of CAR, mostly gender-based crimes. *Prosecutor v Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) (International Criminal Court: Situation in the Central African Republic. See "Jean-Pierre Bemba's war crimes conviction overturned", *The Guardian* (8 June 2018), online: <www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court> [perma.cc/3SZS-K7Q7].

that other types of sexual violence be considered under international criminal law. Accordingly, it forms part of convictions for genocide, crimes against humanity and war crimes. This creates a broad space for superiors to act immediately and properly, in order to prevent or punish any form of illegal sexual act of their subordinates.

II. HISTORICAL OVERVIEW

Historically both concepts of sexual violence and of superior responsibility in the context of international law have been developed separately and independently in the same direction, in order to be codified in the Rome Statute. For a better illustration of the historical development of both concepts, it is possible to distinguish them in three time periods; up to post-WWI, post-WWII and in the course of the establishment of United Nations ad hoc Tribunals (International Criminal Tribunal for former Yugoslavia ICTY, International Criminal Tribunal for Rwanda, ICTR) and the Rome Statute.

The first example of protection from sexual violence during an armed conflict was found during the American Civil War in 1863 with the Instructions for the Army of the United States Federal Government in the Field, known as the Lieber Code or Instructions.⁸ This codification specifically made rape a crime in violation of the laws of war that ought to be punished by death (Articles 44 and 47 Lieber Code). A reference to sexual violence was made almost 40 years later in the Hague Convention (IV) of 1907 through Article 46 by mentioning the importance of family and marriage and their respective roles.⁹ The article implies that the contracting parties should declare their willingness to respect the rights of family and marriage during times of war. Accordingly, any sexual assault against women would violate the provision considered by the Hague

⁸ Patricia Sellers, 'The Context of Sexual Violence', in Gabrielle Kirk MacDonald & Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* vol 1: Commentary (Leiden: Brill, 2000) at 273 [Sellers, "Context"]; Stuart Casey-Maslen, *The War Report: Armed Conflict in 2013* (Oxford: Oxford University Press, 2014), at 279.

⁹ Patricia Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation" (2007) at 7, online (pdf): www.peacewomen.org/sites/default/files/paperprosecution_sexualviolence_0.pdf [perma.cc/JA8T-CZW9]; Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (London: Routledge, 2016) at 15.

Convention. This may be considered as the first step in the criminalisation of sexual violence on an international level.

On the other hand, in comparison to the codification of individual responsibility under international law, superior responsibility was not only well known under many national military law codes, but also under international customary and humanitarian law. The Lieber Code from 1863 authorised the shooting of subordinates by military commanders if they did not obey and order the halting of the commission of the crime.¹⁰ The doctrine of superior responsibility was one of the basic norms of the Hague Conventions,¹¹ and was originally used in the Leipzig,¹² and Istanbul Trials after World War I.¹³

It is noteworthy that sexual violence had occurred during the entire course of the Second World War in both the European theatre of war, and in the Pacific, but there was no direct mention of sexual violence either in the Nuremberg Principles or in the London Charter.¹⁴ On the national

¹⁰ Robert Heinsch "Lieber Code" in Alexander Mikaberidze, ed, *Atrocities, Massacres and War Crimes: An Encyclopedia* 1st ed (California: ABC-CLIO, 2013). "A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior", Article 44 Lieber Code and "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed" Article 71 Lieber Code.

¹¹ Article 1(1) Hague Convention (IV) 1907 & Article 19 Hague Convention (X) 1907. See narrow in Daryl A Mundis, "Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute" in Gideon Boas & William Schabas, eds, *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers, 2003) at 241; Hikmahanto Juwana, "The Concept of Superior Responsibility under International Law as Applied in Indonesia" in David K Linnan, ed, *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* (Westport, Connecticut: Praeger Security International, 2008) at 242.

¹² Simone Grün, *Command Responsibility* (Münster: LIT Verlag, 2017) at 2; See also "Judgment in the Case of Emil Müller, 30 May 1921" in Gideon Boas, James L Bischoff & Natalie L Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2011) at 142.

¹³ Gurgen Petrossian, *Staatenverantwortlichkeit für Völkermord* (Berlin: Duncker und Humblot, 2018), at 69-87; Vahagn N Dadrian & Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (New York: Berghahn Books, 2011) at 293.

¹⁴ Robert J Lilly, *Taken by Force. Rape and American GIs in Europe during World War II* (London: Palgrave, 2007) at 19.

level with Article II 1(c) of the Control Council Law No. 10 of the Control Council, the scope of the definition of crimes against humanity was enlarged by adding the term ‘rape’ to other forms of offences.¹⁵ The same picture of impunity for sexual violence was also to be found in the Far East, but with some additional features. During the Second World War, the Japanese Empire had created “comfort women” sex camps for the sexual pleasure of their soldiers.¹⁶ The camps consisted of women from the occupied local regions (e.g. from China, Korea, the Philippines), who were systematically raped by soldiers of the Japanese Empire Army.¹⁷ The number of forced prostitutes, according to Japanese and Chinese sources, was estimated at between 80,000 and 100,000 victims.¹⁸ In comparison to the Nuremberg Trials, the International Military Tribunal for the Far East has adjudicated on only one case of sexual violence pointing out that the defendant permitted the troops under his command to commit the rape-related offences. This was deemed a breach of international customs of war and thus a war crime.¹⁹ On a national level, the Chinese / Nanking War Crimes Tribunal has confirmed rape as a war crime.²⁰

The doctrine of superior responsibility was however not included in the statute of the International Military Tribunal or the statute of the International Military Tribunal for the Far East,²¹ although it was widely

¹⁵ See Article II1(c) of the Control Council Law No 10, online: <avalon.law.yale.edu/imt/imt10.asp> [perma.cc/5G7V-8HK9].

¹⁶ Julianne Kippenberg, *The War within the War: Sexual Violence against Women and Girls in Eastern Congo* (New York: Human Rights Watch, 2002) at 87.

¹⁷ S Hong, "Internationale Kooperative Zusammenarbeit mit Nordkorea zum 'Trostfrauen'-Problem", in Barbara Drinck, ed, *Forced Prostitution in Times of War and Peace: Sexual Violence against Women and Girls* (Bielefeld: Kleine Verlag GmbH, 2008) at 217; known also as the 'Rape of Nanking', where the International Military Tribunal for Far East found approximately 20.000 cases of rape; See Susan Brownmiller, *Against our Will. Men, Women and Rape* (London: Penguin, 1975) at 57-62.

¹⁸ Yuki Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution during World War II and the US Occupation* (London: Routledge, 2003) at 32; Sarah C Soh, *The Comfort Women. Sexual Violence and Postcolonial Memory in Korea and Japan* (Chicago: University of Chicago Press, 2009) at 49.

¹⁹ The United Nations War Crimes Commission, *Law Reports of Trials of War Crimes*, London, 1948, Case No 21, trial of General Tomoyuki Yamashita at 35.

²⁰ Trial of Takashi Sakai, *Chinese War Crimes Military Tribunal of the Ministry of National Defense*, Nanking, 29 August 1946, Case No 83 at 7, online (pdf): <www.worldcourts.com/imt/eng/decisions/1946.08.29_China_v_Sakai.pdf> [perma.cc/NCN6-7D8U].

²¹ Juwana, *supra* note 11 at 242.

practised at a national level. In Nuremberg, under Article 2(2) Control Council Law no. 10, the Tribunal found that the German medical top staff was responsible for inhuman experiments on their subordinates.²² The Tribunal in Nuremberg stated in the High Command Trial that under the basic principles of command responsibility,²³ an officer ignoring the criminal behaviour and criminal conduct of his/her subordinates violates a moral obligation under international law.²⁴

After the Second World War, another indirect reference to sexual violence could be found in Articles 3.1 and 27 of the Fourth Geneva Convention 1949. These articles mostly point out that persons have to be treated humanely under all circumstances and be protected from all acts of violence.²⁵ Apart from these definitions, there is also the prohibition of any attack against women's honour, such as rape and forced prostitution (Article 27 of the Fourth Geneva Convention 1949).

For several years, sexual violence went unnoticed at the international level. The admittance of international treaties such as the Additional Protocols to the Geneva Conventions 1977, Convention on the

²² Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 238; William H Parks, "Command Responsibility for War Crimes" (1973) 62 *Mil L Rev* 1 at 15.

²³ *Prosecutor v Zlatko Aleksovski*, IT-95-14/1A, Judgement on Sentence Appeal (24 March 2000) at para 76 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber): The Appeals Chamber of Aleksovski stated the definition of the commander, noting the following: "Article 7(3) provides the legal criteria for command responsibility, thus giving the word 'commander' a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision". See also Bing B Jia, "The Doctrine of Command Responsibility Revisited" (2004) 3:1 *Chinese J Intl L* 1 at 5.

²⁴ *United States v Wilhelm von Leeb et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no 10, vol XI (US Govt Printing Office, Washington, DC, 1950), at 510, online (pdf): <www.worldcourts.com/imt/eng/decisions/1948.10.28_United_States_v_Leeb.pdf> [perma.cc/6MDZ-85SX].

²⁵ See Patricia Sellers & Indira Rosenthal, "Rape and Other Sexual Violence" in Andrew Clapham, Paola Gaeta & Marco Sassòli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) at 362; Maria Eriksson, *Defining Rape. Emerging Obligations for States under International Law?* (Boston: Brill, 2011) at 348.

Elimination of All Forms of Discrimination against Women 1979,²⁶ and the Convention on the Rights of Children in 1989,²⁷ confirmed the role of protection from attacks against honour and dignity. These had paved the way for the adaptation of the Vienna Declaration and Program of Action in 1993 during the World Conference on Human Rights,²⁸ in which it was stated that systematic rape, sexual slavery and forced pregnancy are violations of fundamental principles of international human rights and humanitarian law. With this declaration, the States were encouraged to eliminate all forms of crimes based on sexual violence.

Political destabilisation in the 1990's led to bloody insurrections in different parts of the world. The conflicts in the former Yugoslavia and Rwanda could not be solved without international involvement. Therefore, international criminal tribunals were established in order to prosecute the perpetrators in the former Yugoslavia and Rwanda. The statutes of both tribunals included sexual violence, defining it under the crimes against humanity, but alluding to only one definition of sexual violence, 'rape' pursuant to Article 3(g) ICTR Statute, Article 5(g) ICTY Statute.²⁹

With support of civil society organizations,³⁰ the prosecutors of both tribunals have raised the question of other forms of sexual violence before

²⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, UNGA OR Res 34/180, (18 December 1979).

²⁷ *Convention on the Rights of the Child*, UNGA OR Res 44/25 (20 November 1989).

²⁸ Christopher K Hall & Carsten Stahn, "Article 7: Crimes Against Humanity" in Otto Triffterer & Kai Ambos, eds, *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: CH Beck, 2016) at 207; see "Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna" (25 June 1993), online (pdf): <www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> [perma.cc/ADS8-W8VC].

²⁹ See Article 3(g) ICTR Statute, online (pdf): <legal.un.org/avl/pdf/ha/ictr_EF.pdf> [perma.cc/L8HF-D8HV]; and Article 5(g) ICTY Statute online (pdf): <www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [perma.cc/Z3D9-8YNH].

³⁰ See the role of civil society organizations in addressing the issue of sexual violence in Julie Freccero et al, "Responding to Sexual Violence: Community Approaches", (May 2011), at 13, online (pdf): *Human Rights Center: University of California Berkeley* <www.law.berkeley.edu/wp-content/uploads/2015/04/Responding-to-Sexual-Violence-Community-Approaches-SV-Working-Paper.pdf> [perma.cc/YWP3-GWYU]; Maria Jarvis & Najwa Nabti, "Policies and Institutional Strategies for Successful Sexual Violence Prosecutions" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) at 110.

the tribunals,³¹ which also led to significant judgments and enlargements of the definition of sexual violence.³² The result was to include, and attempt to criminalise rape, forced prostitution and other sexual abuses in the ILC Draft Code with Article 18(j),³³ defining it under crimes against humanity.³⁴ The next step was to draft the Rome Statute for the International Criminal Court which was based on practice of ad hoc Tribunals,³⁵ and on precedent from both the Nuremberg and Tokyo Trials. The criminalisation of forms of sexual violence under the Rome Statute involves such offences as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity as a crime against humanity under Article 7(g) ICC Statute and war crime Article 8(2)(b)xxii, (e)vi ICC Statute.³⁶

III. PROSECUTING THE SUPERIORS

The statistics and reports of various Human Rights NGOs show a high number of sexual crimes committed during armed conflicts.³⁷ On the other hand, the individual interviews with soldier-perpetrators in the Democratic Republic of the Congo (DRC), for example, show their own subjective understanding on committing rape, whereby the ‘hardworking soldier’

³¹ Amrita Kapur, “Complementarity as a Catalyst for Gender Justice” in Fionnuala Aoláin et al, eds, *The Oxford Handbook of Gender and Conflict* (Oxford: Oxford University Press, 2018) at 237.

³² See e.g. *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) (International Criminal Tribunal for the former Yugoslavia) [*Furundzija*]; *Kunarac* (Trial Chamber Judgment), *supra* note 2.

³³ “Report of the Commission to the General Assembly on the work of its forty-eighth session” (UN Doc A/51/10) in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: UN, 1996) at 47 (UNDOC. A/CN.4/SER.A/1996/ADD.1).

³⁴ Cherif M Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff, 2013) at 158.

³⁵ It is important to note that during the drafting process some important judgments on sexual violence were still pending.

³⁶ See Article 7(g) and Article 8(2)(b)xxii, (e)vi ICC Statute online (pdf): <www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> [perma.cc/V5LU-DQ4T].

³⁷ See e.g. Tia Palermo, Amber Peterman, *Undercounting, overcounting and the longevity of flawed estimates: statistics on sexual violence in conflict* in Bulletin of the World Health Organization 2011, online: <www.who.int/bulletin/volumes/89/12/11-089888/en/> [perma.cc/7Q4M-LV3P].

deserves and needs sex, therefore the rapes are committed,³⁸ and are furthermore tolerated by the superiors. However, at the same time, the superiors are responsible for the behaviour of their subordinates. They are accordingly obligated to control and discipline their soldiers in accordance with the rules of their command structure. In some matters, the superiors themselves authorise the commission of sexual violence or by their presence encourage their subordinates to commit such offences.³⁹ Examining the judgments of the ad hoc Tribunals and the ICC, it is easy to determine that it was difficult to establish the superior responsibility for sexual violence and, in many cases, it resulted in acquittals.⁴⁰

³⁸ See Jelke Boesten, *Sexual Violence during War and Peace: Gender, Power, and Post-conflict Justice in Peru* (New York: Palgrave, 2014) at 27.

³⁹ See *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998) at paras 12 (a), 12 (b) (International Criminal Tribunal for Rwanda) [*Akayesu*]; *Prosecutor v Gacumbitsi*, ICTY-2001-64-T, Trial Chamber Judgment (17 June 2004) at para 282 (International Criminal Tribunal for Rwanda) [*Gacumbitsi*].

⁴⁰ *Prosecutor v Delić*, IT-04-83-T, Trial Chamber Judgment (15 September 2008) at paras 556-557 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber found that the accused failed to take the necessary and reasonable measures to prevent and punish sexual violence as cruel treatment committed by his subordinates; however he was acquitted, because the evidence showed the cruel treatment occurred in a different facility, not as alleged in the Indictment; *Prosecutor v Gotovina et al*, IT-06-90-T, Trial Chamber Judgment, (15 April 2011) at para 1128 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber could not prove the identity of the perpetrators and their belonging to the HV or Special Police. The Appeals Chamber acquitted all of the accused on the basis that the Trial Chamber erred in finding that there was a JCE and they were not liable under any other mode of liability; see *Prosecutor v Gotovina et al*, IT-06-90-T, Appeals Chamber Judgment (16 November 2012) at paras 157-158 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); ICTY, *Prosecutor v Hadžihasanović & Kubura*, IT-01-47, Trial Chamber Judgment (15 March 2006) at para 1393 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber acquitted the accused of sexual violence crimes, concluding that, while dishonoring the victim, it was not sufficiently serious to constitute cruel treatment; *Prosecutor v Šainović et al*, IT-05-87, Trial Chamber Judgment (26 February 2009) at para 1214 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): Trial Chamber acquitted Lazarević and

It is more than obvious that the main objectives of the International Tribunals were the prosecutions of high-ranking perpetrators in order to create political pressure and open the path for the prosecution of lower ranking criminals. The high-level defendants are predominantly the 'strategic developers' of the crimes committed and are far removed from the scene of the crimes, which makes it more difficult to prosecute. Generally, the modes of liability in such cases are indirect co-perpetration, ordering, soliciting, plus aiding and abetting. If none of them is established for the principal crime, the doctrine of superior responsibility may be taken into account. Hence, superior responsibility is an effective means to ascertain the liability of persons who hold high rank in organisational structures (i.e. those persons that are of particular interest to international tribunals).⁴¹

In order to establish the superior liability pursuant to international criminal jurisprudence, the hierarchical subordination of the accused in the system should firstly be proven. Furthermore, it has to be clarified whether it was the duty of the accused to prevent,⁴² to repress,⁴³ and to submit,⁴⁴ the matter. At the same time, the causation between the omission of the superior's duty and the criminal conduct of the subordinator should be established. Finally, it has to be proven that the superior was obviously aware of the planned or committed criminal conduct of his/her subordinates.⁴⁵

Ojdanić because of lack of knowledge; *Prosecutor v Mucić et al*, IT-96-21-T, Trial Chamber Judgment (16 November 1998) at para 1285 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [*Mucić* (Trial Chamber Judgment)]; *Prosecutor v. Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) at para 194 (International Criminal Court: Situation in the Central African Republic): the superior responsibility of the accused was not established, in contrast, in the *Sikirica* and *Mucić* cases superior responsibility for sexual violence was established; *Prosecutor v Sikirica*, IT-95-8-S, Trial Chamber Judgment (13 November 2001) at para 125 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): however in other sexual violence cases the accused was acquitted on the grounds that there was no evidence that he knew or was in a position to know about the rapes committed by his subordinates.

⁴¹ Sellers, "Context", *supra* note 8 at 17.

⁴² Before the crime is committed.

⁴³ During the commission of the crime.

⁴⁴ After the commission of the crime.

⁴⁵ Helmut Satzger, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht*,

A. Superior-Subordinate Relationship

Every system, regardless of whether it is a private company, military, paramilitary,⁴⁶ or government one, has an organised hierarchical structure, which implies a superior chief of staff and the executive organs. The head of the structure could be de jure or de facto obligated to control the actions initiated by his/her subordinates. In accordance with Article 43 of Additional Protocol I of 1977 to the Geneva Conventions, the armed forces of the Party to the conflict consist of all organised groups and units which are under a superior responsible to that Party for the conduct of its subordination.⁴⁷ It is much more difficult to determine the de facto hierarchical subordination than in the cases where the subordination of the structure is legally defined. Owing to the lack of centralised organisational frameworks, the prosecutor's main problem in the Rwandan cases was to establish the de jure and de facto relationship between the perpetrators and the commanders. The Tribunal had found in the *Mucić et al.* case that the de facto authority is equivalent to de jure.⁴⁸ At the same time, even if the

Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht (Baden-Baden: C.H. Beck, 2018), at 289; *Protocol Additional to the Geneva Conventions of 12 August 1949*, Article 87(1): *Duty of Commanders*, 1977, at 62 (International Committee of the Red Cross); *Rome Statute of the International Criminal Court*, Article 28: *Responsibility of commanders and other superiors*, 17 July 1998, vol 2187, No 38544 at 15 (entered into force 1 July 2002); International Criminal Tribunal for the Former Yugoslavia, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Res 827, Article 7(3) (25 May 1993) at 6 (as amended 7 July 2007, UN Res 1877); *Statute of the International Tribunal for Rwanda*, Article 6(3): *Individual Criminal Responsibility*, 2007, at 48.

⁴⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949*, Article 4 (A)(2): *Prisoners of War*, 1977, at 33 (International Committee of the Red Cross): describes the subordinated system of the paramilitary, mentioning the fact that the prisoner of war could be the person, who belongs to organised subordinated resistance movements commanded by the person responsible for his subordinates.

⁴⁷ The Militia and volunteer corps which could not be defined as a regular army or part of the army should fulfill the following conditions: they should be commanded by a person responsible for his subordinates, to have a fixed distinctive emblem recognizable at a distance, carry arms openly, conduct their operations in accordance with the laws and customs of war. See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds, *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers: Geneva, 1987) at 1008.

⁴⁸ *Prosecutor v Mucić et al.*, IT-96-21-A, Appeals Chamber Judgment (20 February 2001) at para 188 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [*Mucić* (Appeals Chamber Judgment)].

hierarchical subordination is legally clear or de facto determined, it is still not sufficient to establish command responsibility.⁴⁹ The de jure or de facto commander has to have effective control over his/her subordinates.⁵⁰ In the case of *Mucić et al.*, it was held that control and command over the subordinates may be exercised in different ways, such as operationally, tactically, administratively and executively in territories under the control of the superiors.⁵¹ The Tribunal found that there was no legislation to have a de jure superior for the Čelebići camp, where the detainees were kept, tortured, murdered and raped. Therefore, it was rather difficult to find a specific superior to be liable for the atrocities committed in the Čelebići camp. Delalić, who was the coordinator of the Konjic Defense Forces, was charged with having influence on the Čelebići camp's superior, but was found not guilty due to a lack of sufficient command and control over the Čelebići camp.⁵² On the other hand, it was proven that Mucić, who was the de facto commander of the prison camp, failed to prevent the violations of international humanitarian law, especially rape occurring in the camp.⁵³

The attribution of the doctrine of superior responsibility is getting more complicated in relation to the civil superior-subordinate system.⁵⁴ It is obvious that the legalised system of individuals is better organised than civil self-organised initiatives. Accordingly, in case of military or governmental-based hierarchical systems, the identification of the superior is much easier than in the private sector. Even if the superior of the organised initiative could be identified, there is still the need for clarification of effective control

⁴⁹ *Prosecutor v Hadžihasanović & Kubura*, IT-01-47-A, Appeals Chamber Judgment (22 April 2008) at paras 20-22 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia).

⁵⁰ The command responsibility may not be established if the crime was committed before the commander assumed command over that subordinates. See *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Appeals Chamber Decision on Command Responsibility, (16 July 2003) at para. 51; *Prosecutor v Bemba*, ICC-01/05-01/08, Trial Chamber Judgment (21 March 2016) at paras 184-188 (International Criminal Court: Situation in the Central African Republic) [*Bemba* (Trial Chamber Judgment)].

⁵¹ *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 349.

⁵² *Ibid* at para 643.

⁵³ *Ibid* at para 774.

⁵⁴ *Prosecutor v Musema*, ICTR-96-13-A, Trial Chamber Judgment (27 January 2000) at para 919 (International Criminal Tribunal for Rwanda) [*Musema*].

of the identified superior on the self-organised initiative. This leads to further legal difficulties in sexual violence cases.

B. Knowledge

In order to establish command responsibility, it is furthermore important to clarify the mental element, namely whether the commander/superior knew (actual knowledge) or had reason to know/should have known (negligence) of the planned or committed crime of his/her subordinates.⁵⁵ Accordingly, the awareness of the superior may be distinguished in three time perspectives; before, during and after the crime was committed by the subordinates. In each of the aforementioned time periods, the superior has to act as soon as he/she is aware or has actual knowledge of the planned or committed crimes. Actual knowledge is not presumed and is obtained by way of evidence.⁵⁶ However, even at the time when the crimes were still not perpetrated but information, such as the criminal past, sexually violent character or further important factual circumstances,⁵⁷ were available to the superior, it is still possible to raise the question of failure of the command to prevent those crimes.⁵⁸ In the *Bagilishema* case, the Appeals Chamber found that the “had reason to know” standard does not require actual knowledge of the accused about the crimes which were committed or were about to be committed. Rather, it merely requires that the accused had general information in his/her possession, which would put him/her on notice of possible unlawful acts by his/her subordinates.⁵⁹

⁵⁵ Chantal Meloni, "Command Responsibility, Joint Commission and Control over the Crime in the First ICC Jurisprudence" in T Mariniello, ed, *The International Criminal Court in Search of its Purpose and Identity* (London: Routledge, 2016) 1 at 4.

⁵⁶ *Bemba* (Trial Chamber Judgment), *supra* note 50 at para 191.

⁵⁷ E.g. If subordinates had been drinking prior to the mission. See Bakone J Moloto, "Command Responsibility in International Criminal Tribunals" (2009) 3 BJIL12 at 18.

⁵⁸ *Prosecutor v Strugar*, IT-01-42-A, Appeals Chamber Judgment (17 July 2008), at paras 303-304 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia).

⁵⁹ *Prosecutor v Bagilishema*, ICTR-95-IA-A, Appeals Chamber Judgment (3 July 2002) at paras 28, 42 (International Criminal Tribunal for Rwanda); see also Barbara Goy, Michele Jarvis & Giulia Pinzauti, "Contextualizing Sexual Violence and Linking it to Senior Officers" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) at 244.

C. Duties of the Superior

Each superior is responsible for taking all reasonable and necessary measures to ensure the compliance of his/her subordinates. As stated in Article 87 of the Additional Protocol I of the Geneva Conventions, the main duties of the superior are the prevention, suppression and submission of the crime committed under his/her command.⁶⁰ This implies the high awareness of the subordinates regarding their duties and obligations stated in the Geneva Convention during the conflict. The superior has to act as soon as he receives the information or has reason to suspect that a crime will be committed. Each of the acts that should be foreseen by the superiors is distinguished separately. In order to determine that the superior/commander took all necessary reasonable measures available to him/her, it is necessary to clarify which crimes committed by the subordinates were known or should have been known to the superior and at what point in time.⁶¹ However, it is not the case that a commander should consider every possible step at his/her disposal.⁶² As was held in the case *Bemba*, the commanders are allowed to make a cost/benefit analysis when deciding which measures have to be taken to repress or to punish his/her subordinates. The court in *Bemba* stated that “[s]imply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time”.⁶³

To prevent: The duty of the superior is to control the subordinates and their actions by expeditiously taking all necessary measures to avoid the commission of the crime which might be planned, organised and instigated by his/her subordinates. The superior must intervene as soon as he becomes aware of the preparation of the crime and as long as he has the effective

⁶⁰ See Article 87 of the Additional Protocol I of the Geneva Conventions online (pdf): <www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf> [perma.cc/X3LY-PKKU].

⁶¹ *Prosecutor v Bemba*, ICC-01/05-01/08-3636-Red, Trial Chamber Judgment (21 March 2016) at para 168 (International Criminal Court: Situation in the Central African Republic).

⁶² *Prosecutor v Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) at para 169 (International Criminal Court: Situation in the Central African Republic).

⁶³ *Ibid* at para 170.

ability to prevent the perpetrators from commencing or continuing.⁶⁴ In the case of *Akayesu*, it was noted that the presence of Akayesu during the rapes, who was the *bourgmestre* (mayor) of that region, had encouraged the perpetrators to continue their acts; moreover, he did nothing to stop the commission of the crimes.⁶⁵ The superior is responsible for the acts committed by his subordinates without the need to prove the criminal intent of the superior; another view holds that negligence that is so serious as to be tantamount to consent or criminal intent is a lesser requirement.⁶⁶ This doctrine was based on the experience of the Tokyo Trial. The former Foreign Minister of Japan, Hirota Koki, was sentenced for his failure to prevent the mass rape in the city of Nanking.⁶⁷

To repress: If the crime is ongoing, the superior is obliged to repress the commission of the crime of his/her subordinates. Furthermore, the superior has to take measures for the disciplinary punishment of the perpetrator.⁶⁸ If there are no effective measures for the disciplinary punishment, the superior must inform the appropriate authorities about the crimes committed by his/her subordinates.⁶⁹

To submit: The above-mentioned duty constitutes the third obligation of the superior - to submit the matter to the competent authorities or to take steps in order to ensure that the perpetrators are brought to justice.⁷⁰

⁶⁴ *Prosecutor v Brima et al*, SCSL-04-16-T, Trial Chamber Judgment (20 June 2007) at para 798 (Special Court for Sierra Leone) [*Brima*].

⁶⁵ *Akayesu*, *supra* note 39 at para 12(b).

⁶⁶ *Ibid* at para 488.

⁶⁷ Shane Darcy, *Collective responsibility and accountability under international law* (New York: Brill, Ardsley, 2007) at 313: "Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence".

⁶⁸ Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht - Völkerstrafrecht - Europäisches Strafrecht* (Berlin: Springer, 2011) at 141.

⁶⁹ *Prosecutor v Bemba*, ICC-01/05 -01/08, Pre-Trial Chamber, Decision on confirmation of charges (15 June 2009) at para 440 (International Criminal Court: Situation in the Central African Republic) [*Bemba* (Pre-Trial Chamber)].

⁷⁰ *Mucić* (Appeals Chamber Judgment), *supra* note 48 at para 190.

D. Causation

The Appeal Chamber in the *Blaškić* case noted that the causation between the superior's omission and the crime is not the main element of superior responsibility.⁷¹ The statutes of the ad hoc tribunals do not include the element of causation in the doctrine of superior responsibility. In contrast, the ICC jurisprudence accepts the principle of causality for the doctrine of superior responsibility. Regarding this matter, the Court stated that Article 28 of the Rome Statute includes an element of causality between a dereliction of duty and the underlying crimes.⁷² The nexus requirement in a case of superior responsibility would be clearly satisfied when it is established that the crimes would not have been committed, if the commander had exercised his/her control properly.⁷³

IV. THE MODE OF LIABILITY OF SUPERIOR

Essentially, the concept of superior responsibility is seen as 1) a special mode of liability for an omission related to the special status of the person in the superior-subordinate relationship, or 2) as a commission by omission,⁷⁴ and 3) sui generis (of its own kind) responsibility for the

⁷¹ *Prosecutor v Blaškić*, IT-95-14-A, Appeals Chamber Judgment (29 July 2005) at para 76 [Blaškić]: "...causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offence committed by their subordinates..."

⁷² Otto Triffterer, "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?" (2002) 15:1 *Leiden J Intl L* 179 at 203; *Bemba* (Pre-Trial Chamber), *supra* note 62 at para 139: a person shall not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.

⁷³ *Bemba* (Trial Chamber Judgment), *supra* note 50 at para 213; *Bemba* (Pre-Trial Chamber), *supra* note 69 at para 423: despite its significance, the Chamber did not engage in a detailed analysis of the causation issue. It acknowledged that causation is not in the superior responsibility provisions of the statutes of the ad hoc tribunals, the SCSL or the ECCC, and that the case law of the ICTY had expressly rejected it. The only jurisprudence cited by the Chamber in support of this test was the ICTY Appeals Chamber's Judgment in *Hadžihasanović*, para 31, which expressly rejected causation as an element of superior responsibility.

⁷⁴ See Linnea Kortfält, "Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court" (2015) 84:2 *Nordic J Intl L* 1 533 at 571; Chantal Meloni, "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence

derelection of duty.⁷⁵ As discussed in academic literature, if the doctrine of superior responsibility is seen as commission by omission or as a mode of liability, the superior becomes responsible for the principle crime. If, however, it is seen as *sui generis*, the superior is accountable for his own failure to prevent, punish or report,⁷⁶ though not for the principle crime. The practice shows that the involvement of the superiors as the strategic developers of international crimes in conflict zones is common.⁷⁷ While the defence attempted to argue on each element of the superior responsibility in order to exclude the defendant's connection to the particular crime, it showed at the same time the actual contribution of the defendant to the commission of the crime. After establishing the elements of superior responsibility in the *Bagosora* case, including his knowledge of the existing crimes, the International Criminal Tribunal for Rwanda stated that he failed in his duty to prevent the crimes because the accused in fact participated in them.⁷⁸ Accordingly, it is not possible to enter conviction under both individual and superior responsibility in relation to the same conduct.⁷⁹

In cases where there is no evidence or allegation of physical contact between an accused and a rape victim, the accused is not known to have explicitly incited or ordered the related sexual crime, and where the physical presence of the accused at a rape scene or other concrete proof of knowledge of rape has not been established, the nexus between the accused and the crime of rape will not be easy to establish.⁸⁰ This relates to the establishment of the 'prevention and punishment' obligation of the superior, which also includes the knowledge about widespread or systematic perpetrations. On this issue, various investigations and prosecutions on sexual violence

of the Superior?" (2007) 5:3 J Intl Crim Justice 619 at 635.

⁷⁵ *Prosecutor v Halilović*, IT-01-48, Trial Chamber Judgment (16 November 2005) at para 42 (International Criminal Tribunal for the former Yugoslavia).

⁷⁶ See Kortfält, *supra* note 74 at 575.

⁷⁷ See e.g. Gacumbitsi, *supra* note 39 at para 289.

⁷⁸ *Prosecutor v Bagosora et al*, ICTR-98-41-T, Trial Chamber Judgment (18 December 2008) at paras 2011-2040 (International Criminal Tribunal for Rwanda) [*Bagosora* (Trial Chamber Judgment)]; *Prosecutor v Bagosora et al*, ICTR-98-41-A, Appeals Chamber Judgment (14 December 2011) at para 668 (International Criminal Tribunal for Rwanda).

⁷⁹ *Blaškić*, *supra* note 71 at paras 91-92.

⁸⁰ Anne-Marie Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Anwerpen: Intersentia nv, 2005) at 168.

conducted at an international or national level confirm the widespread and systematic occurrence of sexual crimes in armed conflict, the presence of which implies public knowledge of the commission of such crimes. This is exactly the binding point where the doctrine of the superior responsibility and the concept of the sexual violence are crossing. As it was historically presented, sexual violence may be practiced in various forms. There is a need to present those forms of sexual violence committed by the subordinates for which the superiors may be held responsible.

V. RAPE, OTHER FORMS OF SEXUAL VIOLENCE AND SUPERIORS

Rape is explicitly included within the jurisdiction of the Yugoslav and Rwanda Tribunals as a crime against humanity.⁸¹ The impact of the ad hoc Tribunals in terms of the development of the definition of rape as an international crime is inescapable. The *Akayesu* case was the key to the international criminal jurisprudence on the matter of rape. In this case, the Tribunal confirmed that the definition of rape was not explicitly underlined by the ICTR Statute. Accordingly, it firstly had to define what the concept of rape stood for. The Tribunal considered rape as a “form of aggression” which could be classified within the scope of torture aiming at intimidating, humiliating, discriminating against, punishing, controlling or destroying a person.⁸² Up to that point rape was specified as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.⁸³ The definition was broad enough to encompass forced penetration by the tongue of the victim’s mouth, which most legal systems would not stigmatise as a rape, although it might well be prosecuted as a form of sexual assault.⁸⁴ Contemporaneously with the *Akayesu* case, the

⁸¹ International Criminal Tribunal for the Former Yugoslavia, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Res 827, Article 5 (g) (25 May 1993) at 6 (as amended 7 July 2007, UN Res 1877); see also Kelly Askin, “The Jurisprudence of International War Crimes Tribunal: Securing Gender Justice for Some Survivors” in Helen Durham & Tracey Gurd, eds, *Listening to the Silences: Women and War* (Leiden: Brill, 2005) at 128.

⁸² *Akayesu*, *supra* note 39 at para 687; *Brima*, *supra* note 64 at para 718.

⁸³ *Akayesu*, *supra* note 39 at para 688.

⁸⁴ William Schabas, *An Introduction to the International Criminal Court*, 5th ed (Cambridge: Cambridge University Press, 2017) at 104; e.g. in contrast, sexual violence is not limited

ICTY broadened the definition of rape, based on the already existing definition of rape from the ICTR, confirming that rape is a forcible act which represents the use of force against the victim aiming at violating or psychologically oppressing him/her.⁸⁵ The act includes the penetration of the victim's vagina, anus or mouth by the penis, accompanied by force or by the threat of force or coercion against the will of the victim.⁸⁶ Concerning other objects, the Tribunal only considered penetration of either the anus or the vagina as an act of rape.⁸⁷ In this context, it could be summarised that the penetration of the anus, vulva or vagina is not limited to the penis. In the case of *Furundzija*, the ICTY found out that the penetration of the mouth by the male sexual organ is "a most humiliating and degrading attack upon human dignity".⁸⁸

As a result of a dialogue between the two tribunals, the ICTR in the *Musema* case described the definition of rape in the *Akayesu* case as conceptual and in the *Furundzija* case – mechanical, adopting the definition set forth in the *Akayesu* definition.⁸⁹ Shortly after the ICTY in the *Kunarac* case concluded that the definition given before could not be used for other cases referring to the crime of rape, particularly to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.⁹⁰ The Tribunal found that the absence of consent or

by the physical invasion of the human body and could be committed without penetration or physical contact, as for example forcing the victim to undress among a crowd.

⁸⁵ *Furundzija supra* note 32 at paras 173-174.

⁸⁶ Cassese, *supra* note 22 at 112.

⁸⁷ *Furundzija, supra* note 32 at para 174.

⁸⁸ *Ibid* at para 183.

⁸⁹ *Musema, supra* note 54 at para 228; *Prosecutor v Semanza*, ICTR-97-20-T, Trial Chamber Judgment (15 May 2003) at para 345 (International Criminal Tribunal for Rwanda); *Prosecutor v Stakić*, IT-97-24-T, Trial Chamber Judgment (31 July 2003) at paras 757-803 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); *Prosecutor v Muhimana*, ICTR-95-1B-T, Trial Chamber Judgment (28 April 2005) at paras 550-551 (International Criminal Tribunal for Rwanda).

⁹⁰ Niamh Hayes, "Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals" in Shane Darcy & Joseph Powderly, eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) at 148; *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 438; ICTY, *Prosecutor v Kvočka et al*, IT-98-30/1-T, Trial Chamber Judgment (2 November 2001) at paras 175-183 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of

voluntary participation as an element of the crime is equivalently relevant to the force and coercion.⁹¹

Therefore, the Tribunal interprets the definition of the crime of rape given in the *Furundzija* case as follows: The sexual penetration, however slight:

a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. For this purpose consent must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The question of guilt was assumed with the intention to effect sexual penetration, and the knowledge that it occurs without the consent of the victim.⁹²

Already in the first case before the ICTR even the Tribunal was aware that the superior/subordinate relationship existed between the accused and

the Former Yugoslavia) [Kvočka]; ICTY, *Prosecutor v. Nikolić*, IT-94-2-S, Trial Chamber Judgment (18 December 2003) at para 113 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); *Gacumbitsi*, supra note 39 at para 321; *Prosecutor v Brđanin*, IT-99-36-T, Trial Chamber Judgment (1 September 2004) at paras 1008-1013 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [Brđanin]; *Bagosora* (Trial Chamber Judgment), supra note 78 at paras 2198-2201; *Prosecutor v Renzaho*, ICTR-97-31-T, Trial Chamber Judgment (14 July 2011) at para 5.4 (International Criminal Tribunal for Rwanda); *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, Trial Chamber Judgment (17 May 2011) at para 2121 (International Criminal Tribunal for Rwanda); *Prosecutor v Nyiramasuhuko et al*, ICTR-98-42-T, Trial Chamber Judgment (24 June 2011) at para 6072 (International Criminal Tribunal for Rwanda); *Prosecutor v Ndirabaware*, ICTR-99-54-T, Trial Chamber Judgment (20 December 2012) at para 4.6.2.2 (International Criminal Tribunal for Rwanda).

⁹¹ *Kunarac* (Trial Chamber Judgment), supra note 2 at para 440; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) at paras 129-133 [Kunarac (Appeal Chamber Judgment)].

⁹² *Kunarac* (Trial Chamber Judgment), supra note 2 at para 460.

the Interahamwe, the Prosecution was convinced with Akayesu's own role in the commission of crimes, especially by his presence at the crime scene, which motivated the members of the Interahamwe to commit the acts of rape. The Tribunal confirmed that the accused by his own words specifically ordered, instigated, aided and abetted the acts of rape.⁹³

The pressure from civil society demanded, parallel to the definition of rape, the inclusion of other forms of sexual violence under international criminal law. If, under the jurisdiction of the ICTY and ICTR, other forms of sexual violence were considered torture, enslavement or other inhuman acts, the ICC Statute codified other forms of sexual violence as separate offences under crimes against humanity and war crimes. These offences include sexual slavery, forced prostitution, forced pregnancy and enforced sterilisation.⁹⁴

The term 'sexual slavery' does not differ much from the definition of 'enslavement', punished under Article 7(1)(c) ICC Statute, which also includes 'forced labour'.⁹⁵ The main difference between them is the concept of individual sexuality and the freedom of sexual self-determination,⁹⁶ such as forced marriage,⁹⁷ domestic servitude or other forced sexual activity.⁹⁸ The perpetrator exercises the power over the victim in order to purchase, sell, lend or barter, or impose deprivation of liberty, forcing him/her to engage in one or more acts of a sexual nature,⁹⁹ which does not necessarily require a financial benefit.¹⁰⁰ Acts of enslavement that include a sexual element could be categorised as both enslavement and sexual slavery.¹⁰¹ The Special Court for Sierra Leone (SCSL - international hybrid court) was the first international institution that considered forced marriage to be covered by sexual slavery.¹⁰²

⁹³ Akayesu, *supra* 39 at paras 691-695.

⁹⁴ See Article 7(1)(g) ICC Statute.

⁹⁵ Brouwer, *supra* note 70 at 172.

⁹⁶ Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht - Völkerstrafrecht - Europäisches Strafrecht* (Berlin: Springer, Berlin, 2011), at 202.

⁹⁷ *Prosecutor v Katanga & Chui*, ICC-01/04-01/07, Pre-Trial Chamber: Decision on confirmation of charges (30 September 2008) at para 431.

⁹⁸ Hall & Stahn, *supra* note 28 at 211.

⁹⁹ *Preparatory Commission for the International Criminal Court*, Article 7(1)(g): Elements of the Crimes, 1999, at 5.

¹⁰⁰ Brouwer, *supra* note 80 at 172-173.

¹⁰¹ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) at 213.

¹⁰² Kai Ambos, *Treatise on International Criminal Law* (Oxford: Oxford University Press,

Although there are similarities between sexual slavery and forced prostitution, the reasonable difference is the derivation of advantages for the victim from forcing them to perform the sexual acts. The advantages for sexual access are linked to the exchange of goods or services for sex. On the other hand, one must consider that the person benefitting there from is a victim who is hoping not to be tortured or killed.¹⁰³

Forced pregnancy means rape followed by unlawful confinement for the purpose of affecting ethnic composition.¹⁰⁴ An important feature of this offence is the intent of the individual perpetrator who aimed to affect the ethnic composition.¹⁰⁵ The adoption of this offence was controversial. Several delegates from the Vatican and Ireland were worried that the inclusion of the offence in the Rome Statute would imply the abortion of a child or giving up the child for adoption.¹⁰⁶

The crime of enforced sterilisation includes the deprivation of the person's biological reproductive capacity,¹⁰⁷ which is neither justified by medical nor hospital treatment of the person concerned, nor carried out with the person's genuine consent.¹⁰⁸ If the perpetrator aims to limit or to

2016) at 100; Jennifer Gong-Gershowitz, "Forced Marriage: A 'New' Crime Against Humanity?" (2009) 8:1 *Nw J Intl Human Rights* 53 at 53; *Brima, supra* note 64 at para 697; see also Renate Winter & Stephane Kostas, "Gender-Based Violence Offences and Crimes Against Children at the SCSL", in Roberto Bellelli, ed, *International Criminal Justice. Law and Practice from the Rome Statute to its Review* (Farnham: Routledge, 2010) at 315.

¹⁰³ Valerie Oosterveld, "Gender-Based Crimes against Humanity" in Leila Nadya Sadat, ed, *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011) at 89.

¹⁰⁴ Geoffrey Robertson, *Crimes against Humanity. The Struggle for Global Justice* (Princeton: Penguin, 2008) at 331.

¹⁰⁵ Alyson M Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute" (2012) 18:3 *Wm & Mary J Women & L* 595 at 597.

¹⁰⁶ Brouwer, *supra* note 80 at 144.

¹⁰⁷ Kelly Askin, "Crimes against Women under International Criminal Law", in Bertram S Brown, ed, *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar Publishing, 2011) at 101: The crime of enforced sterilisation which was firstly mentioned in the Medical case of US Military Tribunal under Control Council Law No. 10; See also Askin, *supra* note 81 at para 146.

¹⁰⁸ Macheld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia nv, 2002) at 516.

destroy a particular group in whole or in part, enforced sterilisation can imply an act of genocide.¹⁰⁹

The sexual violence is a broad term and it includes acts of any sexual nature, which are committed by force or the threat of force or coercion.

Even considering the development of independent sexual crimes within the Rome Statute, it is still possible to attribute the sexual violence to various forms, ranging from torture to outrages upon personal dignity and serious bodily or mental harm. This accordingly, opens up a new and broader path for the accountability of the superiors under the doctrine of superior responsibility for any illegal sexual act of their subordinates.

VI. SEXUAL VIOLENCE UNDER CRIMES AGAINST HUMANITY AND WAR CRIMES

Meanwhile, the ICTR and ICTY have classified acts of sexual violence using other qualifications than rape, ruling that, as long as the acts met the requirements of international crimes, they could qualify as torture, enslavement or as other inhuman acts.¹¹⁰ Sexual violence is not expressly designated as a grave breach despite the view that sexual violence fits within other categories of grave breaches.¹¹¹ Therefore, acts of sexual violence are also part of war crimes and are charged as various violations of Common Article 3 and grave breaches of the Geneva Conventions. These are torture,¹¹² cruel treatment, outrages upon personal dignity and wilfully causing great suffering or serious injury to body or health. The crime of sexual violence may be considered only when the contextual elements of war crimes or crimes against humanity are met.¹¹³ The superior

¹⁰⁹ Kai. Ambos, *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (Munich: C.H. Beck, 2018) at 267; Kvočka, *supra* note 90 at para 343.

¹¹⁰ In case of crimes against humanity, the victim of sexual violence has to be a civilian, the sexual conduct was part of a widespread or systematic attack, the physical perpetrator of the criminal conduct or other relevant actor knew that it was part of this widespread or systematic attack.

¹¹¹ United Nations Division for the Advancement of Women Department of Economic and Social Affairs, "Sexual Violence and Armed Conflict: United Nations Response" (April 1998) at 7, online (pdf): <www.un.org/womenwatch/daw/public/cover.pdf> [perma.cc/5JC9-LXJ5].

¹¹² The main distinction of the torture as a crime against humanity and torture as war crime is based on the difference of *chapeau* of crime against humanity and war crime.

¹¹³ These are the existence of an armed conflict, nexus of the conduct to the armed conflict,

responsibility may be attributed for the other forms of the sexual violence similarly as mentioned above. It is important at this stage to mention the other forms of sexual violence arising from other crimes.

It is internationally accepted that crimes of a sexual nature inflict serious mental and physical damage on the victim and are deemed an aggravating factor, particularly when committed against vulnerable and defenceless women or girls and may constitute torture.¹¹⁴ The Tribunal in the *Mucić et al.* case, held the crime of rape to be torture. The finding of the Tribunal was based upon the fact that the act of rape offends human dignity and physical integrity, which causes severe pain and suffering, both at a physical and psychological level.¹¹⁵ In the *Semanza* case, the Tribunal stated that the encouragement of the crowd to rape women because of their ethnicity inflicts severe physical or mental pain or suffering for discriminatory purposes.¹¹⁶ Accordingly, it is possible to conclude that if sexual violence is committed on the part of the perpetrator, it may still be considered torture, provided that the other elements of torture are met.¹¹⁷

The prohibition of slavery is the oldest principle of customary law and is part of *jus cogens* (compelling law). The definition of the offence goes back to the 1926 Slavery Convention.¹¹⁸ Article 1 of the convention deemed enslavement the status or condition of a person over whom the right of ownership is exercised. This definition was circulated in the case of *Kunarac*,

violation of a specific rule of IHL, material elements of the offence.

¹¹⁴ Michele Jarvis, "An Emerging Gender Perspective on International Crimes" in Gideon Boas & William Schabas, eds, *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff, 2003) at 180.

¹¹⁵ *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 496; see also *Prosecutor v Češić*, IT-95-10/1-S, Trial Chamber Judgment (11 March 2004) at paras 53-54; *Kvočka*, *supra* note 90 at para 320; ICTY, *Prosecutor v Vasiljević*, IT-98-32-A, Appeals Chamber Judgment (25 February 2004) at para 165; *Prosecutor v Krnojelac*, IT-97-25-T, Trial Chamber Judgment (15 March 2002) at paras 185-186.

¹¹⁶ *Semanza*, *supra* note 89 at para 485.

¹¹⁷ *Akayesu*, *supra* note 39 at para 687; ICTY, *Kunarac* (Appeal Chamber Judgment), *supra* note 91 at paras 142-155; see also ICC, *Prosecutor v Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) at paras 197-199 (International Criminal Court: Situation in the Central African Republic).

¹¹⁸ See *Slavery Convention*: Signed at Geneva on 25 September 1926, Entry into force 9 March 1927, in accordance with article 12, online: <www.ohchr.org/en/professionalinterest/pages/slaveryconvention.aspx> [perma.cc/XY6G-YN3K].

where the Tribunal confirmed the exercise of any or all of the powers attaching to the right of ownership of a person as the *actus reus* (guilty act) and the intention to exercise those powers as the *mens rea* (guilty mind).¹¹⁹ The crime of sexual slavery was not codified in the Statutes of the ad hoc Tribunals. However, slavery for sexual purposes was directly defined under the crime of enslavement.¹²⁰ The Tribunal in the *Kunarac* case described the following acts as power of ownership over a person: control of the individual's movement, control of his or her physical environment, psychological control, measures taken to prevent or deter escape, actual or threatened force or coercion, assertion of exclusive control, subjection to cruel treatment and abuse and control of sexuality.¹²¹ This may refer also to sex as forced labour, prostitution or human trafficking.

In the practice of the ad hoc Tribunals, most of the acts of sexual violence were prosecuted under other inhuman acts of crimes against humanity. This led to a contradiction to the principle of *nullum crimen sine lege* (no penalty without a law) and to difficulties for the interpretation of the definition.¹²² In this matter, the Tribunal in the case against *Tadić* decided that other inhuman acts must consist of acts inflicted upon a human being and must be of a serious nature.¹²³ In the *Kayishema* case, the Tribunal stated that in relation to the ICTR Statute other inhumane acts include those that are similar in gravity and seriousness to the enumerated acts in the Statute on political, racial and religious grounds, which are acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.¹²⁴ Such acts must not be obviously linked to physical force, e.g. forced undressing in a public area, making the victims perform naked physical exercises in a public area,¹²⁵

¹¹⁹ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 540.

¹²⁰ *Brima*, *supra* note 64 at para 706.

¹²¹ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 542.

¹²² Terhi A Jyrkkiö, "Other Inhumane Acts' as Crimes against Humanity" (2011) 1 Helsinki L Rev 183 at 184.

¹²³ *Prosecutor v Tadić*, IT-94-I-T, Trial Chamber Opinion & Judgment (7 May 1997) at para 728 [*Tadić*].

¹²⁴ Angela M Banks, "Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes" (2005) 8 Wm & Mary J Women & L 5 at 28; *Prosecutor v Kayishema et al*, ICTR-95-I-T, Trial Chamber Judgment (21 May 1999) at para 151-153 [*Kayishema*].

¹²⁵ *Akayesu*, *supra* note 39 at para 697.

forcing the prisoner to cut off the testicle of another prisoner,¹²⁶ or cutting off a woman's breast and licking may be interpreted as other inhuman acts under crimes against humanity.¹²⁷

The Tribunal in the *Čelebići* Camp case confirmed that cruel treatment as a war crime may be committed, if the conduct is an intentional act or omission, is deliberate and not accidental and causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.¹²⁸ The sexual cruel treatment may be related to various acts of punishment or mockery against the victims, e.g. tying an electric cord around the genitals of prisoners and forcing prisoners to perform fellatio on one another, kicking in the genitals and repeatedly pulling down their pants while threatening to cut off their penis.¹²⁹

The elements of outrage upon personal dignity as a serious violation of Common Article 3 were also developed by the ad hoc Tribunals. Accordingly, in order to consider the outrages upon personal dignity as a war crime, the perpetrator has to intentionally commit or participate in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and that the perpetrator is aware that the act or omission could have that effect.¹³⁰ In this context the degree of suffering can be established pursuant to subjective and objective elements, such as the cultural background of the victim, objective conditions of the conduct, all factual circumstances, the sexual nature of the conduct, etc.¹³¹ At the same time, it does not matter whether the victim is aware of his/her degradation or humiliation.

The Tribunal in the *Čelebići* Camp has noted that all acts that constitute torture can be automatically qualified as wilfully causing great suffering or serious bodily injury or damage to health, but not vice versa.¹³² Contrary to the crime of torture, wilfully causing great suffering is based on sadism and

¹²⁶ *Tadić*, *supra* note 123 at para 198.

¹²⁷ *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Trial Chamber Judgment (1 December 2003) at paras 678, 936 (International Criminal Tribunal for Rwanda).

¹²⁸ *Mucić* (Trial Chamber Judgment), *supra* note 40 at paras 521-522.

¹²⁹ *Ibid* at para 24; *Prosecutor v Simić et al*, IT-95-9-T, Trial Chamber Judgment (17 October 2003) at para 11.

¹³⁰ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 514; *Kunarac* (Appeal Chamber Judgment), *supra* note 91 at paras 163-165.

¹³¹ See Brouwer, *supra* note 80, at 212-213.

¹³² *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 511.

causes extreme pain, suffering or humiliation to a person. In order to observe sexual violence as a wilful infliction of great suffering or injury to body or health under war crimes, it is necessary to take into account all factual circumstances, including the nature of the act in the context in which it occurs, its duration and repetition, sexual nature and moral effects of the act on the victim, his/her personal circumstances, such as age, sex and health.¹³³

VII. SEXUAL VIOLENCE UNDER GENOCIDE

In order to prosecute sexual violence under the crime of genocide, the elements of genocide need to be fulfilled. Although sexual violence is not mentioned either in the genocide convention or in the Statutes of the International Tribunals, the Tribunal in the *Akayesu* case recognised that acts of sexual violence can be a means of achieving genocide,¹³⁴ and it may fall under the category of genocide,¹³⁵ especially under 'causing serious bodily or mental harm to members of the group' and 'imposing measures intended to prevent births within the group'. On these grounds, the International Court of Justice (ICJ) in the *Bosnia and Herzegovina v. Serbia and Montenegro* case decided that sexual violence could well constitute evidence that genocide has been perpetrated, despite the fact that it has not been conclusively established that such atrocities were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part.¹³⁶ According to international case law, the bodily harm must be serious and inflicted intentionally, meaning the serious damage to health must cause disfigurement or serious injuries to the external and internal organs or senses.¹³⁷ Causing mental harm describes non-physical serious and

¹³³ Michelle Cottier, "Article 8" in Otto Triffterer & Kai Ambos, eds, *Rome Statute of the International Criminal Court: A Commentary* (Munich: CH Beck, 2016) at 310.

¹³⁴ Brouwer, *supra* note 80 at 80; *Akayesu*, *supra* note 39 at para 731.

¹³⁵ See Lisa Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda" (2000) 22:1 *New Political Science* 89-102.

¹³⁶ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, para. 319.

¹³⁷ *Kayishema*, *supra* note 124 at para 690; *Akayesu*, *supra* note 39 at para 504; *Prosecutor v. Krstić*, IT-98-33-T, Trial Chamber Judgment (2 August 2001) at para 507; Florian Jessberger, "The Definition and the Elements of the Crime of Genocide" in Paola Gaeta, ed, *The UN Genocide Convention: A commentary* (Oxford: Oxford University Press, 2009)

intentional attacks on members of the group that significantly affect the group's social existence.¹³⁸ Sexual violence may be inflicted on a group through living conditions calculated to cause the group's physical destruction or that can prevent births within the group.¹³⁹ In the *Akayesu* case, the Tribunal found that in patriarchal societies, the membership of the group is determined by the identity of the father. Consequently, the child will not belong to its mother's group, if the woman was impregnated by a man of another group.¹⁴⁰ To date there has been no conviction for sexual violence amounting to a form of genocide under the doctrine of superior responsibility by the international Tribunals. The prosecution of superiors for genocidal crimes by the subordinates led to contradictory discussions on the matter of special intent. On the one hand, a conclusion was made not to include the element of *dolus specialis* in the omission of the superior.¹⁴¹ This conclusion was contradictory to the decision made afterwards in the case of *Stakić*, where the Tribunal found that the special nature of genocide should be considered for the conviction of the superior for his omission.¹⁴² The Tribunal in the *Brđanin* case was unable to agree with the previous decision and stated that the superior does not need to possess the special intent in order to be held liable for genocide under superior responsibility.¹⁴³

at 98.

¹³⁸ *Akayesu*, *supra* note 39 at para 731.

¹³⁹ Dorothy Thomas, "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath" (September 1996) at 35, online (pdf): *Human Rights Watch* <www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf> [perma.cc/7GNE-PT55]; e.g. women subjected to sexual violence may be left physically unable to reproduce, or, they may be denied this role by their community given the nature of the attacks they have suffered.

¹⁴⁰ *Akayesu*, *supra* note 39 at para 507; Tathiana Flores Acuña, "The Rome Statute's Sexual Related Crimes: an Appraisal under the Light of International Humanitarian Law" (2006) 39:1 *Revista IIDH* 169-202.

¹⁴¹ *Prosecutor v Ntagerura et al*, ICTR-99-46, Trial Chamber Judgment (25 February 2004) at paras 653-654, 690, 694-695.

¹⁴² ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24, Trial Chamber, Decision on Rule 98bis Motion for Judgment of Acquittal, 31 October 2002, para. 92.

¹⁴³ *Brđanin*, *supra* note 90 at paras 717-721.

VIII. CONCLUDING REMARKS

Superiors who are prosecuted for the sexual crimes of their subordinates are usually actively involved in the perpetration of the crime, where they either encouraged the commission of the crime with their presence or ignored the violence which was occurring. As strategic developers of mass atrocities, they have committed the same crimes. In order to prove the superior-subordinate relationship element, difficulties arise in cases of a de facto hierarchical system, where the absence of the legal measures cannot guarantee an obligation of the superior towards his/her subordinates. In cases of mass violations, the superiors or commanders cannot avoid information of ongoing violence. Even if they cannot prevent or stop the commission of the crimes, they are still obligated to take all necessary and reasonable measures to punish the perpetrators. Although the Courts are engaged in prosecuting high-ranking superiors in order to motivate the national courts into prosecuting low-ranking perpetrators for the crimes committed, there is still an academic and practical dispute on the matter of the doctrine of superior responsibility.

The enlargement of the definitions of sexual acts under the international criminal law demands the superiors to be wide awake about the possible gender-based perpetrations of their subordinates.

“They Just Don’t Care”: Women Charged with Domestic Violence in Ottawa

A N I T A G R A C E *

ABSTRACT

Police in Ontario are obligated to lay charges when responding to incidents of intimate partner violence and to ensure that those charges are laid against the primary or dominant aggressor. This obligation is intended to protect victims, the majority of whom are female. However, there is evidence that women are being inappropriately charged in situations of intimate partner violence which raises questions about how police are applying policies designed to identify primary aggressors. Drawing from interviews conducted with 18 women who have been charged in situations of intimate partner violence, this study examines women’s accounts of how police responded to them during the incident for which they were charged. The women’s compelling and complex accounts of these incidents, and the ways in which police responded, suggest that in some situations, police are failing to identify the primary aggressor and are inappropriately charging women. Women experience these failures by police as betrayal. Some even feel the police become complicit to their on-going abuse. As a result, women who have been inappropriately charged in situations of intimate partner violence say they would be unwilling to turn to the police for protection in the future, even if they are again victims of violence. *Keywords:* domestic violence, intimate partner violence, mandatory charging, primary aggressor, dominant aggressor, police, assault

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I. INTRODUCTION

Canada has clearly made significant progress from the time in which “the abuse of women within marriage [was] an aspect of the husband’s ownership of his wife and his ‘right’ to chastise her.”¹ Yet women still represent nearly 80 percent of the victims of spousal violence² and last year alone, 148 women and girls were killed by violence in Canada, 53 percent of whom were victims of their intimate partner.³ The serious nature of intimate partner violence has been acknowledged by federal, provincial and territorial governments.⁴ Mandatory arrest policies have been the principal justice system responses in Canada as in other Western nations. Such measures are intended to deter perpetration, demonstrate moral intolerance, limit police discretion, and protect victims, of whom the vast majority are women.⁵ Indeed, incidents involving female victims are more likely to lead to charges.⁶ However, justice system responses to intimate partner violence have resulted in unanticipated adverse legal, social, and economic outcomes for women.⁷ In particular, women are being charged with assault and other related offences, even in situations in which they themselves have been victims of violence.⁸ Due to concerns about such

¹ *R v Lavallee*, [1990] 1 SCR 852 at 872, [1990] SCJ No 36 (QL).

² Marta Burczycka & Shana Conroy, “Family violence in Canada: A statistical profile, 2015” (2017) 37:1 Juristat 1 at 36.

³ Myrna Dawson et al, *#CallitFemicide: Understanding gender-related killings of women and girls in Canada 2018*, (Guelph: Canadian Femicide Observatory for Justice and Accountability, 2019) at 6-7.

⁴ Canada, Ad Hoc Federal-Provincial-Territorial Working Group, *Spousal Abuse Policies and Legislation: Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*, (Ottawa: Department of Justice, 2002).

⁵ Mariana Valverde, Linda MacLeod & Kirsten Johnson Kramar, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies*, Mariana Valverde, ed. (Toronto: University of Toronto Press, 1995); Elizabeth A Sheehy, “Legal Responses to Violence Against Women in Canada” in Katherine MJ McKenna & June Larkin, eds, *Violence Against Women New Canadian Perspectives*, (Toronto: Inanna Publications, 2002) 473.

⁶ Burczycka & Conroy, *supra* note 2 at 37.

⁷ Valli Rajah, Victoria Frye & Mary Haviland, “Aren’t I a Victim?” (2006) 12:10 Violence Against Women 897; David Hirschel & Eve Buzawa, “Understanding the context of dual arrest with directions for future research” (2002) 8:12 Violence Against Women 1449.

⁸ Susan L Miller, “The Paradox of Women Arrested for Domestic Violence” (2001) 7:12 Violence Against Women 1339; Russell P Dobash et al, “The Myth of Sexual Symmetry in Marital Violence” (1992) 39:1 Soc Problems 71; Jennifer E Caldwell et al, “Why I

adverse impacts, many jurisdictions across Canada and America have enacted primary aggressor policies that mandate police officers to identify the primary or dominant aggressor in a domestic incident.⁹ This article reports on findings from an Ottawa-based research project designed to examine experiences of women who received intimate partner violence related charges in light of such primary aggressor policies.

I begin by placing mandatory charging and primary aggressor policies within the historical and legal context of criminal justice responses to intimate partner violence. Concerns about mandatory charge policies are articulated, as are the remedies put in place to address them. This is followed by a brief review of recent scholarship on intimate partner violence, demonstrating existing gaps and the need for studies such as this. The methods and findings of this research project follows, focusing on the narratives of women charged in situations of intimate partner violence. The first section of research findings provides a detailed exploration of the ways police responded to women, and how women describe these interactions. The second section explores women's intersecting vulnerabilities such as race, immigration, and addiction. The article concludes by highlighting key concerns raised by this research about police responses to intimate partner violence.

II. MANDATORY CHARGING

In 1982, Canadian Member of Parliament Margaret Mitchell told the House of Commons that "one in ten [Canadian] husbands beat their wives regularly."¹⁰ She was immediately drowned out by laughter and heckling.

hit him: Women's reasons for intimate partner violence" (2009) 18:7 J Aggression Maltreatment & Trauma 672; Meda Chesney-Lind, "Criminalizing Victimization : The Unintended Consequences of Pro-Arrest Policies for Girls and Women" (2002) 2:1 Criminology & Public Policy 81.

⁹ Ontario, Ministry of the Solicitor General, *Policing Standards Manual*, 2000, (Ontario: MSG, 2000) at Domestic Violence Occurrences, 7/12 [*Policing Standards Manual*]; David Hirschel, Philip D McCormack & Eve Buzawa, "A 10-Year Study of the Impact of Intimate Partner Violence Primary Aggressor Laws on Single and Dual Arrest" (2017) J Interpersonal Violence 1; Cheryl Fraehlich & Jane Ursel, "Arresting Women: Pro-arrest Policies, Debates, and Developments" (2014) 29:5 J Family Violence 507; Mary A Finn et al, "Dual Arrest Decisions in Domestic Violence Cases: The Influence of Departmental Policies" (2004) 50:4 Crime & Delinquency 565.

¹⁰ *House of Commons Debates*, 32-1, Vol 15 (12 May 1982) at 17334 (Margaret Mitchell) [*Hansard Vol 15*]. The statistic of 1 in 10 women beaten by their husbands was from the

Defiantly responding that wife battering was “no laughing matter,”¹¹ Mitchell went on to request that courts and law-enforcement start to treat spousal abuse as a criminal offence.¹² Later that year the Canadian government affirmed the criminality of ‘wife battering’¹³ and over the next three years, federal and provincial governments adopted policies and directives requiring police to lay charges in all incidents of spousal abuse where there were reasonable grounds to believe an offence had been committed.¹⁴ Originally classified as ‘wife assault,’ over the next three decades, the terms used to describe violence within intimate relationships evolved into ‘domestic violence,’ ‘spousal abuse,’ and ‘intimate partner violence.’ These terms recognize varieties in intimate relationships and the potential and actual victimization of men and women, cis and transgender; they also incorporate various types of violence, including emotional and psychological abuse.¹⁵ Bill C-75, which received Royal Assent in 2019, adds a gender-neutral definition of intimate partner to section 2 of the *Criminal Code* which includes a person’s “current or former spouse, common-law partner and dating partner.”¹⁶ Similarly, the 2000 Ontario Policing Manual

first Canadian report on ‘wife battering’ titled *Wife Battering in Canada: The Vicious Circle* (1980). It was written by Ottawa sociologist Linda MacLeod. MacLeod continued to research and report on domestic violence and violence against women, publishing *Battered But Not Beaten* (1987) and *The City of Women: No Safe Place* (1989).

¹¹ Hansard Vol 15, *supra* note 10 at 17334.

¹² Judy Stoffman, “MP Margaret Mitchell famously called wife abuse ‘no laughing matter’”, *The Globe and Mail* (22 March 2017), online: <www.theglobeandmail.com/news/politics/mp-margaret-mitchell-famously-called-wife-abuse-no-laughing-matter/article34392492/> [perma.cc/KRA8-38F5].

¹³ Peter Jaffe et al, “The impact of police charges in incidents of wife abuse” (1986) 1:1 J Family Violence 37.

¹⁴ Sheehy, *supra* note 5; Valverde, *supra* note 5.

¹⁵ Currently six provinces (Alberta, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Saskatchewan) and three territories (Northwest Territories, Yukon, and Nunavut) have specific legislation on family violence that broadens the scope of what constitutes domestic violence. For example, Manitoba’s *The Domestic Violence and Stalking Act*, SM 1998, c 41 includes under the meaning of domestic violence “conduct that reasonably, in all the circumstances, constitutes psychological or emotional abuse” (2(1.1)(c)). See also Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 4.

¹⁶ 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*, Parliament of Canada, 2019, c. 25, cl 1(3). The Bill, which is currently before Senate, also introduces reversal of onus of proof in bail applications for those who have previous charges against intimate partners, longer maximum sentences for those convicted of indictable offences against intimate

notes that “intimate relationships include those between the opposite-sex and same-sex partners. These relationships vary in duration and legal formality, and include current and former dating, common-law and married couples.”¹⁷ However, despite the gender neutrality of policies addressing intimate partner violence, the rates and severity of experiences and threats of violence continue to disproportionately affect women. In 2003, a report released by the Ad-Hoc Federal-Provincial-Territorial Working Group tasked with reviewing spousal abuse policies and legislation concluded that while both men and women experience spousal abuse, that which is suffered by women is much more severe.¹⁸

Canada was not alone in implementing mandatory or pro-charge policies during the 1980s. In the United States and the United Kingdom, similar policies that targeted spousal abuse were being welcomed by feminists as a “symbolic and normative condemnation of domestic violence.”¹⁹ Early studies of mandatory charging in Canada showed a dramatic increase in charge rates,²⁰ and in public support for such policies.²¹ Yet in jurisdictions across North America, concerns were soon being raised about policy effectiveness, particularly given patriarchal power differences, gender inequities in access to the law, and male-dominated criminal justice institutions.²² Concerns were also expressed about increased rates of women

partners, and the consideration of offence committed against an intimate partner as an aggravating circumstance on sentencing.

¹⁷ *Policing Standards Manual*, *supra* note 9 at Domestic Violence Occurrences, 1/12.

¹⁸ Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 4; Holly Johnson & Myrna Dawson, *Violence Against Women in Canada: Research and Policy Perspectives* (Don Mills: Oxford University Press Canada, 2011).

¹⁹ Marianne Hester, “Who does what to whom? Gender and domestic violence perpetrators in English police records” (2013) 10:5 *European J Criminology* 623 at 623; see also Chesney-Lind, *supra* note 8; Carol Smart, *Law, Crime and Sexuality*, (London: Sage, 1995).

²⁰ Jaffe et al reported a 2500% increase police charges in London, Ontario from the pre-policy year of 1979 to the third year of policy, 1983, despite relative consistency in the number of ‘family calls’. Jaffe et al, *supra* note 13.

²¹ A 1996 study in the Yukon found that 85% of victims were in favour of pro-charging policies. Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 4 at 18; See also Myrna Dawson & Tina Hotton, “Police Charging Practices for Incidents of Intimate Partner Violence in Canada” (2014) 51:5 *J Research Crime & Delinquency* 655.

²² Smart, *supra* note 19; Faith E Lutze & Megan L Symons, “The Evolution of Domestic Violence Policy Through Masculine Institutions: From Discipline to Protection to Collaborative Empowerment” (2003) 2:2 *Criminology & Public Policy* 319.

charged with assault and other related offences.²³ In Winnipeg in 1991, 23 percent of charges against women were related to intimate partner violence, in 1995, two years after the adoption of mandatory charge policies, that percentage jumped to 58.²⁴

Primary aggressor policies were implemented to address concerns about the rise in intimate partner violence charges against women, and the fear that women were being inappropriately charged. Such policies mandate police officers to identify the primary or dominant aggressor in a domestic incident.²⁵ Even if both parties have or claim injury, police should carefully consider the severity and type of injury, as well as prior violence, and determine which party, if any, is the primary or dominant aggressor.²⁶ To promote identification of primary aggressors and reduce inappropriate charging of women, Domestic Violence Crown Attorneys, community groups, and the Ministry of Community Safety and Correctional Services in Ontario created an ‘Investigative Aid for Police Officers’ aimed at the “reduction of dual charges in domestic violence occurrences.”²⁷ It notes that the dominant aggressor may not be the individual who initiated the violence, but is the ‘principal abuser’ with a history of violence, as well as power and control indicators such as emotional abuse and isolation.²⁸ Various other investigative tools are available to police in Ontario to aid them in identifying the dominant aggressor. These include the Ontario Domestic Assault Risk Assessment, used to assess the severity and frequency

²³ Susan L Miller, “The Paradox of Women Arrested for Domestic Violence” (2001) 7:12 *Violence Against Women* 1339; Russell P Dobash et al, “The Myth of Sexual Symmetry in Marital Violence” (1992) 39:1 *Soc Problems* 71; Jennifer E Caldwell et al, “Why I Hit Him: Women’s Reasons for Intimate Partner Violence” (2009) 18:7 *J Aggression Maltreatment & Trauma* 672; Meda Chesney-Lind, “Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women” (2002) 2:1 *Criminology & Public Policy* 81.

²⁴ Fraehlich & Ursel, *supra* note 9 at 508 citing Elizabeth Comck, Vanessa Chopyk & Linda Wood, *Mean Streets? The Social Locations, Gender Dynamics, and Patterns of Violent Crime in Winnipeg*, (Winnipeg: Canadian Centre for Policy Alternatives, 2000). .

²⁵ Hirschel, McCormack & Buzawa, *supra* note 9; Finn et al, *supra* note 9.

²⁶ David J Hirschel & Eve S Buzawa, “The Role and Impact of Primary Aggressor Laws and Policies” (2012) 12:2 *J Police Crisis Negotiations* 165; Finn et al, *supra* note 25; John Hamel, “In Dubious Battle: The Politics of Mandatory Arrest and Dominant Aggressor Laws” (2011) 2:2 *Partner Abuse* 224.

²⁷ Ministry of Community Safety and Correctional Services, *Investigative Aid: Dual Charges* (2016).

²⁸ *Ibid* at 2-3.

of assaults and the risk of future assault; the Domestic Violence Supplementary Report Form²⁹ which includes a 19-point checklist of risk factors, such as past history of violence, access to firearms, bizarre behaviour, and drug and alcohol use; and the Spousal Assault Risk Assessment Guide with a 20-point checklist on criminal history, psychological functioning and social adjustment.³⁰ However, even when such guidelines exist, research in the United Kingdom has indicated police still use their own discretion in determining whether or not to make arrests.³¹ Research in the United States shows that policy compliance by police is low.³² In Canada, research in the 1990s on officers' perceptions of mandatory charging policies indicated they were resistant to loss of discretion³³ and that interpretation of policy is influenced by individual officer's perceptions and stereotypes.³⁴ More recently, Myrna Dawson and Tina Hutton analyzed the 2008 Canadian Uniform Crime Reporting Survey which includes 81,482 incidents of intimate partner violence reported to the police.³⁵ They found that legal and extralegal factors influence police decisions to lay charges across all jurisdictions, despite the prevalence of mandatory-charge policies.³⁶ In a 2004 Toronto area study of women charged with domestic violence, Shoshanna Pollack found that 90 percent of women charged had a history of physical, emotional and sexual abuse by the partner they allegedly assaulted, and six of 19 respondents had called 911 for their own protection, yet were instead themselves arrested.³⁷ The existence of policy directives and

²⁹ This form was created by the Ontario Provincial Police Behavioural Science Form in response to the inquest into the murder of Arlene May by her boyfriend Randy Iles. Allison Millar, Ruth Code & Lisa Ha, *Inventory of Spousal Violence Risk Assessment Tools Used in Canada*, (Ottawa: Department of Justice Canada, 2009).

³⁰ *Ibid.*

³¹ Andy Myhill & Kelly Johnson, "Police use of discretion in response to domestic violence" (2016) 16:1 *Criminology & Crim Justice* 3.

³² Dana A Jones & Joanne Belknap, "Police Responses to Battering in a Progressive Pro-Arrest Jurisdiction" (1999) 16:2 *Justice Q* 249.

³³ Kelly Hannah-Moffat, "To Charge or Not to Charge: Front Line Officers' Perceptions of Mandatory Charge Policies" in Mariana Valverde, Linda MacLeod & Kirsten Johnson, eds, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies*, (Toronto: University of Toronto Press, 1995) 35.

³⁴ J Faubert & R Hinch, "The Dialectics of Mandatory Arrest Policies" in Thomas O'Reilly-Flemming, ed, *Post-Critical Criminology* (Toronto: Prentice Hall, 1996) 230.

³⁵ Dawson & Hotton, *supra* note 21.

³⁶ In Ontario, 86.3% of cases were cleared by a criminal charge, which is higher than the national average of 74%.

³⁷ Women Abuse Council of Toronto, *Women Charged with Domestic Violence in Toronto*:

guidelines does not guarantee changes to police practices, nor unequivocally prevent inappropriate charging of women. However, Research and Education for Solutions to Violence and Abuse recently conducted a study of 2,736 women accused of intimate partner violence offences in Winnipeg.³⁸ They found there was a decline in dual arrests (where both parties are arrested) after police received primary aggressor training.³⁹

III. APPROACHES TO STUDYING INTIMATE PARTNER VIOLENCE AND MANDATORY CHARGING

International scholarship on mandatory charging and primary aggressor policies notes that police continue to exercise great deal of discretion in responding to domestic situations.⁴⁰ As has been shown in research on police responses to sexual assault, officers may mistrust or disbelieve women's accounts of assault and apply stereotypes about 'real' victims.⁴¹ Additionally, officers who disagree with mandatory charge policy guidelines can downplay them at every level in practice, training, and supervision.⁴² They can selectively invoke the law according to context and their own moral judgments.⁴³ Susan Miller suggests that officers may be reluctant to conduct thorough investigations of family violence if they feel they lack the

The Unintended Consequences of Mandatory Charge Policies, by Shoshana Pollack, Vivien Green & Anke Allspach (Toronto: WACT, 2005) [Pollack, Green & Allspach].

³⁸ Fraehlich & Ursel, *supra* note 24.

³⁹ *Ibid* at 511, 516.

⁴⁰ Durant Frantzen & Claudia San Miguel, "Mandatory arrest? Police response to domestic violence victims" (2009) 32:2 Policing 319.; David Hirschel et al, "Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions" (2008) 98:1 J Crim L & Criminology 255; Enrique Gracia, Fernando García & Marisol Lila, "Police Attitudes Toward Policing Partner Violence Against Women: Do They Correspond to Different Psychosocial Profiles?" (2011) 26:1 J Interpersonal Violence 189.

⁴¹ Jan Jordan, "Perfect Victims, Perfect Policing? Improving Rape Complainants' Experiences of Police Investigations" (2008) 86:3 Public Administration 699; Amy Dellinger Page, "Gateway to reform? Policy Implications of Police Officers' Attitudes Toward Rape" (2008) 33:1 American J Crim Justice 44.

⁴² Eve Buzawa, Thomas L Austin & Carl G Buzawa, "Responding to Crimes of Violence Against Women: Gender Differences Versus Organizational Imperatives" (1995) 41:4 Crime & Delinquency 443.

⁴³ Trish Oberweis & Michael Musheno, "Policing Identities: Cop Decision Making and the Constitution of Citizens" (1999) 24:4 Law & Soc Inquiry 897 ; Myhill & Johnson, *supra* note 31.

training or resources to do so.⁴⁴ They may also believe it is best left for the courts to decide.⁴⁵ Thus, arresting both parties may be seen as a prudent and cautious step, one which the courts can remedy if need be. However, Canadian 2017 data indicate criminal court cases involving females accused of violent crimes are more likely (compared to males) to be stayed or withdrawn.⁴⁶ Given that women's violent crimes are most likely to be related to situations of intimate partner violence,⁴⁷ withdrawal of charges raises questions about whether these charges were appropriate. Although Miller found that police minimize negative effects of arrest on victims, believing that arrest could provide victims with safety and motivate them to seek assistance,⁴⁸ research clearly shows that women charged and arrested with intimate partner violence become very wary of the police and are unlikely to call upon them in the future, even if they are being physically assaulted.⁴⁹ Women who have been charged also face many other negative consequences, including costly legal fees and lengthy legal proceedings; loss of child custody, employment and housing; and feelings of isolation and depression.⁵⁰

Feminist scholars like Miller,⁵¹ Marianne Hester,⁵² and Janet Mosher⁵³ have argued that the criminal justice system is incident-focused, and is thus ill-equipped to respond to and recognize sustained patterns of violence, including emotional, physical, sexual, and economic control and abuse.⁵⁴ This narrow focus increases the likelihood that police may arrest a woman for lashing out, such as scratching, slapping or pushing her partner, yet ignore sustained abuse she has endured.⁵⁵ Clearly, in some cases women do

⁴⁴ Miller, *supra* note 8.

⁴⁵ Margaret E Martin, "Double Your Trouble: Dual Arrest in Family Violence" (1997) 12:2 J Family Violence 139 at 142.

⁴⁶ Laura Savage, "Female offenders in Canada, 2017" (2019) 39:1 Juristat 1 at 10.

⁴⁷ *Ibid* at 7.

⁴⁸ Miller, *supra* note 8.

⁴⁹ Pollack, Green & Allspach, *supra* note 37 at 20-23.

⁵⁰ *Ibid* at 4-5, 20-21; Hillary Kaert, *Help or Hindrance: the Impact of the Mandatory Charge Policy* (Peterborough, 2013) at 54-55; Hirschel & Buzawa, *supra* note 9 at 1459.

⁵¹ Miller, *supra* note 8.

⁵² Hester, *supra* note 19.

⁵³ Janet E Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:1 Windsor YB Access Just 149.

⁵⁴ See also Hirschel & Buzawa, *supra* note 3.

⁵⁵ Miller, *supra* note 8.

use physical violence against their partners. However, most women who use violence against an intimate partner do so in the context of violence against themselves, and their violence is often in self-defense.⁵⁶ Still, Shoshana Pollack argues that women charged with offences related to domestic violence are rarely given opportunities to provide context for their actions, but are treated as ‘offenders’ and ‘batterers.’⁵⁷ She adds that women are more likely to be charged if they use a ‘weapon,’ even if this is something like a phone or tv remote.⁵⁸ Hillary Kaert notes that women often feel re-victimized, dismissed, and disbelieved by police.⁵⁹ Victoria Frye and Mary Haviland find that even when women have visible, serious physical injuries, sometimes they are still sole-charged.⁶⁰ Indigenous women experience intimate partner violence at a much higher rate than that experienced by non-Indigenous women in Canada,⁶¹ yet they are often wary of turning to police for assistance, as they have found police to be unresponsive to their complaints.⁶² For many women, the ‘choice’ to stay in abusive relationships “may be influenced, constrained, or dominated by violence witnessed and experienced during childhood,” rates of which are disproportionately high in Indigenous communities.⁶³ Similarly, racialized women such as new immigrants and visible minorities experience high rates of intimate partner violence, but underutilize criminal justice system responses.⁶⁴

Mandatory charging policies and other efforts aimed at addressing intimate partner violence have been met by an antifeminist backlash from men’s rights activists across Western jurisdictions.⁶⁵ In 2000, when the

⁵⁶ Kathleen J Ferraro, *Neither Angels nor Demons: Women, Crime and Victimization* (Hanover: University Press of New England, 2006); Hirschel & Buzawa, *supra* note 7; Miller, *supra* note 8; Suzanne C Swan & David L Snow, “The Development of a Theory of Women’s Use of Violence in Intimate Relationships” (2006) 8:3 *Violence Against Women* 1026.

⁵⁷ Pollack, Green & Allspach, *supra* note 49 at 9.

⁵⁸ *Ibid* at 7-9.

⁵⁹ Kaert, *supra* note 50.; see also Dora MY Tam et al, “Racial Minority Women and Criminal Justice Responses to Domestic Violence” (2016) 31:4 *J Family Violence* 527.; Finn et al, *supra* note 8.

⁶⁰ Victoria Frye & Mary Haviland, “Aren’t I a Victim?” (2006) 12:10; see also Martin, *supra* note 45.

⁶¹ Dawson et al, *supra* note 3.

⁶² Manitoba, *Aboriginal Justice Implementation Commission Final Report* (Winnipeg: AJIC, 2001).

⁶³ McGillivray & Comaskey, *supra* note **Error! Bookmark not defined.** at 16.

⁶⁴ Tam et al, *supra* note 59.

⁶⁵ Ruth M Mann, “Men’s Rights and Feminist Advocacy in Canadian Domestic Violence

Ontario government tabled Bill 117 *An Act to Better Protect Victims of Domestic Violence*, which would enhance restraining orders for abusive partners, men's groups lined up in protest.⁶⁶ For example, Butch Windsor of Equal Parents of Canada voiced themes common in backlash discourses, such as women's "rampant" use of false allegations and the refusal of government to support men's groups; Peter Cornakovic of Fathers Can Parent Too claimed spousal violence is "largely mutual."⁶⁷ Similarly, within academic scholarship, an argument about 'gender symmetry' claims that women are just as violent, if not more violent, than men in intimate relationships.⁶⁸ Such articles are countered by scholars insisting male violence toward women is more likely to cause serious physical injury and that women are more likely than men to fear their intimate partners.⁶⁹ Recent data from Statistics Canada show that more women than men are victims of police-reported intimate partner violence at a rate per 100,000 of 482 to 132.⁷⁰ Nevertheless, the gender symmetry debate remains persistent so it is vital that feminist scholars prepare themselves for backlash⁷¹ and present their research findings within the context of gender power dynamics and gendered experiences of violence. For example, Dawson and Hutton reported that in Canada in 2008, offences against females were more likely to result in charges (than those against males) by a factor of 2.4,⁷² a finding which could bolster arguments of those claiming men are discriminated against in mandatory charging policies and practices. However, Dawson and Hutton go on to note that their study could not examine co-related factors which influence arrest decisions, such as prior criminal records, which men

Policy Arenas: Contexts, Dynamics, and Outcomes of Antifeminist Backlash" (2008) 3:1 *Feminist Criminology* 44; Miller, *supra* note 8 at 1343;; for example of argument that mandatory charge policies are biased against men see Hamel, *supra* note 26..

⁶⁶ Mann, *supra* note 65 at 55-59.

⁶⁷ Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, 37, (24 October 2000).

⁶⁸ Murray A Straus, "Why the Overwhelming Evidence on Partner Physical Violence by Women Has Not Been Perceived and Is Often Denied" (2009) 18:6 *J Aggression Maltreatment & Trauma* 552; Donald Dutton, Tonia Nicholls & Alicia Spidel, "Female Perpetrators of Intimate Abuse" (2005) 41:4 *J Offender Rehabilitation* 1.

⁶⁹ Leslie M Tutty et al, *The Justice Response to Domestic Violence: A Literature Review* (Calgary, 2008) at 1; Dobash et al, *supra* note 8 at 75; Miller, *supra* note 8 at 1344-46.

⁷⁰ Burczycka & Conroy, *supra* note 2 at 53.

⁷¹ Mann, *supra* note 65.

⁷² Dawson & Hotton, *supra* note 21 at 671.

are more likely to have and that women make up the vast majority of victims of intimate partner violence.⁷³

Arguments about gender symmetry are fueled by variances in data and lack of clarity around trends in charging practices. A 2013 study in Peterborough, Ontario found that women were charged in about 20 percent of domestic incidents,⁷⁴ while a 2016 province-wide study in Ontario found that when police were contacted in domestic violence situations, women were charged in only 5 percent of cases.⁷⁵ This would suggest a downward trend in women being charged, which counters what is reported anecdotally by community partners. Data on criminal charges against women indicate the rates of various charges women receive, but cannot locate these charges within police practice regarding mandatory charging. For example, 2017 data on criminal charges in Canada indicate 70% of violent-crime related charges against women were for assault, of which the vast majority (76%) were level 1 assaults (assaults which cause little physical harm to victims and do not involve weapons); and victims of females accused of a violent crime were most likely to be intimate partners.⁷⁶ This suggests that violent-crime related charges levied against women are primarily made in relation to intimate partner violence situations, but it cannot speak to how these charges were determined, nor the context in which they were made. Clearly more research is needed to assess charging rates and practices in jurisdictions across the country in ways that would render findings comparable.

Substance use is a complicating factor in both domestic violence and police intervention. For example, a study using criminal justice data to compare women and men arrested for domestic violence found that 67 percent of women and 78 percent of men appeared to have been using drugs or alcohol when they were arrested.⁷⁷ Another study found that 92 percent of domestic violent assailants (of which 22 percent were female) had used

⁷³ Lynette Feder & Kris Henning, "A Comparison of Male and Female Dually Arrested Domestic Violence Offenders." (2005) 20:2 Violence & Victims 153.

⁷⁴ Kaert, *supra* note 50 at 27.

⁷⁵ Holly Johnson & Deborah Connors, The Benefits and Impacts of Mandatory Charging in Ontario: Perceptions of Abused Women, Service Providers and Police (Ottawa: University of Ottawa 2017) at 4.

⁷⁶ Savage, *supra* note 46 at 7-8, 11.

⁷⁷ Amy L Busch & Mindy S Rosenberg, "Comparing Women and Men Arrested for Domestic Violence: A Preliminary Report" (2004) 19:1 J Family Violence 49 at 54.

drugs or alcohol on the day of the assault.⁷⁸ Martin found that alcohol and/or drugs were involved at the time of the arrest in more than half of dual arrest cases.⁷⁹ In a study of women who used violence against their intimate partners, 33 percent indicated they had hit their partner "because [they] were drinking or using drugs."⁸⁰ What is not clear from this research is the extent to which substance use influenced the women's behaviour (such as increasing aggression or decreasing inhibitions), and/or the extent to which it influenced police decisions about whether or not to arrest one or both individuals, although research has found that police are less likely to believe domestic violence victims if they have been drinking.⁸¹ There are on-going questions about the role substance use plays in police decision-making. If a woman has been drinking, are police more likely to arrest and charge her with assault? At the same time, are they less likely to believe her accounts of violence she experienced?⁸²

The Barbara Schlifer Commemorative Clinic in Toronto, which provides services to more than 4,700 women each year, noticed an increase in women being criminalized when requesting state protection from gender-based violence. Their on-going 'Criminalization of Women Project' focuses on women charged in relation to family law violations, sexual assault laws, and immigration and refugee laws. Such research projects are needed in Canada since research on justice responses to intimate partner violence still focuses predominantly on the perspectives of women victims.⁸³ With a few

⁷⁸ Daniel Brookoff et al, "Characteristics of Participants in Domestic Violence: Assessment at the Scene of Domestic Assault" (1997) 277:17 J American Medical Association 1369 at 1370-1371 at 1371.

⁷⁹ Martin, *supra* note 45 at 148.

⁸⁰ Caldwell et al, *supra* note 8 at 680.

⁸¹ Research indicates police are less likely to believe, and more likely to blame, drunk victims of domestic than sober victims, but it is not clear if police are more likely to arrest drunk 'assailants.' Joyce Stephens & Peter G Sinden, "Victims' Voices: Domestic Assault Victims' Perceptions of Police Demeanor" (2000) 15:5 J Interpersonal Violence 534; Anna Stewart & Kelly Maddren, "Police Officers' Judgements of Blame in Family Violence: The Impact of Gender and Alcohol" (1997) 37:11/12 Sex Roles 921; Hannah-Moffat, *supra* note 33.

⁸² Stewart and Maddren found that police are less likely to believe, and more likely to blame, drunk victims of domestic than sober victims, but their research did not indicate if police are more likely to arrest drunk 'assailants'. Stewart & Maddren, *supra* note 81. See also Hannah-Moffat, *supra* note 33.

⁸³ Johnson & Connors, *supra* note 75; Mosher, *supra* note 53; Joseph Roy Gillis et al, "Systemic Obstacles to Battered Women's Participation in the Judicial System: When Will the Status Quo Change?" (2006) 12:12 Violence Against Women 1150; Tam et al,

important exceptions⁸⁴ there is little research being done in Canada on women who are charged in situations of intimate partner violence. As noted above, gaps and variances in research on charges against women can fuel arguments of gender symmetry and make it difficult to locate studies such as this. Additionally, scholarship aimed at police practices has focused on the role of prosecution,⁸⁵ and factors leading to the laying of charges.⁸⁶ Less attention has been given to how women experience these police practices, particularly women who are deemed by police to have committed an offence. This research builds upon Canadian scholarship about police charging practices and addresses gaps created by the shortage of attention to the perspectives of women who have been charged in situations of intimate partner violence.

IV. RESEARCH PROJECT

This study is part of a community-based project on Violence Against Women, the primary goal of which was to examine, in light of primary aggressor policies, the experiences of women who had received an intimate partner violence related charge.⁸⁷ Community partners working with criminalized women and women who have experienced intimate partner violence were active members of the project. They assisted with recruitment of participants, as well as with interpretation and communication of findings. As researchers Mary Haviland, Victoria Frye and Valli Rajah point out, understanding women's experiences of violence and power is part of "domestic violence work."⁸⁸ As such, this project was rooted in feminist

supra note 59; Dianne L Martin & Janet Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8:3 CJWL 3.

⁸⁴ Fraehlich & Ursel, *supra* note 24; Pollack, Green & Allspach, *supra* note 37; Kaert, *supra* note 59.

⁸⁵ Johnson & Dawson, *supra* note 18.

⁸⁶ Dawson & Hotton, *supra* note 21.

⁸⁷ The project was funded by the Social Sciences and Humanities Research Council as part of a larger partnership project (Community First: Impacts of Community Engagement) that explored how to make community/academic partnerships more effective from a community perspective. It was conducted by the author under the supervision of Dr. Diana Majury, and guided by representatives of the Elizabeth Fry Society of Ottawa and Harmony House. Additional community partners include Odawa Native Friendship Centre, Catholic Family Services, and the Eastern Ontario Resource Centre.

⁸⁸ Mary Haviland, Victoria Frye & Valli Rajah, "Harnessing the Power of Advocacy -

research principles that prioritize in-depth understanding women's experiences, and the context of these experiences through narrative accounts,⁸⁹ and that honour the work and insights of frontline workers.

The research process involved in-depth interviews with 18 women in Ottawa, Ontario who had been charged in domestic violence incidents.⁹⁰ Community partners report increases in the number of women who have received intimate partner violence related charges and who are seeking support services. However, in some cases cutbacks in funding have resulted in loss of programming designed for these women. Recruitment for this project had initially been planned from one such program, but as it ended soon after the project began, additional community partners were brought in so that more potential participants could be reached. These included a community organization offering services relating to violence against women, another organization offering a Partner Assault Response program to women, and a drop-in centre for Indigenous women. This engagement with diverse community partners facilitated access to women of different demographics and from different areas of Ottawa. However, it is important to acknowledge that women who use these services are not representative of all women charged in situations of intimate partner violence.⁹¹

The recruitment process involved displaying posters at partner locations and having service providers give the posters to women who met the recruitment criteria.⁹² When women contacted me, the researcher, we would arrange to meet at a mutually convenient time, usually in a private room at the location where the woman received information about the

Research Lessons From the Field" (2008) 3:4 *Feminist Criminology* 247 at 249.

⁸⁹ Shulamit Reinharz & Lynn Davidman, *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992); Marjorie L DeVault, "Talking Back to Sociology: Distinctive Contributions of Feminist Methodology" (1996) 22 *Annual Rev Sociology* 29.

⁹⁰ All participants were interviewed in Ottawa and most of their experiences related to interactions with Ottawa municipal police. However, four women's experiences were with police from other jurisdictions, including the Ontario Provincial Police.

⁹¹ See Holly Johnson, "Methods of Measurement" in Katherine MJ McKenna & June Larkin, eds, *Violence Against Women New Can Perspect* (Toronto: Inanna Publications, 2002) 21.

⁹² Service providers working with criminalized women are aware of the charges women have faced or are in the process of dealing with due to the nature of the services they provide. As such, women recruited for this project did not need to disclose to the service provider any information about their charges or situation about which that individual was not already aware.

project.⁹³ By relying on participant self-selection, I cannot know the criteria upon which women decided to participate, or how many women chose not to participate.⁹⁴ Participants received a \$10 gift card, which especially for economically marginalized women could have influenced their decision. Several women told me they responded because they wanted to have the chance to tell their story. One participant was in the process of trying to have the charges against her withdrawn. She told me she had engaged a lawyer, but given the high cost of his fees, she was reluctant to communicate much with him. During the interview, as she discussed the event that had led to her charges, she noted that there were details she was telling me about which her lawyer was not aware. I offered to give her our interview transcript so she could give it to her lawyer. She shared the transcript with him and later I heard through the community partner that charges against her were withdrawn. Certainly, I have no way of knowing if the transcript had any influence on the lawyer's arguments or the court's decision, however I provide this account to illustrate a feminist approach to research which emphasizes compassion and connectedness.⁹⁵

Interviews focused on women's experiences with the police with respect to the charges against them and how much information the police solicited about the abuse they had experienced in the light of the primary aggressor charging policy in place in Ontario. Length of the interviews ranged from 16 to 100 minutes, with an average of 41 minutes.⁹⁶ As a researcher, I

⁹³ Two women asked me to come to their home or office as it was not convenient for them to meet me at the partner site.

⁹⁴ Johnson, *supra* note 91.

⁹⁵ Sandra Harding & Kathryn Norberg, "New Feminist Approaches to Social Science Methodologies: An Introduction" (2005) 30:4 *Signs* 2009; Rebecca Campbell et al, "What Has It Been Like for You to Talk With Me Today?": The Impact of Participating in Interview Research on Rape Survivors" (2010) 16:1 *Violence Against Women* 60; Amanda Burgess-Proctor, "Methodological and ethical issues in feminist research with abused women: Reflections on participants' vulnerability and empowerment" (2015) 48 *Womens Studies Intl Forum* 124.

⁹⁶ The 16-minute interview ended early because the participant, recruited at a drop-in centre, grew increasingly distraught when talking about her experiences of violence. As the emotional well-being of research participants was my primary concern, when she first became upset, I offered that we stop the interview and I expressed concern about her well-being, but she insisted that she wanted to continue saying, 'I have talk to somebody about it, right?' and talking about her loneliness. However, after a few more minutes she said she wanted to stop, to which I immediately agreed. It is not unusual for participants who have experienced violence to become distraught during interviews – see Rebecca Campbell et al, *supra* note 91 – although this was the only interview that

approached narratives not as records of fact, but as meaning-making representations of the “chaotic mass of perceptions and experiences.”⁹⁷ I viewed interviews as guided conversations through which I sought to understand women’s experiences from their perspectives and in a process of narration that they chose.⁹⁸ I opened each interview by inviting the woman to talk about her experience however she wanted. Some women began by describing how they first met their husband or boyfriend many years previously and talked at length about their relationship; others began with an account of their arrest, providing context later on during our conversation. While I referred to my interview guide to make sure we had addressed all the questions listed (such as whether the police took photos or items for evidence), the sequencing of questions about the incident varied significantly and often women provided answers to the research questions without my direct inquiry. I tried to end all interviews with questions aimed at drawing out narrative accounts of resiliency and strength. Community partners had ensured that counsellors were freely available to women after our interview, a service about which I informed each woman prior to and after the interview. None of the women took up this invitation. Despite that many of them cried during our conversation, several commented that the interview experience was positive, which corresponds with research on feminist practices in interviews of sexual assault victims wherein interviews can be supportive environments that allow women to talk about their experiences, particularly when women are given choices in how they tell their story and are met with compassion rather than judgment.⁹⁹

Of the 18 interviews, 16 were audio-recorded and transcribed; for the other two I took notes, which were then transcribed. All interviews were anonymized and pseudonyms assigned to each case. My analytic process involved thematic data analysis developed through intensive reading, coding using software QSR NVivo, and searching for themes that described the experiences of respondents. Some guiding questions included: How do

was cut short due to the participant's emotional distress.

⁹⁷ Ruthellen Josselson, “Imagining the Real: Empathy, Narrative, and the Dialogic Self” in Ruthellen Josselson & Amia Lieblich, eds, *Interpreting Experience: The Narrative Study of Lives* (Thousand Oaks: Sage Publications, 1995) 27 at 33.

⁹⁸ Steinar Kvale & Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing*, 2nd ed (Los Angeles: SAGE Publications Inc, 2009).

⁹⁹ Campbell et al, *supra* note 95.

women describe their encounter with police? What was the context in which the incident occurred? What have been the impacts of police intervention? Following the process of interviewing, coding, and analyzing, I drafted a report which was circulated to the project's community partners. Two roundtables were held with community partners, including service providers who assisted with participant recruitment, individuals who assist in providing court-related supports to criminalized women, and feminist researchers and advocates. These women served as guides in interpreting and communicating findings¹⁰⁰; they challenged me on some of my preliminary conclusions, and helped to place research findings within the broader context of feminist efforts to address violence against women.

A. Findings

1. *Incidents and charges*

Before delving into the narrative accounts of women who participated in this study, this section provides an overview of these women and the charges laid against them, findings which are placed within the national context of intimate partner violence and women's criminalization. As will be discussed more fully, women in this study faced intersecting and compounding vulnerabilities through poverty, race, immigration, disability, addiction, and histories of abuse (See Table 1). The only criteria for participating in this project was that women had been charged in a domestic situation. However, each of the 18 women interviewed had been sole-charged, meaning she alone was charged and her partner was not, although one woman had, in another situation, been dual charged. This sole-charging of women is hard to understand, since of the 18 women interviewed, only one said that her partner had not been physically violent toward her, and indeed several women told me they had visible injuries on their bodies when police arrived. Women also mentioned their partner's use of sexual violence, withholding of money, threats, and other types of control and aggression.

¹⁰⁰ Haviland, Frye & Rajah, *supra* note 88.

Table 1 – Women's demographics

Ages (at time of interview)	range from 25 to 62, with a mean of 39 and median of 36
Ages (at time of incident ¹⁰¹)	range from 19 to 60, with a mean of 36 and a median of 33
Employment	9 employed 9 unemployed
Ethnicity	8 Indigenous and Inuit* 5 Immigrant 4 Caucasian 1 Black
Living arrangements at time of incident	7 women lived with partner in shared house/apartment 6 women had their own homes 4 women were staying in his apartment 1 couple was homeless
Children	7 had children with them (ranging from infant to age 21) 6 had no children 5 had children but not with them (i.e. grown up or living elsewhere)
History of abuse prior to this relationship	14 women indicated prior abuse, as children and/or as adults 3 women indicated there had not been prior abuse 1 woman was not asked this question**
Self-identified disabilities	12 women said they had no disabilities (although some identified as alcoholics) 5 women identified disabilities (incl. acquired brain injury, PTSD, depression) 1 woman was not asked this question

¹⁰¹ Age at time of incident is an approximation since it was not one of the questions asked during the interview. While some women mentioned their age, in other instances they mentioned the year in which the incident happened or indicated the amount of time that had passed.

Drug and alcohol use	9 women described themselves as alcoholics or having a ‘problem’ with alcohol (of which 2 also reported frequently using drugs) 9 women did not indicate alcoholism or drug use
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* 5 of the 8 Indigenous and Inuit women were recruited at the Indigenous drop-in centre.

** See footnote 95.

When investigating allegations of intimate partner violence, police are instructed to look at previous charges, police records, and protection orders (all of which are indicative of a history of violence).¹⁰² Among the 18 women, three had prior charges of assault, two of whom were involved in relationships with men who also had prior assault charges. One woman had a prior charge of manslaughter, but it was unclear if the man whom she stabbed in the incident we discussed had any prior charges. Two women had prior charges of drinking in public, and one of impaired driving. Nine women had no prior involvement with police, nor any previous charges. However, at least six of the women interviewed (and sole-charged) were accused of assaulting someone who had a previous violent charge against them. Irena’s husband even had a restraining order based on his violent assaults against her. Even if application of the primary aggressor policy could have contributed to the charging of those women with previous violent offence charges, it is hard to understand how the rest of the women were sole charged, particularly when accused of assaulting someone known to have a history of violence.

Canadian statistics indicate that 70 percent of women who are charged with violent crimes receive charges of assault¹⁰³ and that for females accused of assault, 40-51 percent of their victims were intimate partners.¹⁰⁴ Among the 18 women interviewed, 16 received assault charges. Charges laid against these women were comparable to national rates, since seven women’s charges were for assault with a weapon or aggravated assault, and nationally these levels of assault make up 49 and 50 percent respectively of assault charges against an intimate partner. The weapons women were accused of using included knives (three incidents), a frozen bag of meat, a lamp, and a

¹⁰² Ministry of Community Safety and Correctional Services, *supra* note 27.

¹⁰³ Savage, *supra* note 46 at 3.

¹⁰⁴ Statistics Canada, *Women and the Criminal Justice System*, by Tina Hotton Mahony, Joanna Jacob & Heather Hobson, Catalogue No 89-503-X (Ottawa: Statistics Canada, 2017) at 29.

snow shovel. The charge of aggravated assault was for a fingernail scratch on her husband's cornea.

Intimate partner violence takes place at all demographic and socio-economic levels.¹⁰⁵ Women who participated in this study also spanned demographic and socioeconomic categories. Nine women were employed, nine were not. Some women were born and raised in Ontario, others came from Northern Canada or countries abroad. Some lived in their own homes, alone or with their children, others were dependent on a partner or on housing services. All of the respondents indicated they were in a heterosexual partnership; for one couple the male partner was transgender. International research on LGBTQ experiences of intimate partner violence indicates they "are at equal or higher risk of experiencing [intimate] partner violence when compared to heterosexual" couples.¹⁰⁶ National data from 2015 also indicates violence within dating relationships is more common (54 percent) than within spousal relationships (44 percent).¹⁰⁷ Among the women interviewed, only five were married to their partner, although eight others had been living with their partner for over a year and could be considered common-law.

While intimate partner violence knows no boundaries, there are some demographic factors associated with heightened risk, such as youth and racialization. The average age of the women who participated in this study was 33. Statistics on women's criminalization indicates that charges against women decline as women age (as they do with men), with women aged 18-24 receiving the highest number of assault charges (all levels).¹⁰⁸ Similarly, women under 24 are most likely to be victimized by an intimate partner, usually someone they are dating.¹⁰⁹ Women in this study were slightly older than the age at which most women are victimized and criminalized. However, although the incident(s) that led to charges happened for most women when they were in their 30s, many women had been experiencing violence for several years prior to their charge. Racialized women, by which I mean women whose skin colour, accent, and other sensory markers denote

¹⁰⁵ Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 4.

¹⁰⁶ Ellis Furman et al, "It's a gap in awareness': Exploring service provision for LGBTQ2S survivors of intimate partner violence in Ontario, Canada" (2017) 29:4 J Gay Lesbian Soc Services 362 at 363.

¹⁰⁷ Burczycka & Conroy, *supra* note 2 at 47.

¹⁰⁸ Mahony, Jacob & Hobson, *supra* note 104 at 27-28.

¹⁰⁹ Burczycka & Conroy, *supra* note 2 at 48.

a non-Anglo-Saxon Caucasian origin,¹¹⁰ made up the majority (13/18) of the respondents. In Canada, research consistently shows that Indigenous women are more likely to be affected by violent victimization, including intimate partner violence.¹¹¹ Indigenous women experience spousal violence at a rate three times higher than that of non-Indigenous women, and are more likely to experience severe violence and fear for their lives.¹¹² Statistics reveal that slightly fewer immigrant women report victimization by spouses than non-immigrants¹¹³ but that racial minority women from developing countries experience high rates of violence.¹¹⁴ Other factors which have been associated with increased risk of experiencing intimate partner violence include having experienced abuse as a child.¹¹⁵ The majority (14/18) of the women in this study reported experiencing prior abuse, as children and/or as adults.

The demographics of the 18 women are generally consistent with national trends on intimate partner violence and women's criminalization. That said, the results of this small qualitative study cannot be generalized to larger populations of women who receive intimate partner violence related charges, nor to the frequency of problems associated with primary aggressor policies.¹¹⁶ Additionally, while this project focused on women who have received intimate partner violence related charges, in Canada, as in other Western nations, the majority of those arrested on such charges are men¹¹⁷ and thus results here cannot be generalized to police responses to domestic calls. However, "women's powerful narratives provide considerable feedback"¹¹⁸ which can be used to understand how they have experienced police responses to situations of intimate partner violence, and which can raise question about the implementation of primary aggressor policies. The following section turns to women's descriptions of their experiences with

¹¹⁰ Sherene Razack, "What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" (1994) 19:4 Signs 894.

¹¹¹ Mahony, Jacob & Hobson, *supra* note 104; Dawson et al, *supra* note 3.

¹¹² Mahony, Jacob & Hobson, *supra* note 104 at 16.

¹¹³ *Ibid* at 15.

¹¹⁴ Tam et al, *supra* note 59 at 527.

¹¹⁵ Experiencing abuse as a child is associated with higher risks of spousal violence - 6% compared to 3 %. *Ibid* at 15.

¹¹⁶ Haviland, Frye & Rajah, *supra* note 88.

¹¹⁷ Dawson & Hotton, *supra* note 21; Johnson & Connors, *supra* note 75.

¹¹⁸ Tam et al, *supra* note 59 at 535.

the police. Identifying details have been altered slightly, but as much as possible, women's narratives are presented in their own words.

2. Police Questions and Investigations

When police respond to a domestic violence call, they are supposed to separate the couple, make sure any children are safe, interview each person separately to find out what happened, and gather evidence (such as taking photos and securing objects for evidence).¹¹⁹ Eight of the women interviewed said they were questioned by police separately from their partner, such as in different rooms of their home. Sometimes the police took one person outside of the building for questioning. "They took my ex out and they talked to him, got his side of the story," Melissa said. "And then they talked to me and got my side of the story." But she said the police then told her their accounts don't 'jive.' Melissa scoffed, "of course they don't jive together." Her boyfriend was denying that he had hit her, while she was claiming he had. Melissa said that in situations like this, people were going to lie and it was up to the police to figure out what happened. Similarly, Melanie described the questioning as "he said, she said. And nobody really tells the truth, ever." Yet while most women who were questioned by police suggested they did not feel heard or believed, six women said they were not questioned by police nor given opportunities to explain what had happened. Felicia and Christine both did not recall any questions being asked of them. "They just charged me and left it at that," said Christine. "They didn't even ask questions or whatever."

In addition to women reporting they were not separately questioned about the incident, five women said they had visible physical injuries when the police arrived. Yet they were still sole-charged. Mitch's injuries were extensive. "The whole side of my face was black and blue and swollen up to here," she said, drawing her hand up her face toward her eyebrow. Her partner had attacked her in the kitchen, thrown her to the ground, and punched her repeatedly in her face, breaking her nose. She then grabbed two knives and stabbed him. Mitch did not demonstrate surprise at being charged, since she admitted she had stabbed him, but she was frustrated the police refused to consider that her action was in self-defense, despite her bloodied face.

¹¹⁹ Ministry of Community Safety and Correctional Services, *supra* note 27; *Policing Standards Manual*, *supra* note 9.

I couldn't even eat with a spoon. I almost had to suck everything through a straw because of it. People looked at me and was like 'oh my lord.' Well, that's what domestic violence does.

Similarly, Jeannie noted, "even in my mug shot, I had black eyes" from the beating her boyfriend had given her the night she stabbed him. Yet both Mitch and Jeannie were sole-charged and it does not appear that their injuries were considered as evidence of their own victimization, or grounds for at least dual-charging. Melissa admitted that when the officer was questioning her, she got upset with his repeated refusal to acknowledge her injuries. "I said, this is why women don't bother coming out and speaking up and telling you what happened, because then you're going to believe the other person!" Similarly, Irena said the police refused to document the injuries on her body. "My ankle was so swollen," she said, "I was in real pain." She also had bruises all over her arm. "They never made pictures of it." Makayla said the police did take pictures of her injuries, but she still did not feel like they believed her.

I had a red mark on my arm from him squeezing me so tight. And I had some bruising and scratches on my chest and [the police] said, 'they're old injuries and they don't add up to what happened.' But I never had those marks before that moment.

The police discounted Makayla's injuries, suggesting she was exaggerating or even lying, as if she does not know her own body. Although the police took pictures, they did so in black and white. Makayla, whose father is Jamaican, noted that black and white pictures will not clearly show fresh bruises on dark skin.

Police comments to Makayla that her injuries did not "add up to what happened," or to Melissa that her story did not 'jive' with her boyfriend's, illustrate what several women experienced during their encounters with police, namely that officers seemed to give more weight to accounts told by men. Katia said that police made notes when they came to the house after her partner called 911, but she insisted that what they wrote down was not true, "because they wrote what he said mostly." She added, "they didn't even check [his allegations] in any shape or form. They just took what he said!" Of the 18 women, in four cases, it was the male partner who called 911 and made allegations of assault; in an additional two cases the men pressed charges at the police station after which women were charged. In other words, in six cases men went to the police with allegations. Their 'version of events' was what police believed. When women tried to explain their side,

they felt disbelieved and even belittled. "The police believe whoever goes first. That's my impression," said Elena. "That's maybe why they dismissed everything I said, because he called them first, even though it was unfounded." Similarly, Felicia suggested the police believed her boyfriend because he got to them first. "I don't think it was fair," she said. "It's just, who's gonna call 911 first?"

When Leena was picked up by the police and told she was being charged with assault, she told them that her husband had also been violent toward her. Police responded that there was no point in her saying anything about that since it would just look like she was trying to 'get back' at him. The six men who made allegations to the police against their partners had been violent and controlling in the past. For example, Felicia, an immigrant woman, was living with a man who abused her physically and sexually. He may have realized she was getting ready to go to the police about her abuse, so one day when she was alone in the apartment the police arrived. They claimed to be responding to a 911 call placed by her boyfriend alleging that she had hit him with a snow shovel. She was baffled by the accusation; she pointed out there was not even a snow shovel on the premises. But she says, her ex had convinced the police, "and then, that's it. They picked me up like I was a crazy animal or something." She was charged with assault with a weapon.

Katia described her husband as extremely abusive and controlling. One night after an argument, he locked her out of the bedroom the two of them shared with their infant son. He ignored Katia's pleas to open the door, but finally she managed to force her way in. She described feeling so fed up and angry at this point that she yelled and swore at him. He continued to ignore her, pretending to sleep. In frustration, she picked up a pajama top and threw it at him. Katia described what happened next. "He kinda pretended to wake up, and he's like 'what are you doing? What are you doing? Like why are you doing this? Why are you hitting me? Why are you hitting me?'" Katia said she wondered why he was "acting weird" and saying this, but she was so angry she said she just kept saying "I hate you! I hate you!" He then left the room and went outside to his car, from which he called the police and alleged that he was afraid for his own safety and that his wife had been beating him.

Katia had gone to bed after he left the room and was surprised when the police arrived. They told her they were responding to allegations of assault. "This is kinda ironic," she told them. "He's the crazy, like violent

abusive one.” The police warned her that she should be careful since she could be charged, but she did not take this seriously since she did not think she had done anything wrong. That night they left without laying charges, but told her that if he truly was abusive, she should file a report. A couple of weeks later, Katia went to the police station where she completed a 13-page report about his abuse, including descriptions “of him trying to kill me, like choking me till I passed out.” A few weeks later, Katia received a phone call from a detective informing her that she was being charged with assault. She was dumfounded. During that entire ‘incident’ when she threw the pajama top, her husband had been secretly making an audio-recording. This explains why he asked Katia repeatedly why she was hitting him. “I didn’t say anything like, ‘I’m not hitting you,’” Katia said regretfully. “I just said, ‘I hate you.’” Based upon this ‘evidence’, and despite the detailed report she had filed about her own abuse, Katia was charged with assault. Her husband did not receive any charges and claimed custody of their children.

Katia’s story was striking as it demonstrated planned deception on the part of her abusive partner. Other women also found themselves caught up in investigations apparently based upon false allegations. For example, after breaking up with her controlling boyfriend Elena was shocked to get a call from a police detective saying she was being charged with criminal harassment. Her ex had made multiple accusations against her, which she felt the police accepted without scrutiny. Twice she went to the police station in attempts to understand the charges being made against her and to ask what she could do to counter them, both times she was met with an unsympathetic officer. “He was talking to me very rudely,” Elena said. “So I started crying, because I’d already been panicked when I got there. And he shouted at me, ‘Go home! Take your meds!’ He literally shouted that at me.”

The charges Elena’s ex levied seemed to her to have been done purely out of spite. However, other women describe how their partners used calls to the police to get something they wanted, whether this was custody of children or having their partner removed from the home. For example, a few years ago Tammy had accidentally scratched her husband in the eye with her fingernail. The next week, when the eye still looked irritated, she encouraged him to go to the hospital where it was determined that the cornea had been scratched. Two years later, their marriage was ending and her husband wanted full custody of their young son. He obtained the hospital records about his scratched cornea and went to the police. Tammy

was charged with aggravated assault; her husband gained full custody of their child.

In some cases, partners had already taken away the women's phones so they were unable to call 911 themselves.

I was screaming, 'somebody please call 911.' Because my ex had taken my phone and basically like confined me to our apartment. Cuz he didn't want me to leave, or he didn't want me to call the police for whatever reason. – Melissa

Of the 18 women interviewed, only two had been the ones to call 911 for police intervention. Makayla called because she hoped police would remove her boyfriend from her home following a fight in which he pushed her around and knocked her to the ground. But when her boyfriend realized she had called police, he locked himself in the bedroom and also made a call, alleging his own victimization. When the police arrived, they accepted his story and took Makayla away in handcuffs. Irena also called the police after being pushed and kicked by her husband, but when the police arrived, he convinced them that she had bitten him. Despite her injuries, that she had called for help, and that he had a restraining order due to his previous violence against her, Irena was arrested on the spot and sole-charged with assault.

Several women made the point that police should try to 'understand where I'm coming from', which suggests they felt misunderstood. They faced questions from police such as, 'Why didn't you just leave?' or 'Why did you go back to him if he was so abusive?' Some women said police even implied women were responsible for their own abuse.

One of the things the cops said to me was, 'why didn't you go take a walk?' I did. I left the house and I went for a walk for half hour, came back, and he was not cooled down...They just treat it as if I could have done something to prevent it but why couldn't my ex? Why can't you tell my ex to do something to prevent it instead? So, yeah. Yeah. It's like we're the problem. – Makayla

Makayla's partner was given the opportunity to fill out a long domestic violence victim's form, something which was offered to none of the 18 women interviewed. This form included questions about things such as financial, social and emotional control. Although Makayla doubts police would have listened to her side of the story, given everything she experienced, she insists that if they had been willing to listen "they would learn what he was really like to me."

3. *Women's Intersecting Vulnerabilities*

The 18 women interviewed had varied past experiences of involvement with police. As noted above, four had previous charges for violent crimes, and three had previous charges related to alcohol consumption. The ways in which they engaged with police may have been shaped by these and other previous experiences. For example, Brenda had previous alcohol-related charges and her boyfriend was on probation for something “unrelated.” She had been in the process of moving out of their shared apartment when they got into an argument during which she hit him with a bag of meat she was taking out of the freezer. She then went over to her neighbours to ‘chillax.’ When she saw the police arrive, she ‘went over to chat.’ Upon realizing that she was being questioned, she said she became evasive and tried to negotiate with the police, such as suggesting she would go and stay at her friend’s place while things calmed down. Her partner also told the police that he had pushed her first, although Brenda says this was not true but rather said in an attempt to not have her charged. However, the police still arrested her and charged her with assault with a weapon (the weapon being the bag of frozen meat).

Colleen had been street-involved for much of her adult life. She said she had a long history with the police, which included a grudge against an officer whom she claimed stole a carton of her cigarettes. In the incident for which she was charged, a staff member at the homeless shelter where she was staying saw her hitting her boyfriend and called the police. When police arrived, Colleen unsuccessfully tried to convince them they should let her go to “sleep it off.” Colleen also described another occasion in which police charged her with assault. In this instance, Colleen recalled physically struggling with an officer.

I do remember me and the police officer, the female, struggling with each other, and I told her, I said... ‘you seem to like assaulting me when I’m drunk.’ And I said, ‘why don’t you try me when I’m sober and with no gun and no badge.’ And then I guess that’s when I was taken down to the floor a second time.

Colleen was the only woman who described physically struggling with police, however other Indigenous women also described attempts to defend themselves, such as by refusing to answer questions or by being purposefully evasive. Of the 18 women interviewed, five were Inuit and four were Aboriginal. Most had stories of previous negative encounters with police, and expressed distrust and apprehension toward cops. Janis reported that in the past she had a run-in with police during which they asked her for her

name. She gave them her Inuktitut name. "And they were going to charge me with using a false name," she said. Cathy, who has an acquired brain injury from a motor vehicle accident, said police had tasered her three times in her own apartment when she was drunk and unstable. She said sometimes she ends up at the police station and is not sure why she is there. "I don't know how and what, but I wake up in jail several times." She has been charged twice for assaulting her boyfriend, who is also Inuit. Although he has also been violent toward her, Cathy said described him as "pretty smart for living here longer than me." He has never been charged, which Cathy suggests is because the police "understand him more than me."

Cathy's accounts of the situations in which she was charged indicate the complicating factor that alcohol can have in intimate partner violence. She was a soft-spoken woman who laughed easily, but she admitted that when she is drunk, she is unstable and aggressive. "Maybe I have to control my alcohol," she said. "I'm bad when I'm drunk, I think, hitting my boyfriend." Cathy and Nancy both relayed stories in which they had been drinking and woke up in the police station where they were told they had hit or beaten up their partner. Indeed, in describing the incident that led to the arrest, 12 of the 18 women indicated that drugs and alcohol were 'a factor.'¹²⁰ They characterized alcohol as contributing to, or even causing, the violent incident. Lucia describes herself as putting up with her partner's abuse and control for months, but one night she finally spoke out. "We had a couple of drinks and so that's like what made it all explode, the drinks," she said. "We started yelling, like pushing each other, and um, 'I want to leave. I don't want to be here. I'm not in love with you. You're a jerk.'" She suggested alcohol triggered the argument that escalated into physical violence, and subsequent police intervention. Other women similarly described alcohol as sparking the argument and physical violence for which they were charged. In these situations, police were called to the scene by on-lookers (such as shelter staff, neighbours, relatives), perhaps when it seemed the situation was getting out of control.

Some of the women who described alcohol as frequently contributing fights between themselves and their partners had stories of police intervening but not laying charges. Nancy said there was one police officer who 'understands' her situation. She relayed an account when her partner

¹²⁰ When this research started, the use of drugs and alcohol was not identified as a factor to be studied, so specific questions were not asked about it. It was in reviewing transcripts that the repeated mention of alcohol use was noted and explored.

called the police on her. The police arrived and the man was yelling at her, 'You're going to jail! You're going to jail!' But Nancy said the cop replied, "You are going to jail if you keep yelling at her like that." Nancy said that made her boyfriend shut up. The officer did not arrest her, but did take her away from the situation. For Nancy, this was an indication that the police could be at times supportive and could recognize that they were being used to settle a personal score. This also indicates the discretion police exercise when responding to a domestic call and raises questions about why, in the stories described above, they chose to lay sole-charges against the women involved.

Most of the women who had no prior experience with police were shocked and terrified by their arrival. In some cases, this was because of the aggressive manner in which police arrived on the scene. For example, Lucia had gone to bed after an argument with her boyfriend during which they had both pushed each other. She was lying in bed when two male officers kicked her door open and yelled at her to get up. She had a blanket covering her bare breasts, which one officer pulled off. "So I pull another one to cover myself. He pulls it off again," she said. "They're just standing there staring at me." While police were much less aggressive with Leena, she also described being in a state of shock when they picked her up in their cruiser and informed her that she was being charged with assault. Tammy received a phone call from police telling her she needed to come in for questioning about an assault allegation. She describes getting off the phone and 'hyper-ventilating' in a state of panic.

The fear and panic described by several women was particularly acute among immigrant women like Lucia, Felicia and Elena, none of whom had permanent residency status. Elena said her residency and job in Canada have been threatened by the charges and court proceedings. "The problem is, I'm just not having the time to go to trial and ask for justice, because that's a matter of having lots of time and money," she said. "It's not a matter of what's fair and what's right." Immigrant women also said they lacked knowledge of the justice system and struggled to access services. Lucia said the night police charged her she had been in the country for less than a year and was still learning English. She could not understand what police were saying to her, nor the papers she was told to sign at the police station. After laying the allegations of being hit with a snow shovel, Felicia's partner knew that she had been charged and given a no-contact order. He used this to extort sexual favours, threatening Felicia that if she did not comply with his

requests, he would have her deported from the country. She spent close to a year enduring this sexual exploitation out of fear that her refusal to comply would jeopardize her immigration status.

Women interviewed were generally adamant that they will never turn to the police for help in the future, even if they were to continue to experience abuse. Tammy said she has talked with other women who have received domestic violence related charges about whether they would call police if they were to experience violence again. "We would never call the police if we needed help because we would feel like we had to defend ourselves and why we did this." She described a situation, which happened after her charge, in which a boyfriend began hitting her and putting holes in the wall. She said other women might have called police for help, but she did not. She was concerned that blame would somehow be placed on her. She felt like she could neither physically defend herself, nor call for help. She said her only option was to escape, leaving her partner unaccountable for his violence and her own safety still at risk. Melanie said that after her experience with being charged, she is not sure she could bring herself to call the police. "Do I think my phone can dial that number, my finger? 911?" she asked, then answered herself in a whisper. "I don't know. I don't know." She paused, then explained. "Cuz they come in there and, and you are guilty until proven innocent. Innocent until proven guilty? No. No. No. No. You're not. You are guilty." The experience of being treated as 'guilty' is deeply scarring.

B. Discussion

Consistent with other research on intimate partner violence and women's charging, most women in this study were charged with assault. However, all of the 18 women had been sole charged, which may indicate as shift from previously identified patterns of increases in dual charging.¹²¹ The sole charging of women is very concerning given that women reported being in physically and emotionally abusive relationships and some even had visible injuries on their bodies at the time of police intervention. Five women said they were not questioned by police, which indicates that in their cases police may not have followed the protocol of separating the couple

¹²¹ Pollack, Green & Allspach, *supra* note 37; Fraehlich & Ursel, *supra* note 24; Kaert, *supra* note 50. In America, research found that primary aggressor policies have in some jurisdiction decreased rates of dual arrests, but it is unclear if primary aggressors are being correctly identified – Hirschel & Buzawa, *supra* note 26.

and interviewing each person individually. At least six women interviewed had the charges laid against them dropped; but this does not mean justice was served. The impacts are profound on women when they are charged with assault and other violent aggressions. Women reported impacts including loss of child custody and disruptions in their contact with their children, huge financial costs, loss of housing, drawn-out court processes, restrictive conditions placed upon themselves, and extreme emotional scarring.

Even when police did question women, many women felt that police did not believe what they said or give their account equal weight to that of their male partners. Women interpreted certain actions and words by police as indications that their stories, and their abuse, were not significant or worthy of police attention. There are many ways in which police officers demonstrate to women that their version of events did not matter;¹²² these included walking away while women were trying to explain, not writing down what women were telling them, raising their voices at women, belittling them, and refusing to take evidence (such as photos). Additionally, in some cases, police challenged the veracity of what women told them, telling them their story didn't 'match' that of their partner. This echoes research findings on women who report intimate partner violence and sexual assault to the police. Dismissive police responses, such as accusing women of making false allegations and ignoring their complaints, negatively impact women's confidence in police.¹²³ Women in this study also faced questions from police about why they 'stayed' in an abusive relationship if it 'really was so bad,' or why they didn't 'do something to stop it.' There is extensive research on why women remain in abusive relationships. Reasons can include economic dependence on abusive partners; lack of financial, social and emotional support; concern about children if she were to leave; fear of retaliation; and hope that things will improve.¹²⁴ It is concerning that police tasked with responding to domestic violence calls would demonstrate such a basic lack of understanding of abusive relationships, especially when police are supposed to have been provided training on these specific issues. Victims of intimate partner violence do not 'choose' to be abused even if

¹²² Stephens & Sinden, *supra* note 81.

¹²³ Holly Johnson, "Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police" (2017) 29:1 CJWL 36; Stephens & Sinden, *supra* note 81.

¹²⁴ Ad Hoc Federal-Provincial-Territorial Working Group, *supra* note 4.

they have not left the abusive relationship, nor are victims to blame for acts of violence committed against them.

Recent Canadian scholarship on police responses to intimate partner violence indicate that many women have positive experiences of their interactions with the justice system, including “informative, practical and emotional support.”¹²⁵ Victims of domestic violence are more likely to approve of police actions when their preferences with regard to arrest were followed and their concerns not belittled or trivialized.¹²⁶ In this regard, it is perhaps not surprising that our findings differed from such scholarship, such that women interviewed for this project unanimously disapproved of police actions. When women turn to the police for help, such as by calling 911 to have an abusive partner apprehended, it is clearly not their expectation to be themselves arrested. However, most women in this study did not make the decision to call the police, that was done by neighbours, friends, family members, or onlookers. This indicates that women are hesitant to involve police, even when they are being abused, which is consistent with 2014 Canadian data that suggest 70 percent of victims do not report spousal violence to police.¹²⁷ Additionally, in one third of the cases in this project, it was abusive male partners who called the police to make allegations against their female partner. These calls can be interpreted as efforts to avoid their own arrest and to exert further control and abuse. It is troubling that police are failing to recognize situations in which aggressors are using police as weapons in their on-going violence. Women in these situations expressed more than disapproval of police actions; they expressed outrage and bitterness for what they perceived as police complicity in sustaining and even augmenting their abuse.

Some findings in this study do support other domestic violence research, such as the increased vulnerability of Indigenous, immigrant, and racialized women. Studies have shown that newcomers to Canada, who do not speak English, who are economically dependent and socially isolated by their abusive partners face heightened difficulties in accessing resources to

¹²⁵ Tam et al, *supra* note 59 at 534; see also Johnson & Connors, *supra* note 75.

¹²⁶ Amanda L Robinson & Meghan S Stroshine, “The importance of expectation fulfilment on domestic violence victims’ satisfaction with the police in the UK” (2005) 28:2 Policing 301; Buzawa, Austin & Buzawa, *supra* note 42.

¹²⁷ Marta Burczycka, “Family violence in Canada, 2014” (2016) 36:1 Juristat 1 at 47. In 2016, Johnson and Connors found even lower rates of reporting in Ontario, with 58% of English-speaking women and 46% of French-speaking women reporting domestic violence to police, *supra* note 75 at 2.

escape their abusive situations, and that mandatory charge policies deter racialized women from reporting domestic violence due to “cultural considerations, fear and integration challenges.”¹²⁸ Indigenous and ethnic minority women are more likely than Caucasian women to indicate lack of trust in police which deters them from contacting police about experiences of intimate partner violence.¹²⁹ Indigenous women in this study reported previous negative encounters with police and were very guarded in their interactions with officers. Yet in comparison to women who had never had any encounter with police, they were more likely to try to negotiate with police, such as asking to be released so they could ‘sleep it off.’ However, such negotiations did not prove successful and they indicated they felt stereotyped by police, such as being assumed to be violent when they had been drinking. Immigrant and racialized women in this study reported ways in which police failed to accommodate them, such as by not offering translation services during questioning (Lucia and Felica) or by failing to recognize that fresh bruises on melanin-rich skin will not show in black and white photos.¹³⁰ This study also showed that abusive partners were able to use the threat of deportation to coerce and intimidate immigrant women, and that immigrant women are more constrained than Canadian citizens in accessing and utilizing support in navigating the justice system.

The intersection of substance use with interpersonal violence is a complicating factor in studies of intimate partner violence and police intervention. Twelve of the women interviewed described alcohol as ‘a factor’ in the incident that led to their arrest. Two women (Katia and Leena) indicated their partner had been drinking heavily and in both these cases these men made exaggerated accusations to the police. Two women (Cathy and Nancy) did not recall the incident that led to their charge because they had been too drunk, but they pled guilty and did not indicate they felt falsely accused. The other eight women described incidents in which both they and their partner had been drinking and/or using drugs. These women admitted to hitting, pushing, slapping or even stabbing their partner, but all except Brenda said their partner was also physically violent to them at the time. Mitch, Melissa and Jeannie had extensive injuries.

¹²⁸ Tam et al, *supra* note 59 at 536.

¹²⁹ Johnson & Connors, *supra* note 75 at 2.

¹³⁰ Sameena Mulla, *The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention*, (New York: New York University Press, 2014).

Clearly alcohol consumption is not an excuse for violent behaviour.¹³¹ Recognizing co-relations between substance addiction and intimate partner violence does not mean that interventions targeting one issue will solve the other.¹³² However, recognizing the association between substance addiction and intimate partner violence raises difficult questions about appropriate police and criminal justice system interventions.

Due to the small sample size and lack of benchmark data about charging rates of women in situations of intimate partner violence, it is hard to conclude that more women are being charged by police responding to domestic calls. I also cannot determine if the experiences reported here are anomalies caused by inconsistencies among police officers, nor if and how police behaviours relate to police training. Several women suggested police need to be better trained in how to respond to domestic situations, which echoes a 2014 consultation by the Ottawa Police with frontline workers involved in the issue of violence against women; the number one recommendation was mandatory training informed by guiding principles from violence against women advocates.¹³³ The findings of this study certainly illustrate the negative impact on women when they receive intimate partner violence related charges and raise questions about the appropriateness of these charges, and about police understandings of situations of intimate partner violence. Police have power in choosing to whom they listen, and whose stories they refuse to hear. When police do not fully investigate the situation, disregard the account and evidence provided by women, and make assumptions about what took place, not only do they risk charging the wrong person, they also make women more vulnerable to future assault. This research confirms other studies that show that women charged and arrested with intimate partner violence become very wary of the police and are unlikely to call on them in the future, even if they are being physically assaulted. Failure by police to properly implement primary aggressor policies, and to give women's accounts and

¹³¹ Section 33.1 of the *Criminal Code*, RSC 1985, c C-46, states "It is not a defence to an offence referred to in subsection (3) [an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person] that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence."

¹³² Richard Irons & Jennifer P Schneider, "When is domestic violence a hidden face of addiction?" (1997) 29:4 J Psychoactive Drugs 337.

¹³³ Ottawa Police Services, *Ottawa Police Service Violence Against Women Consultations*, (Report) (Ottawa: OPS, 2015) at 45.

experiences the attention and respect they deserve, undermines effective justice system responses to intimate partner violence.

“Alluring Make-Up or a False Moustache”: *Cuerrier* and Sexual Fraud Outside of HIV Non-Disclosure

KYLE MCCLEERY *

ABSTRACT

The *Criminal Code of Canada* identifies “fraud” as one of several circumstances capable of vitiating consent to sexual activity. Where fraud does not go to identity or the “nature and quality” of the sexual act, consent will be invalid only where the fraud results in a “significant risk of serious bodily harm.” Since this standard was settled in the Supreme Court of Canada’s decision in *R v Cuerrier* in 1998, consideration of its effects has focused almost exclusively on non-disclosure of an individual’s HIV-status. This article considers the application of the *Cuerrier* standards to cases not involving the non-disclosure of HIV. It concludes that the standard is not operating as intended, shielding those who have committed reprehensible acts from criminal liability, and undermining sexual autonomy.

Keywords: *Cuerrier*; HIV non-disclosure; fraud; sexual fraud; consent; *Mabior*; *Hutchinson*

I. INTRODUCTION

Section 265(3)(c) of the *Criminal Code of Canada* identifies “fraud” as a circumstance that may vitiate consent to sexual activity. The Supreme Court of Canada considered the meaning of fraud in this context twenty years ago in *R v Cuerrier*,¹ in which the accused failed to disclose his

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¹ *R v Cuerrier*, [1998] 2 SCR 371, [1998] SCJ No 64 (QL).

HIV-positive status to his sexual partners. In *Cuerrier*, the majority held that fraud will vitiate consent in the sexual context only where the deception constituting the fraud results in “a significant risk of serious bodily harm.”²

In the two decades that have followed, significant academic and judicial attention has been paid to the application of the test established in that case in the HIV non-disclosure context. Comparatively little attention has been paid to how the test is applied in other circumstances where deception or non-disclosure may have impacted an individual’s decision to consent to sexual activity. While the law’s treatment of those who fail to disclose their HIV-positive status to their sexual partners is an important issue, *Cuerrier* established a broadly applicable standard with wide-reaching implications, and consideration of other contexts is essential to a critical evaluation of that standard.

This article seeks to contribute to the extensive body of commentary on the *Cuerrier* standard through an examination of judicial consideration of cases in which fraud is alleged to vitiate consent where the deception at issue is something other than HIV non-disclosure. It begins with an overview of the current state of the law in this area, followed by a discussion of past criticism of the *Cuerrier* standard which, as noted above, is focused predominantly on its operation in the HIV non-disclosure context. This discussion will lead into a review of lower court decisions in which *Cuerrier* has been applied or considered in cases not involving HIV non-disclosure. The article will conclude with a discussion of what these cases can add to the existing understanding of *Cuerrier*, and a proposal for a new standard.

This analysis reveals that the current standard is overly focused on physical harm, and is inconsistent with the focus of the modern law of sexual offences on sexual autonomy. The result is a standard that is too narrow, and which excludes highly harmful and morally culpable acts from criminal liability. By abandoning *Cuerrier*’s focus on physical harm and considering more broadly the circumstances surrounding a sexual encounter, the law can better protect the right of individuals to decide whether, when, and with whom to engage in sexual activity.

² *Ibid* at para 128.

II. THE CURRENT STATE OF THE LAW

A. Sexual Fraud in the Criminal Code

The *Criminal Code* identifies the offence of sexual assault as a variant of the broader offence of assault. Assault *simpliciter* is defined in s. 265 of the *Code* to include the intentional application of force to another person without that person's consent.

The term "sexual" is not defined in the *Code*, but the question of what qualifies an assault as "sexual" was considered by the Supreme Court of Canada in *R v Chase*.³ In *Chase*, Justice McIntyre, writing for a unanimous Court, explained:

Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) [now 265(1)] of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.⁴

Section 265 of the *Code*, also includes a list of circumstances in which no consent is obtained. Among these, section 265(3)(c) provides that "no consent is obtained where the complainant submits or does not resist by reason of... fraud." This provision was enacted in 1983. Prior to this time, the *Code* provided that consent to sexual activity could be vitiated by fraud only where consent was obtained through deception regarding the identity of the accused, or "false and fraudulent representations as to the nature and quality of the act."⁵

³ *R v Chase*, [1987] 2 SCR 293, [1987] SCJ No 57 (QL).

⁴ *Ibid* at para 11 [footnotes omitted].

⁵ Christine Boyle, "The Judicial Construction of Sexual Assault Offences" in Julian Roberts and Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social*

B. *R v Cuerrier*

The new fraud provision was first considered by the Supreme Court of Canada in *R v Cuerrier*. In *Cuerrier*, the accused was charged with aggravated sexual assault for failing to disclose his HIV-positive status to two sexual partners, the two complainants, both of whom gave evidence that they would not have consented had he disclosed his status in advance.⁶ The accused was acquitted at trial because non-disclosure in this case did not meet the traditional standard for fraud in sexual offences, which required that the fraud go to identity or “the nature and quality of the act.”⁷ The acquittal was upheld on appeal.⁸

The majority reasons in *Cuerrier*, written by Justice Cory, affirmed that fraud as to the identity of the accused, or the nature and quality of the sexual act, would continue to be sufficient to vitiate consent. However, the majority also held that the 1983 amendments had the effect of expanding the definition of fraud in this context such that fraud would also be sufficient to vitiate consent where two conditions are satisfied. First, there must be a deception, which could be the result of either deliberate deceit or non-disclosure, which is to be assessed objectively based on whether a reasonable person would find the accused’s conduct dishonest. Secondly, the deception must result in a deprivation. The deprivation can consist of actual harm or the risk of harm but, at a minimum, the deception must expose the complainant to “a significant risk of serious bodily harm.”⁹

Two sets of concurring reasons advocated for significantly different approaches to fraud in the sexual context. Justice McLachlin took the position that the legislative amendments were not intended to create a substantive change in the law, and that only an incremental change was open to the Court.¹⁰ She took the position that the law ought to be extended only such that, in addition to fraud as to identity and the nature and quality of the act, deception regarding sexually transmitted infections would be sufficient to vitiate consent.¹¹ Justice L’Heureux-Dubé’s concurring judgment proposed an expansive interpretation of the law aimed at

Change (Toronto: University of Toronto Press, 1994) 136 at 143-144.

⁶ *Cuerrier*, *supra* note 1 at paras 78-83.

⁷ *Ibid* at para 87.

⁸ *R v Cuerrier* (1996), 141 DLR (4th) 503 (BC CA), [1996] BCJ No 2229 (QL).

⁹ *Cuerrier*, *supra* note 1 at paras 126-129.

¹⁰ *Ibid* at paras 43-44.

¹¹ *Ibid* at paras 66-75.

protecting physical integrity and autonomy. In her reasons, Justice L’Heureux-Dubé opined that the focus of the fraud analysis should be “whether the dishonest act in question induced another to consent to the ensuing physical act.”¹²

***C. R v Mabior*¹³ and *R v Hutchinson*¹⁴**

The Court has revisited the issue of sexual fraud on multiple occasions since *Cuerrier*.¹⁵ In *R v Mabior*, the Court affirmed the *Cuerrier* test and provided additional detail as to when the obligation to disclose HIV-infection will arise. According to *Mabior*, individuals with HIV must always disclose their status to sexual partners unless they have a low viral load and use a condom.¹⁶

In *Hutchinson*, the Court considered sexual fraud not involving HIV non-disclosure. The accused had intercourse with the complainant using a condom that he had intentionally damaged so as to render it ineffective for the purpose of contraception.¹⁷ The complainant gave evidence that she would not have consented had she been aware that the condom had been compromised.¹⁸ The majority in *Hutchinson* upheld the conviction entered at trial, again affirming the *Cuerrier* test, and concluding that “the sorts of profound changes in a woman’s body... resulting from pregnancy”¹⁹ qualify as “serious bodily harm,” meeting the standard set in *Cuerrier*.²⁰

III. CRITICISM OF *CUERRIER*

While the decision in *Cuerrier* was not without its supporters, it has been widely criticized since it was decided. Much of this criticism has focused on HIV non-disclosure. Specifically, critics have argued that the decision undermines public health efforts to combat HIV; that the standard set in the case is arbitrary, uncertain, and lacking foundation in science; and that

¹² *Ibid* at para 16.

¹³ *R v Mabior*, 2012 SCC 47.

¹⁴ *R v Hutchinson*, 2014 SCC 19.

¹⁵ See also *R v Williams*, 2003 SCC 41; *R v DC*, 2012 SCC 48.

¹⁶ *Mabior supra* note 13 at para 103.

¹⁷ *Hutchinson, supra* note 14 at para 2.

¹⁸ *Ibid* at para 44.

¹⁹ *Ibid* at para 70.

²⁰ *Ibid* at para 75.

it subjects marginalized groups to unequal treatment. Beyond the HIV context, criticism of *Cuerrier* has focused on the incongruity between the decision and the focus of the modern law of sexual offences on sexual autonomy. These issues are addressed below, following a brief discussion of the limited praise received by the decision.

A. Support for *Cuerrier*

Much of the commentary on *Cuerrier* has been critical, but it did receive some degree of support following its release. This support was grounded largely in the view that the decision represented a clear improvement on the status quo.²¹ As noted above, the accused in *Cuerrier* had been acquitted at trial, and his acquittal upheld by the BC Court of Appeal. The accused was well aware that he was HIV-positive, and had been clearly warned of the importance of advising his prospective sexual partners of his status. The decision in *Cuerrier* has been praised for creating a tool of “last resort” which offers some recourse for those who “show knowing disregard for the well-being of others.”²² The decision has also been recognized for advancing the interest of sexual autonomy to some degree. Implicit in *Cuerrier* is the recognition, previously absent from Canadian law, that valid consent requires accurate information about possible physical harm that may result from sexual activity.²³

B. *Cuerrier* and HIV/AIDS as a Public Health Issue

Critics of the criminalization of HIV non-disclosure have argued that it undermines public health efforts to contain the virus in several ways. Criminalization can create a disincentive to HIV testing, increasing the likelihood that those carrying the virus will be unaware of their status, undermining their own health and increasing the likelihood they will pass the virus on to others.²⁴ It has also been shown to make those with HIV less likely to connect with public health resources and less likely to inform health providers about their sexual practices or difficulties they face in

²¹ Diana Ginn, “Can Failure to Disclose HIV Positivity to Sexual Partners Vitiolate Consent? *R. v. Cuerrier*” (2000) 12:1 CJWL 235 at 241.

²² *Ibid* at 242.

²³ *Ibid* at 245.

²⁴ Kim Shayo Buchanan, “When is HIV a Crime? Sexuality, Gender and Consent” (2015) 99 Minn L Rev 1231 at 1245-1246.

disclosing their status to their sexual partners.²⁵ *Cuerrier* has also been criticized for creating an uncertain legal landscape around disclosure, making it difficult to give accurate and useful guidance to those living with HIV.²⁶ As a result of these dynamics, individuals with HIV are less likely to be aware that they carry the virus, less likely to seek treatment, and less likely to obtain assistance in understanding how to avoid passing the virus on to others, posing a serious challenge for society's efforts to slow the spread of HIV.

C. Arbitrariness and Uncertainty

In *Mabior*, the Court sought to resolve concerns that the *Cuerrier* standard was too uncertain to offer meaningful guidance to individuals living with HIV. *Mabior* not only did little to address this uncertainty, but set an arbitrary and unworkable standard that lower courts have struggled to apply.

In *Mabior*, the Court held that individuals will not be obliged to disclose their HIV-positive status to their sexual partners only where they have both a low viral load and use a condom. This standard has been criticized for its lack of foundation in science as either of these measures alone would normally be sufficient to render the risk of transmission negligible.²⁷ Treatment alone has been demonstrated to reduce viral load to undetectable levels, eliminating any meaningful risk of transmission.²⁸

This inconsistency between science and law has created challenges for Courts confronted with evidence that contradicts *Mabior*. For example, the trial judge in *R v JTC*,²⁹ a decision of the Provincial Court of Nova Scotia, in which the accused was acquitted despite his failure to use a condom, described the difficult position in which lower courts find themselves when trying to apply *Mabior*:

It would be a strange outcome indeed if the law required that there be a significant risk of bodily harm established by the realistic possibility of transmission of HIV and the unchallenged and accepted expert testimony in the case confirmed that

²⁵ Eric Mykhalovskiy, "The Problem of 'Significant Risk': Exploring the Public Health Impact of Criminalizing HIV Non-Disclosure" (2011) 73:5 Soc Science & Medicine 668 at 671-673.

²⁶ *Ibid* at 671-673.

²⁷ Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013) 63 UTLJ 475 at 480.

²⁸ Buchanan, *supra* note 24 at 1243-1244.

²⁹ *R v JTC*, 2011 NSPC 105.

such a realistic possibility was not present, yet a conviction was entered because the accused was not wearing a condom. That would be particularly the case when, as here, the accepted expert evidence is that the use of a condom would provide virtually nothing by way of incremental protection against the transmission of HIV. The only way that that could logically happen would be if the Supreme Court of Canada decisions were to be seen as imposing a factual finding on a trial court that would apply almost as a deemed finding of fact to apply notwithstanding the actual evidence. It would be even more unusual if the result would be to impose criminal sanctions for aggravated sexual assault on an already marginalized group as a penalty for deceit in the absence of a significant risk of harm, when deceit in the same context by others does not attract those sanctions.³⁰

Lower courts have also struggled to apply *Mabior* when confronted with factors affecting the risk of transmission not considered in that case. Martha Shaffer describes this challenge in criticizing the *Mabior* standard for addressing only heterosexual, vaginal intercourse:

[I]t is not clear how this 'realistic possibility' test applies to sexual activities other than vaginal intercourse. For oral sex, the risk of transmission is so low that studies have not been able to obtain an accurate measure. Must a person with HIV have a low viral load and use condoms during oral sex to avoid liability on the basis of non-disclosure? On the flip side, anal intercourse has a higher rate of transmission than vaginal intercourse, particularly where the insertive partner is HIV-positive. Will low viral load and condom use negate the existence of 'realistic possibility' of transmission in these circumstances?³¹

The case law and academic literature reveal a number of other variables on which *Mabior* is silent, but which affect the risk of transmission. These include the occurrence of ejaculation;³² whether the HIV-positive partner is the insertive or receptive partner;³³ whether the HIV-negative partner is taking pre-exposure prophylaxis medication;³⁴ age;³⁵ and circumcision.³⁶ In addressing only viral load and condom use in the context of heterosexual, vaginal intercourse, *Mabior* offers lower courts, and those living with HIV, little guidance on the legal significance of these factors.

³⁰ *Ibid* at para 100.

³¹ Martha Shaffer, "Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud" (2013) 63 UTLJ 466 at 473.

³² *R v CB*, 2017 ONCJ 545

³³ *R v JAT*, 2010 BCSC 766 at para 29.

³⁴ Jack Vidler, "Ostensible Consent and the Limits of Sexual Autonomy" (2017) 17 Macquarie LJ 104 at 120.

³⁵ *R v JU*, 2011 ONCJ 457 at para 86.

³⁶ *Ibid*.

D. Stigma and Unequal Treatment

Cuerrier and *Mabior* have been criticized for contributing to the stigma already faced by those living with HIV and for the differential impact they have on members of already marginalized groups. Following the release of *Mabior*, Isabel Grant criticized the decision for its failure to recognize the “difficulty of disclosing HIV in a society where people who are HIV-positive have been discriminated against in numerous ways and where disclosure can trigger a domino effect of negative repercussions.”³⁷ Criminalizing the transmission of HIV exacerbates this stigma by signaling that those living with the disease are “potentially criminal or dangerous.”³⁸

The stigma associated with HIV is well-documented, and has been demonstrated to have significant adverse effects on the health outcomes of those living with HIV.³⁹ As in other parts of the world, however, HIV in Canada disproportionately affects those who are already members of stigmatized and marginalized groups, including sex workers, drug users, individuals who are incarcerated and members of racial, cultural and sexual minorities.⁴⁰ The stigma and discrimination faced by these groups increase the likelihood of HIV-infection and create barriers to access to services following infection.⁴¹

As a result, a policy of criminalization, such as that established by *Cuerrier*, has a disproportionate effect on already marginalized members of society. The standard set in *Cuerrier* and *Mabior*, for example, assumes a level of access to treatment and testing, as it requires effective treatment to achieve a low viral load, and testing to ensure an individual knows his or her viral load.⁴² Members of marginalized groups are less likely to have this

³⁷ Grant, *supra* note 27 at 476.

³⁸ Aziza Ahmed et al, “Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership” (2011) 6:S3 Global Public Health S357 at S361.

³⁹ Anne C Wagner et al, “HIV-Related Stigma and Overlapping Stigmas Towards People Living with HIV Among Health Care Trainees in Canada” (2017) 29:4 AIDS Education & Prevention 364 at 365.

⁴⁰ *Ibid*; Carmen H Logie et al, “HIV, Gender, Race, Sexual Orientation, and Sex Work: A Qualitative Study of Intersectional Stigma Experienced by HIV-Positive Women in Ontario, Canada” (2011) 8:11 PLoS Medicine 1 at 2; Isabel Grant, “The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV” (2008) 31:1 Dal LJ 123 at 160-161.

⁴¹ Wagner et al, *supra* note 39; Ahmed et al, *supra* note 38 at S361-S362.

⁴² Grant, *supra* note 27 at 476.

level of access to health care, and therefore less likely to be in a position to take advantage of the exception to the obligation to disclose created by *Mabior*.⁴³ Similarly, the law ignores power imbalances that may make disclosure more difficult, or more dangerous. Whereas men who have sex with women may be in a position to unilaterally decide to use a condom, eliminating the need for disclosure (if they also have a low viral load), women and men who have sex with men may need to negotiate condom use with a partner, forcing disclosure and further increasing their already heightened risk of sexual and domestic violence.⁴⁴

E. *Cuerrier* and Sexual Autonomy

While much of the criticism levied at *Cuerrier* focuses on its impact on people living with HIV, some commentators have taken a broader approach. Specifically, these critiques have focused on the poor fit between this standard and a legal environment that, in the realm of sexual offences, has become increasingly focused on sexual autonomy rather than physical harm.⁴⁵

Renu Mandhane argues that reforms to the sexual offences in the *Criminal Code* made in 1983 and the Supreme Court of Canada's decision in *R v Ewanchuk*⁴⁶ mark an important shift in the law toward recognizing sexual autonomy as a fundamental principle underlying the law of sexual offences.⁴⁷ Similar shifts in the focus of the law have been identified in the United States,⁴⁸ and the United Kingdom.⁴⁹ Lucinda Vandervort argues that the *Cuerrier* standard is antithetical to this approach as it provides that the violation of autonomy inherent in obtaining consent by fraud is insufficient to warrant criminalization, and that some additional, physical harm is necessary to render sexual deception worthy of prosecution:

The reasons in *Mabior* appear to leave open the possibility that there is a distinction between some violations of sexual autonomy, human dignity, and sexual integrity,

⁴³ Logie et al, *supra* note 40 at 2.

⁴⁴ Richard Elliott, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Geneva: UNAIDS, 2002) at 24; Grant, *supra* note 27 at 159.

⁴⁵ Ben A McJunkin, "Deconstructing Rape by Fraud" (2014) 28:1 Colum J Gender & L 1 at 6.

⁴⁶ *R v Ewanchuk*, [1999] 1 SCR 330, [1999] SCJ No 10 (QL) [*Ewanchuk*].

⁴⁷ Renu Mandhane, "Efficiency or Autonomy: Economic and Feminist Legal Theory in the Context of Sexual Assault" (2001) 59:2 UT Fac L Rev 173 at 208-211.

⁴⁸ McJunkin, *supra* note 45.

⁴⁹ Vidler, *supra* note 34.

and others; those that threaten public health by creating a “realistic” risk of transmission, constitute criminal harms, while those which “merely” violate individual human dignity and sexual autonomy do not. Such a view is not in accord with contemporary values or *Charter* protections for the personal rights of individuals.⁵⁰

Others have identified a connection between the reluctance to criminalize sexual fraud and traditional notions of masculinity. Kim Shayo Buchanan argues that “[r]ape law’s *caveat emptor* approach to sexual deception condones a heterosexist expectation that men, as sexual initiators, will press reticent women for sex - and that the law should not punish men for using deception to get it.”⁵¹ Similarly, Ben McJunkin, suggests that this reluctance is based on a misguided attempt to preserve space for “seduction,” in which “men are responsible for initiating and pursuing sexual relationships while women either resist men’s overtures or, if all goes right, relent to them,”⁵² illustrating the point with the following passage from *People v Evans*:⁵³

So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time....It is not criminal conduct for a male ... to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.⁵⁴

While both of these authors are writing from an American perspective, a similar insistence on preserving some scope of ‘seduction by deception’ is apparent in the Canadian authorities.⁵⁵ In *Cuerrier*, for example, both Justice Cory and Justice McLachlin reject the broad approach proposed by Justice L’Heureux-Dubé for just this reason. Justice Cory defends the importance of ensuring that a man who lies about his age, salary, or fidelity to a sexual partner not be placed at risk of prosecution,⁵⁶ while Justice McLachlin expresses concern at the prospect that “alluring make-up or a false moustache” might “render the casual social act criminal.”⁵⁷ Aside from an

⁵⁰ Lucinda Vandervort, “HIV, Fraud, Non-Disclosure, Consent and a Stark Choice: Mabior or Sexual Autonomy?” (2013) 60:2 Crim LQ 301 at 316-317.

⁵¹ Buchanan, *supra* note 24 at 1274.

⁵² McJunkin, *supra* note 45 at 25.

⁵³ *People v Evans*, 85 Misc 2d 1088, 379 NYS 2d 912 (Sup Ct 1975).

⁵⁴ *Ibid* at 1099.

⁵⁵ Boyle, *supra* note 5 at 145-146.

⁵⁶ *Cuerrier*, *supra* note 1 at paras 134-135.

⁵⁷ *Ibid* at para 52.

apparent intuitive sense that these deceptions are trivial, neither provides a compelling explanation for why these forms of fraud are undeserving of condemnation regardless of their significance to or impact on the person deceived.

F. Tension Within the Criticism of *Cuerrier*

While these perspectives share a clear skepticism of *Cuerrier* and *Mabior*, they also reveal a tension in this opposition. The critiques focused on HIV non-disclosure argue that the law should retreat, so as to further limit the criminalization of HIV non-disclosure, but in doing so, expand the scope of permissible sexual deception. Conversely, the broader autonomy-focused critics argue in favour of an expansion of the test that would limit or do away with entirely the risk of harm requirement in order to better protect the right to make an informed decision as to whether to consent to sexual activity. In doing so, this approach would criminalize a much broader range of sexual deception. This tension poses a challenge to any attempt to reform the *Cuerrier* standard in a way that is responsive to its shortcomings.

IV. *CUERRIER* OUTSIDE OF HIV NON-DISCLOSURE

As discussed above, much of the attention devoted to the *Cuerrier* standard focuses on cases in which the deception at issue is the failure to disclose HIV status. However, as the Supreme Court made clear in *Hutchinson*, fraud capable of vitiating consent to sexual activity is not limited to non-disclosure of HIV. The standard set by the Supreme Court of Canada allows for the vitiation of consent by fraud in any case where there is “a significant risk of serious bodily harm.” This restrictive standard is often justified by the purported danger of over-reach outside of HIV cases.⁵⁸

Aside from the broad consideration of the relationship between the *Cuerrier* standard and sexual autonomy discussed above, there has been little attention paid to the application of the *Cuerrier* standard where the “risk of serious bodily harm” is something other than infection with HIV. As the majority in *Cuerrier* specifically rejected an expansion of the law targeted only at the non-disclosure of sexually transmitted infections, the impact of the *Cuerrier* standard cannot be properly evaluated without an understanding of its application where other forms of harm are at issue.

⁵⁸ *Ibid* at paras 52, 134-135.

This analysis is all the more important in light of the persistent fear that the removal of the harm requirement would lead to the criminalization of ‘harmless’ deceptions in the course of ‘courtship.’

A review of lower court decisions since *Cuerrier* reveals that its application remains largely limited to HIV non-disclosure cases. The small number of cases in which another form of deception is considered can be categorized into four groups: non-disclosure of a sexually transmitted infection other than HIV; deceptions resulting in financial deprivation; deceptions causing psychological harm; and those in which the deception relates to professional status. Pregnancy, the harm found in *Hutchinson*, is notably absent from this list. It appears that pregnancy has not been alleged to constitute harm arising from sexual fraud in any reported case since *Hutchinson*.

A. Sexually Transmitted Infections Other Than HIV

On several occasions, Canadian courts have considered whether non-disclosure of sexually transmitted infections other than HIV, including genital herpes and hepatitis, is sufficient to vitiate consent to sexual activity.

Courts have been willing to entertain the possibility that sexually transmitted infections other than HIV may amount to “serious bodily harm” sufficient to vitiate consent. These cases, however, suggest a more forgiving attitude from the Courts than is typically observed in the HIV context. In *R v JH*, the Ontario Court of Justice accepted a guilty plea for sexual assault associated with the non-disclosure of genital herpes, but granted the accused a conditional discharge,⁵⁹ a significant departure from the multi-year custodial sentences that are the norm in HIV non-disclosure cases.⁶⁰

This distinct approach is more apparent in cases not resulting in convictions. In *R v JTT*, another Ontario Court of Justice case, the Court acquitted the accused in part on the basis that he knew that he had been infected with genital herpes for over a decade but did not believe he could transmit the disease to others because he did not think he had ever done

⁵⁹ *R v JH*, 2012 ONCJ 753; this case can also be distinguished in part by the fact that the conviction in *JH* was for assault *simpliciter*, a less serious form of assault than aggravated assault, the typical charge in HIV non-disclosure cases.

⁶⁰ See *R v Nduwayo*, 2010 BCSC 1467 at paras 25-37; *R v Bruneau*, [2010] OJ No 4600 (Ont CJ) at para 26.

so.⁶¹ In HIV non-disclosure cases, the Courts rarely seem to seriously engage with the question of whether the accused knew that he could infect others, and there appear to be no cases in which an accused has been acquitted on this basis.

Similarly, in *R v Jones*, which involved non-disclosure of Hepatitis C, the New Brunswick Court of Queen's Bench found that the *Cuerrier* standard was not met, as the risk of transmission was less than 1%.⁶² In *Mabior* (decided after *Jones*), however, despite evidence that the risk of transmission ranges between 0.05% and 0.26% in cases of unprotected sex with an infected partner with an unreduced viral load,⁶³ the Court held that non-disclosure should lead to conviction unless the risk was further reduced by both condom use and a low viral load.⁶⁴

While the number of these cases is very small, they lend credence to the argument that the legal treatment of HIV non-disclosure is grounded in stigma. The fact that prosecutions for non-disclosure of other sexually transmitted infections seem to be rare suggests that, unlike HIV non-disclosure, the Crown does not view these cases to be sufficiently serious to prosecute in large numbers. The approach to these cases taken by the Courts suggests that this view is shared by the judiciary. These attitudes seem to be a reflection of *Cuerrier*'s emphasis on the harm caused, which may differ significantly between infections, rather than the impact on sexual autonomy, which would focus attention on the impact on the complainant's right to make an informed decision about consent.

B. Financial Deprivation

At least three cases decided since *Cuerrier* have addressed the issue of whether fraud resulting in financial deprivation is sufficient to vitiate consent. Each involved an agreement to pay for sex, followed by a failure to provide the promised payment.

In *R v Gartner*,⁶⁵ the earliest of these three cases, Justice Turpel-Lafond of the Saskatchewan Provincial Court ultimately found that there had been no consent at all to the sexual activity in question, but expressed concern

⁶¹ *R v JJT*, 2017 ONCJ 255.

⁶² *R v Jones*, 2002 NBQB 340.

⁶³ *Mabior*, *supra* note 13 at para 97.

⁶⁴ *Ibid* at para 104.

⁶⁵ *R v Gartner*, 2003 SKPC 178.

about excluding deceptions about payment from the definition of fraud in the sexual context generally:

The Court does not accept that [*Cuerrier*] stands for a general proposition that sex for money where money is not exchanged is fraud but not assault. The *Cuerrier* precedent can be distinguished from the case at bar on the facts. Moreover, if this position were accepted generally in sexual assault cases, then a "rape myth" would be resurrected. This myth or stereotype is that a prostitute's consent to sex is less worthy of protection at criminal law than is that of other woman. In other words, the Court would then have to endorse the view that women working in the sex trade are not harmed when they do not consent because they are engaged in sex for money anyway and hence sexually available on different terms than other women.⁶⁶

Justice Turpel-Lafond does not engage directly with the question of whether financial deprivation qualifies as "serious bodily harm."

After *Gartner*, but prior to the two cases discussed below, the Supreme Court of Canada released its decision in *Hutchinson*. While the harm in *Hutchinson* was not financial, the reasons of the majority clearly indicate that deception resulting in financial loss is not sufficient to vitiate consent:

To establish fraud, the dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case. For example, financial deprivations or mere sadness or stress from being lied to will not be sufficient.⁶⁷

In each of the two cases decided after *Hutchinson*, the Court concluded that financial deprivation does not satisfy the "significant risk of bodily harm" test. In *R v ROS*,⁶⁸ an Ontario Court of Justice decision, the accused were two of four men alleged to have engaged in sexual activity with the complainant with the promise of payment. Two of the four paid the complainant before she was beaten and robbed by the same four men. While the accused were convicted of robbery, the trial judge held that obtaining sex with no intention of payment does not qualify as a "significant risk of serious bodily harm."⁶⁹

In *R v Wilson*,⁷⁰ in the Ontario Superior Court of Justice, the accused was committed to trial for the first-degree murder of a sex trade worker it was alleged he had not intended to pay. On the application to quash the

⁶⁶ *Ibid* at para 30.

⁶⁷ *Hutchinson*, *supra* note 14 at para 72.

⁶⁸ *R v ROS*, 2014 ONCJ 274.

⁶⁹ *Ibid* at para 89.

⁷⁰ *R v Wilson*, 2015 ONSC 7224.

committal the application judge concluded that there was no evidence supporting the allegation that the accused caused the death of the deceased while committing the illegal act of sexual assault. This was based in part on the conclusion that even if the accused had no intention to pay the deceased for sex, it would not have amounted to sexual assault, as non-payment would not vitiate consent to sexual activity.⁷¹

Despite the concerns raised in *Gartner* it seems clear that financial deprivation will not satisfy the “significant risk of serious bodily harm” test.⁷² This is so even where, as in *ROS* and *Wilson*, the financial deprivation is associated with acts of significant violence to which the complainant did not consent.⁷³ It is curious that a standard based on fraud in commercial settings,⁷⁴ which commonly seeks to protect against financial loss, would discount the significance of just such a deprivation in this context. Nevertheless, it seems clear that this form of harm falls outside of that which will give rise to fraud capable of vitiating consent to sexual activity.

C. Psychological Harm

Whether ‘psychological harm’ satisfies the “serious bodily harm” requirement has been considered in *R v Chen*,⁷⁵ in British Columbia and *R v Thompson*,⁷⁶ in Nova Scotia. In *Chen*, the accused falsely held himself out to be a doctor of Chinese medicine, and administered treatment to the complainants that involved touching their breasts and genitals. As there was no evidence at trial this would not have been legitimate treatment had the accused been properly qualified, the deception did not amount to fraud as to the nature and quality of the act. Instead, the Crown sought to establish fraud vitiating consent on the basis of a significant risk of serious bodily harm.⁷⁷

⁷¹ *Ibid* at para 71.

⁷² This conclusion is also consistent with the BC Court of Appeal’s decision in *R v Petrozzi* (1987), 58 CR (3d) 320, which predated *Cuerrier*.

⁷³ Withholding agreed upon payment from a sex worker has itself been described as a “systemically violent act”, even in the absence of the use of additional physical force: Elizabeth Manning and Vicky Bungay, “‘Business before Pleasure’: The Golden Rule of Sex Work, Payment Schedules and Gendered Experiences of Violence” (2017) 19:3 *Culture, Health & Sexuality* 338 at 339.

⁷⁴ *Cuerrier*, *supra* note 1 at para 117.

⁷⁵ *R v Chen*, 2003 BCSC 1363 [*Chen*].

⁷⁶ *R v Thompson*, 2018 NSCA 13 [*Thompson*].

⁷⁷ *Chen*, *supra* note 75 at para 86.

In a ruling on a *voir dire*, the Court held that psychological harm could qualify as “serious bodily harm,” relying on *R v McCraw*,⁷⁸ which defined “serious bodily harm” as “any hurt or injury, whether physical or psychological, that interferes in a substantial way with physical or psychological integrity, health or well-being of the complainant.”⁷⁹ The Court reconciled *McCraw* with *Cuerrier* by concluding that psychological harm would be sufficient only where it rose above “mental distress,” which was held to be insufficient in *Cuerrier*. The accused’s conviction did not turn on this issue, but the Court appeared to affirm this conclusion in the reasons for conviction.⁸⁰

The Nova Scotia Court of Appeal reached the opposite conclusion in *Thompson*. At trial, the accused was acquitted of aggravated sexual assault because the Crown failed to prove that there existed a realistic possibility of transmission of HIV. However, he was convicted of sexual assault causing bodily harm as the trial judge found that the deception had caused “serious psychological harm” to the complainants.⁸¹ The Court of Appeal overturned the conviction, rejecting the trial judge’s reasoning based on the statement in *Hutchinson* that “mere sadness or stress from being lied to will not be sufficient” to establish a significant risk of serious bodily harm.⁸²

While *Chen* is not entirely unpersuasive, the reasoning in *Thompson* is more compelling given that “serious bodily harm” seems to plainly require some physical injury, and that there is no indication in *Cuerrier* that “mental distress” was intended to reflect a level of suffering lower than “psychological harm.” Further, *Cuerrier* requires only a risk of harm to vitiate consent. It seems that there would be at least a risk of psychological harm in any case of HIV non-disclosure, making the requirement in *Cuerrier* and *Mabior* that there be a risk of actual transmission unnecessary.

That the *Cuerrier* standard excludes these cases should cause concern. The deceptions perpetrated here were found to have caused suffering, albeit not physical, and the deceptions are a far cry from the “alluring make-up or...false moustache” of concern to Justice McLachlin. There seems to be

⁷⁸ *R v McCraw*, [1991] 3 SCR 72, [1991] SCJ No 69 (QL).

⁷⁹ *R v Chen*, 2003 BCSC 984 at para 31.

⁸⁰ *Chen*, *supra* note 75 at para 36. The conviction was affirmed by the Court of Appeal, which did not consider this issue: 2008 BCCA 523.

⁸¹ *R v Thompson*, 2016 NSSC 134 at paras 141, 143.

⁸² *Thompson*, *supra* note 76 at para 35.

little public interest in protecting this behaviour, and good reason to question any legal standard that does so.

D. Deception Regarding Professional Status

In two very different cases, Courts have suggested that deceptions relating to the professional status of the accused are insufficient to vitiate consent. In neither case is the alleged “significant risk of serious bodily harm” clearly identified and, perhaps predictably, in neither case is the fraud found to be sufficient to vitiate consent. Cases involving medical practitioners in which fraud as to the “nature and quality of the act” is alleged to vitiate consent are not addressed here as they do not engage the “significant risk of serious bodily harm” standard.

In *R v Dadmand*,⁸³ the accused held himself out to be a modelling agent, and engaged in sexual activity with the multiple complainants under the guise of a modelling audition. While several of the allegations were found to have been non-consensual, two of the complainants were found to have consented to the sexual activity, but only because they believed it to be part of an audition. The trial judge, noting that the Crown had not raised the issue of fraud vitiating consent, suggested that the evidence would be insufficient to satisfy the *Cuerrier* test in any event:

The accused deceived the complainant by claiming to be a modelling agent, thereby inducing her to have sex with him and to permit their activity to be video recorded. However, again, the Crown has not argued fraud negating consent contrary to s. 265(3)(c) of the Code, and has not led evidence to meet the second requirement for fraud of the significant risk of serious bodily harm to the complainant.⁸⁴

A similar issue arose in a very different context in *R v NMP*.⁸⁵ The accused, charged with communicating for the purposes of prostitution, argued that the charge ought to be stayed because an undercover police officer had touched her pubic hair at her request in order to prove that he was not a police officer. The accused argued on appeal that the officer had sexually assaulted her as he had obtained her consent by fraud, and that this action amounted to a violation of her section 7 and 15 *Charter* rights. The Court held:

⁸³ *R v Dadmand*, 2016 BCSC 1565.

⁸⁴ *Ibid* at para 168 [emphasis added].

⁸⁵ *R v NMP*, 2000 NSCA 46.

Clearly, in determining whether consent was obtained by fraud, the nature and extent of the duty to disclose if any must be considered in the context of the particular case. The interests intended to be protected by the provisions of the *Criminal Code* relating to sexual assault are the dignity, bodily integrity and safety of the person. The legislation is not designed to make it easier for law breakers to circumvent legitimate undercover police operations. The type of harm to which the appellant was exposed by the deceit practiced here (i.e., apprehension by police for criminal behaviour) is not, in my view, the serious harm envisaged by the majority opinions of the Supreme Court of Canada in *Cuerrier*, *supra*.⁸⁶

While the facts of these cases are very different, both reveal the centrality of the issue of “serious bodily harm.” In each of these cases, the complainants consented to sexual contact as a result of active deception that was central to the decision to consent. Both illustrate how far the *Cuerrier* standard has removed Canadian law from an autonomy-centred concept of consent in the context of sexual fraud. Despite the obviously reprehensible conduct in *Dadmand*, it is clear that the criminal law is unable to intervene unless the deception in that case had also resulted in physical harm, giving reason to question whether *Cuerrier* has appropriately drawn the line between criminal and non-criminal conduct.

E. Conclusion: Fraud Outside of HIV Non-Disclosure

The cases discussed above reveal several shortcomings in the *Cuerrier* test. First, it is clear that Justice Cory was unsuccessful in crafting a test that goes beyond the narrow extension of the law suggested by Justice McLachlin. Justice McLachlin proposed extending the law to specifically criminalize non-disclosure of sexually transmitted infections. Arguably, Justice Cory’s test has failed to do even that, as convictions arising from sexual fraud continue to come almost exclusively for non-disclosure of HIV. While there has been at least one conviction for non-disclosure of genital herpes, there is very little reason to believe that the *Cuerrier* test is having the intended effect of extending protection from sexual fraud beyond non-disclosure of sexually transmitted infections.

Secondly, it is clear that the law is failing to capture truly reprehensible and morally blameworthy conduct that goes well beyond the type of “seduction” described by Ben McJunkin. A man lying to a sex worker about his intention to pay, or deceiving an unsophisticated aspiring model into believing that intercourse is a necessary part of an audition is a far cry from

⁸⁶ *Ibid* at para 39.

the embellishments about one's wealth, profession, or accomplishments so often cited as being at risk from a more expansive notion of sexual fraud. Even if it is accepted that there is a need to preserve some scope for exaggeration in the course of courtship, it is clear that the current standard is protecting a right to deception that goes far beyond harmless hyperbole.

Thirdly, these cases suggest that the Court has failed to provide certainty in this area. There is at least some disagreement with respect to whether serious bodily harm can be found in either financial loss or psychological harm, while the low rate of conviction in these cases suggests a difficulty on the part of the Crown in predicting what will be sufficient to vitiate consent. Add to this the uncertainty discussed above that remains even with respect to HIV non-disclosure, a subject the Supreme Court of Canada has addressed at least four times since 1998, and it becomes clear that the Court has done little to provide predictability to the Courts or the public.

Finally, these decisions offer a clear indication of how far out-of-step with an autonomy-centred approach the law is in this respect. In virtually all of the case discussed above, there is no question that the complainant would not have consented to the sexual activity in question had she been aware of the deception. Yet, because fraud is in issue, the Court focuses instead on whether that decision would have been objectively defensible - imposing its own assessment of the decision the complainant should have made had she been aware of the deception rather than considering how the deception would actually have affected her decision to consent had she been given the opportunity to make her own choice with complete information.⁸⁷ If autonomy is truly the central focus of the modern law of sexual offences, the analysis should respect the absolute right of the complainant to decide whether or not to consent for any reason, and not examine whether the complainant would have had a 'valid' basis for withholding consent.

V. REFORMULATING THE *CUERRIER* TEST

The discussion above reveals a number of significant problems with the *Cuerrier* test. Within the HIV non-disclosure context, it undermines public health, creates uncertainty and arbitrary outcomes, disadvantages

⁸⁷ Elizabeth Sheehy & Christine Boyle, "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 247 at 265.

marginalized groups, and is out of step with sexual autonomy. The law fares little better when applied in cases not involving HIV non-disclosure. Here, it fails to capture clearly blameworthy conduct, and again fails to provide certainty and promote sexual autonomy. In light of these problems, it is evident that a new approach should be considered.

A. Proposed Alternatives to the *Cuerrier* Test

In addition to the alternative tests proposed by Justices L'Heureux-Dubé and McLachlin in their concurring judgments in *Cuerrier*, several commentators have taken on the task of re-formulating the *Cuerrier* test for sexual fraud.

Hamish Stewart, writing in 2004, proposed eliminating the “significant risk of serious bodily harm” test, and replacing it with a “mixed subjective-objective test.” Under Stewart’s test, fraud would vitiate consent where three conditions are met: first, there must be a deception that induces consent; secondly, the accused must have intended that the deception induce consent; and, finally, the deception must be such that the reasonable person would have realized the deception was important to the decision to consent.⁸⁸

Similarly, Kevin Rawluk advocates for a standard that would vitiate consent in any case in which dishonesty induces physical contact to which the complainant would not otherwise have consented. In place of an automatic, unilateral disclosure obligation, Rawluk proposes a shared responsibility for disclosure in which the obligation to disclose is triggered by a reciprocal obligation to inquire. He argues that this standard would better emphasize personal autonomy by requiring all parties to exercise their agency to protect their sexual health, and would reduce stigma by normalizing shared responsibility to prevent infection. Rawluk acknowledges that there may be circumstances in which it would not be reasonable to expect a party to inquire or to disclose and that where, for example, there is a reasonable fear of violence, these obligations would not be enforced.⁸⁹

Lucinda Vandervort likewise advocates for the elimination of the bodily harm requirement. She argues that “non-disclosure or deception with

⁸⁸ Hamish Stewart, “When Does Fraud Vitate Consent? A Comment on *R v Williams*” (2004) 49 Crim LQ 144.

⁸⁹ Kevin Rawluk, “HIV and Shared Responsibility: A Critical Evaluation of *Mabior* and *DC*” (2013) 22 Dal J Leg Stud 21.

respect to any circumstance that is an essential aspect of the sexual activity, including its possible reproductive or health consequences, renders sexual consent...impossible.” Vandervort suggests that the different classes of sexual assault could be applied such that less consequential deceptions could be charged as sexual assault *simpliciter* to ensure that the offence and punishment are commensurate with the seriousness of the offence, while more harmful deceptions could be prosecuted as sexual assault causing bodily harm, or aggravated sexual assault. She does not engage at length with the issue of what would qualify as the “essential aspects” of the sexual activity.⁹⁰

While each of these proposals would represent an improvement over the current state of the law, a superior solution can be achieved by combining elements of each. Such a standard is outlined below.

B. A New Test

To replace the current test, I propose a two-step analysis. As in the three proposed standards discussed above, this alternative test would eliminate the “significant risk of serious bodily harm” requirement.

In assessing whether consent was vitiated by fraud, the Court should first ask whether the complainant was deprived of information material to her decision to consent. If so, the second stage of the analysis would consider whether, in all the circumstances, the accused had a duty to disclose that information to the complainant.⁹¹ This second stage would require the Court to ask three questions: Did the accused have the information of which the complainant was deprived? Did the accused know that the information was material to the complainant’s decision to consent, or was he reckless or willfully blind to that fact? Is there any reason why a duty to disclose the information should not be imposed in the circumstances?

Consistent with the standards proposed by Stewart, Rawluk, and Vandervort, the first step places the complainant’s sexual autonomy at the forefront of the analysis by recognizing that it is the complainant that should

⁹⁰ Vandervort, *supra* note 50.

⁹¹ Of the three commentators discussed above, only Rawluk, *supra* note 89, uses the word “duty” in formulating his proposed standard. I believe this is important, as it acknowledges that the law is imposing an obligation to act, and potentially criminalizing omissions. Acknowledging the creation of a “duty” forces consideration of the circumstances in which the duty to act arises.

determine what information is significant to her decision to consent. It requires the Court to consider whether the complainant had the information she required to exercise her right to provide or withhold consent.⁹² This inquiry is a logical extension of the formulation of consent in *Ewanchuk*, which affirms that the core of the issue is whether an individual is choosing to engage in sexual activity.⁹³ The proposed standard recognizes that this choice is meaningless unless the complainant is assured an accurate understanding of the decision she is making.⁹⁴

The second step in the analysis examines whether the accused can reasonably have been expected to disclose the information in the circumstances. It first requires that the accused have the information at issue. Regardless of the significance of the information to the complainant, the accused cannot be faulted for failing to share information he did not have. Where, for example, an individual with a sexually-transmitted infection, including HIV, is genuinely unaware of the infection, failure to disclose could not be sufficient to ground a criminal conviction.

Secondly, it requires that the accused be aware of (or reckless or willfully blind as to) the significance of the information to the complainant. Again, this question is central to the blameworthiness of the accused as the accused cannot be faulted for failing to disclose information if he was oblivious to its significance to the complainant. A test that takes into account the complainant's subjective state of mind is essential to the creation of a truly autonomy-centred standard. An objective standard will always have the effect of deciding for a complainant whether the decision she would have made to engage in or decline sexual activity, if she had the benefit of full information, would have been justified or legitimate. This is antithetical to the modern law of consent which protects the right to decide whether to consent to sexual activity for any reason, no matter how arbitrary, misinformed, or offensive it may seem to others.⁹⁵

It is at this stage that active deception could be differentiated from passive failure to disclose. It seems likely that an accused that intentionally

⁹² See Boyle, *supra* note 5 at 146.

⁹³ *Ewanchuk*, *supra* note 46 at paras 26-28.

⁹⁴ Here, the proposed test differs from that proposed by Lucinda Vandervort, who would retain some level of objectivity by requiring that the deception relate to an "essential aspects" of the sexual activity.

⁹⁵ See *R v ADH*, 2013 SCC 28 at para 23; Here the proposed test differs from the standard formulated by Hamish Stewart, which includes an objective element.

provides false information in advance of a sexual encounter, or who lies in response to an inquiry from a prospective partner,⁹⁶ would be found to have understood the significance of the active deception. An accused who simply fails to disclose may more plausibly deny awareness of the importance of the information in issue, but the failure to disclose information of obvious significance, such as a serious sexually transmitted infection, could still be capable of supporting a conviction.

The final question offers relief for those cases in which there is a compelling reason for the failure to disclose. Where disclosure would expose the accused to a risk of sexual or physical abuse, for example, or where there is a compelling privacy interest that requires protection,⁹⁷ the court may find that there was a valid reason not to disclose the information. This inquiry would need to take all of the surrounding circumstances into account. Failure to disclose highly significant information would demand a more compelling explanation than failure to disclose more trivial matters.⁹⁸

C. Assessing the Proposed Standard

While I argue that the proposed standard would represent an improvement over the current law, it does not address all of the identified shortcomings in the *Cuerrier* standard, and may cause new challenges. This change in the law would address the inequality resulting from the *Cuerrier* test, emphasize sexual autonomy, and expand the reach of the law. It would do little, however, to create space for a public-health centred approach to HIV, and may exacerbate the existing uncertainty in the law. It may also

⁹⁶ Rawluk, *supra* note 89, would require a complainant make inquiries before an obligation to disclose would arise. I argue that such a standard would be too limiting, and would fail to recognize the realities of relationships in which a partner may reasonably expect disclosure of important information even without an inquiry.

⁹⁷ While the right to give or withhold consent for any reason is worthy of protection, it should not create an absolute right to disclosure of every intimate detail about a prospective partner's personal life and history. While in many cases privacy interests can be served by refusing to provide information, there may be instances in which declining to respond to an inquiry from a prospective partner, for example, regarding sexual history or gender identity, may reveal personal details in which there is a compelling privacy interest. In such cases, the courts may conclude that deception is justifiable.

⁹⁸ This element addresses what I respectfully argue is a key shortcoming in Hamish Stewart's proposed standard, which does not address circumstances in which disclosure may expose an individual to serious risks of harm, such as physical or sexual abuse: *supra* note 91.

criminalize behaviour that a portion of the population would view as morally suspect, but not deserving of criminal sanction.

The proposed standard would make progress towards addressing some of the problems caused by *Cuerrier*. Whereas *Cuerrier* is out of touch with an autonomy-centred approach to sexual offences, the proposed test places autonomy at the centre of the analysis. Further, by requiring Courts to consider whether circumstances justifying non-disclosure are present, the proposed test offers the flexibility needed to accommodate those for whom disclosure may create a risk of harm or cause undue hardship. Finally, whereas *Cuerrier* failed to formulate a standard that effectively captured deceptions outside of the non-disclosure of sexually-transmitted infections, the proposed standard is broad enough to capture the sorts of reprehensible conduct seen in cases such as *ROS* and *Dadmand* but appropriately limited by capturing only deceptions which the accused knows to be material to the complainant's decision to consent. In doing so, it focuses on the real wrongfulness of fraud in the sexual context - deliberate deprivation of the complainant's right to make a fully informed choice as to whether to engage in sexual activity.

The two identified shortcomings with the *Cuerrier* standard not addressed by the proposed test are the criminalization of HIV, and the uncertainty inherent in the current law. As discussed above, *Cuerrier* has been criticized for being too broad, criminalizing HIV in a manner that is discriminatory and undermines public health.⁹⁹ While it is conceivable that the negative impact of criminalizing HIV non-disclosure on public health efforts may be identified as a compelling reason not to impose a duty to disclose, this reasoning seems inconsistent with the proposed standard's emphasis on autonomy. Accordingly, it would likely do little to resolve this issue, and may exacerbate it by extending the criminalization of HIV by creating a risk of conviction even where there is no possibility of transmission.

Secondly, the proposed test would not provide the certainty that has proved elusive following *Cuerrier*. Its focus on the significance of information to the particular complainant makes it virtually impossible to provide reliable guidance as to what information must be disclosed. While it does little to improve the law in this respect, it may be that predictability in this area of the criminal law is impossible. Even in the HIV non-

⁹⁹ Buchanan, *supra* note 24 at 1245-1246; Mykhalovsky, *supra* note 25 at 671-673.

disclosure context, there are too many variables for even the clear standard articulated in *Mabior* to provide the certainty intended by the Court. When expanded to the entirety of potential sexual frauds, it seems implausible that any standard could provide certainty in all situations. The proposed standard does, however, at least offer the accused some measure of control in that it will generally protect an individual that provides a prospective sexual partner with the information that he believes she would want to know.

Finally, it is important to acknowledge that the proposed test also poses a risk of criminalizing behaviour that may be seen by many not to merit criminal sanction. In their reasons in *Cuerrier*, both Justice Cory and Justice McLachlin clearly took the position that there should be some permissible scope for deception in the course of “courtship.” It seems likely that there remain many in Canadian society who share this view, even if they view such lies as unsavoury. In this way, a purely subjective test may be viewed as radical and overly oppressive and may struggle to achieve broad societal acceptance.

VI. CONCLUSION

The Supreme Court of Canada’s decisions in *Cuerrier*, *Mabior* and *Hutchinson* represent a significant shift in the law of sexual consent in Canada. In these decisions, the Court expanded the circumstances in which fraud will vitiate consent to sexual activity to include deceptions resulting in a “significant risk of serious bodily harm.” While *Cuerrier* has received limited praise for expanding protection for sexual autonomy, it has been widely criticized for undermining public health efforts to combat HIV, for setting an arbitrary and uncertain standard, and for contributing to HIV-related stigma and having a disproportionate effect on members of already marginalized groups. The standard set in *Cuerrier* has also been criticized for failing to go far enough in protecting sexual autonomy by offering protection only where fraud results in a significant risk of serious bodily harm.

While much of the analysis of *Cuerrier* has focused on cases in which the fraud at issue is non-disclosure of HIV, it is clear that the standard set in that case and those that followed was intended to apply well beyond this context. The purpose of this article is to examine the application of *Cuerrier* in cases involving deception other than non-disclosure of HIV. Cases

involving sexual fraud since *Cuerrier* can be divided into four categories: those involving non-disclosure of sexually transmitted infections other than HIV, deception resulting in financial deprivation, deception resulting in alleged psychological harm, and deception relating to professional status.

This analysis revealed several shortcomings in the *Cuerrier* standard. It is clear that the test set by Justice Cory is not having its intended effect of regulating sexual fraud beyond the HIV non-disclosure context, and is failing to capture behaviour that is truly morally reprehensible and not worthy of legal protection. The standard has also failed to provide the clarity and certainty needed by members of Canadian society to understand their legal obligations, and by lower Courts trying to faithfully apply the standard set by the Supreme Court. Finally, the standard set in *Cuerrier* is increasingly out-of-step with the modern focus of the law of consent in the sexual context on autonomy, failing to provide adequate protection of the right of individuals to decide whether, when, and with whom to consent to sexual activity.

In order to rectify these shortcomings, this article proposes a new standard. This standard would eliminate the requirement that fraud result in a “significant risk of serious bodily harm.” The proposed test would require two inquiries. First, the Court would be required to consider whether the complainant was deprived of information material to her decision to consent to sexual activity. If so, the Court would then consider whether, in all the circumstances, the accused had a duty to disclose the information in question by asking three questions: Did the accused have the information of which the complainant was deprived? Did the accused know that the information was material to the complainant’s decision to consent? Is there any reason why a duty to disclose should not be imposed in the circumstances of the case before the Court?

By asking at the outset of the inquiry whether the complainant had the information she required to make a decision as to whether to consent, the proposed standard appropriately puts sexual autonomy at the centre of the analysis. The second stage turns the focus of the analysis to the actions of the accused, ensuring that the accused can fairly be said to have had an obligation to provide the information in question, and that the decision not to do so is morally blameworthy and deserving of criminal sanction.

Despite these advantages, the proposed test is not without its shortcomings. It would do little to rectify the problems associated with *Cuerrier*’s criminalization of HIV, and while it would eliminate the

confusion that has resulted from *Mabior*, may itself prove challenging for members of the public to understand, and Courts to apply. Additionally, it may set a standard not in accordance with public opinion and which may not enjoy widespread public support.

Whether or not the proposed standard strikes the right balance, it is clear that reform is needed in this area of the law. In recent decades, Canadian criminal law has moved significantly towards a focus on sexual autonomy, as represented in the absolute right guaranteed in *Ewanchuk* to decide whether, when, and with whom to consent to sexual activity. The ability to meaningfully exercise this right is dependent on having complete and accurate information about the issues that are material to that decision. Whereas the *Cuerrier* standard decides for a complainant the bases upon which she could reasonably have declined sexual activity, the proposed standard recognizes that the decision to consent to sex is intensely personal, and that individuals should be entitled to decide for themselves the factors that will inform that decision, no matter how arbitrary or unreasonable they may seem to others.

Consent and the Constitution

COLTON FEHR *

ABSTRACT

The consent of a victim generally operates as a bar to criminal responsibility. In its early jurisprudence, the Supreme Court of Canada went so far as to imply that the consent principle might qualify as a principle of fundamental justice under section 7 of the *Charter*. Subsequent jurisprudence, however, has failed to provide any moral content to the consent principle. In this article, I maintain that any constitutional role for the consent principle must derive from its dual purpose: protecting accused who commit morally innocent and morally permissible acts from criminal conviction. Constitutionalizing consent in this manner serves two purposes. First, it provides a mechanism for distinguishing the consent principle's role as an element of an offence from that of a defence. Second, it illustrates the valuable role a constitutional framework for consent can play with respect to refining several of its most controversial applications—pre-consent to sex, sadomasochism, and incest.

Keywords: consent; *Charter*; fundamental justice; pre-consent to sexual touching; sadomasochism; incest

I. INTRODUCTION

In *R v Barton*,¹ the Supreme Court of Canada demurred when presented with the opportunity to adopt the reasoning in lower appellate courts to the effect that intentionally causing bodily harm during sexual intercourse would vitiate consent.² The Court's reluctance to consider the argument was defensible given that the Crown had not appealed on this basis, nor

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¹ *R v Barton*, 2019 SCC 33.

² *Ibid* at para 180 citing *R v Zhao*, 2013 ONCA 283.

was the issue strictly necessary to resolve the appeal.³ The factual record also failed to highlight the various public policy concerns relevant to making such a determination.⁴ In short, the lower court decisions in *Barton* and other appellate cases “were insufficient to give this important issue the full and comprehensive analysis that it deserves.”⁵

The Court in *Barton* also was not presented with argument about the relationship between the role of consent in the criminal law and the *Canadian Charter of Rights and Freedoms*.⁶ Building on the Court’s seminal decision in *R v Jobidon*,⁷ lower courts have on occasion considered whether the consent principle might qualify as a principle of fundamental justice under section 7 of the *Charter*.⁸ Unfortunately, the jurisprudence has not addressed this question in significant detail.⁹ Instead, constitutional challenges relating to the role of consent in the criminal law have dovetailed into arguments about instrumental rationality,¹⁰ full answer and defence,¹¹ absolute liability,¹² and equality.¹³

The lack of engagement with the constitutional rationale underlying the consent principle likely arises from its underdevelopment in Canadian law. Although in some instances it is uncontestable that consent is an essential element of the offence, courts have not engaged with the literature debating whether consent is properly conceptualized as a justificatory defence in other contexts.¹⁴ More importantly, although there is broad agreement that public policy places some limits on the scope of the consent principle, this

³ *Ibid* at para 181.

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *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.

⁷ *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454 (WL) [*Jobidon*].

⁸ See *R v CM* (1992), 75 CCC (3d) 556 at 562-567 (ONSC) (absence of consent must be part of the offence where consent makes the act morally innocent); *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 1166-1173, 1184 (court refused to decide whether consent was a principle of fundamental justice).

⁹ *Ibid*.

¹⁰ See *R v Hann* (1992), 75 CCC (3d) 355 at para 9, 15 CR (4th) 355 (NLCA).

¹¹ See *R v Geisel*, 2000 CanLii 8446 (MBPC) at para 5.

¹² See *R v Robinson* (1991), 14 WCB (2d) 624, 96 Sask R 220 (SKQB).

¹³ See *R v CM* (1995), 98 CCC (3d) 481, 82 OAC 68 (ONCA); *R v Roy* (1998), 161 DLR (4th) 148, 125 CCC (3d) 442 (QBCA).

¹⁴ The relevant literature will be discussed in detail below.

policy rationale has not been distilled into a basic guiding principle.¹⁵ Only by uncovering the principles underlying consent will it be possible to test whether they qualify as principles of fundamental justice under section 7 of the *Charter*.

In this article, I contend that consent is encompassed by two distinct principles. When consent must exist as an element of an offence, I maintain that failure to incorporate consent into the offence violates the principle of fundamental justice that the morally innocent not be subject to criminal liability. In cases where an act constitutes a *prima facie* wrong, I contend that consent is best conceptualized as a justificatory defence. The principle underlying consent in this capacity is moral permissibility. This principle, which I have developed in detail elsewhere,¹⁶ requires courts to investigate the reasons why prohibiting an accused's act is wrong. If the benefits of prohibiting the accused's act do not clearly outweigh any benefits derived from the activity, its criminal prohibition will fail to satisfy the principles of fundamental justice.

The article unfolds as follows. In Part II, I review the literature discussing the jurisprudential basis of the consent principle. In so doing, I contend that consent may be conceptualized as either part of an offence or as a defence, depending on the relationship between the consent and the act at issue. In Part III, I then outline the moral innocence and moral permissibility principles in greater detail. Although the former principle has already qualified as a principle of fundamental justice, it is necessary to further consider whether the moral permissibility principle may be elevated to the same status. After answering this question in the affirmative, I use the moral permissibility and moral innocence principles to test the constitutional boundaries of several controversial applications of the consent principle: pre-consent to sex, sadomasochism, and incest.

II. THE JURISPRUDENTIAL BASIS OF CONSENT

The jurisprudential basis of the consent principle has been the subject of significant academic debate. There is broad agreement that consent must be an element of the offence where absence of consent is essential to the

¹⁵ See *Jobidon*, *supra* note 7.

¹⁶ See Colton Fehr, "(Re-)Constitutionalizing Duress and Necessity" (2017) 42:2 *Queen's LJ* 99 [Fehr, "(Re-)Constitutionalizing"]; Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 *Queen's LJ* 85.

conduct being criminal. Whether in other instances consent may operate as a justification for committing a criminal offence raises questions not only relating to the relationship between offences and defences, but as to the structure of justificatory defences as well.

A. Consent as an Element of Offences and Defences

The role of the consent principle with respect to two charges—sexual assault and assault *simpliciter*—illustrates why consent serves a bifurcated role within Anglo-American criminal law. It is generally accepted that consent is not a “defence” to sexual assault in the traditional sense of the term.¹⁷ The reason for this is because there is nothing wrong with having sex.¹⁸ An understanding of sexual assault as a prohibition against sexual intercourse that allows consent to be asserted as a defence “would invite an almost comically inefficient, intrusive, and disorienting use of prosecutorial and judicial resources.”¹⁹ The underlying conduct being socially desirable therefore requires that consent operate as an element of the offence.

To the contrary, scholars maintain that there is a *prima facie* reason to prohibit generic assaults.²⁰ Regardless of whether one consents, the fact that the assault occurs will result in human suffering.²¹ For this reason, the

¹⁷ See John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007) at 144-145 [Gardner, “Offences”] citing Kenneth Campbell, “Offence and Defence” in Ian Dennis, ed, *Criminal Law and Justice* (London: Sweet & Maxwell, 1987) at 73; John Gardner, “Justification Under Authority” (2010) 23 Can JL & Jur 71 at 75-76 [Gardner, “Justification”]; and George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) at 566-568. Although this view is generally accepted, at least one competing view exists. See Michelle Dempsey & Jonathan Herring, “Why Sexual Penetration Requires Justification” (2007) 27:3 Oxford J Leg Stud 467 at 467.

¹⁸ *Ibid.*

¹⁹ See Stuart Green, “Consent and the Grammar of Theft Law” (2007) 28:6 Cardozo L Rev 2505 at 2520.

²⁰ The term *prima facie* is not used in the sense that a reason against committing the act appears to be there but is revealed to be illusory. Instead, “the reason...is really there and continues to be there and to exert its force throughout, such that [committing the act] is regrettable—even though this is a case with a stronger conflicting reason such that [committing the act] is justified”. See Gardner, “Offences”, *supra* note 17 at 146. See also Vera Bergelson, “The Defense of Consent” in Markus Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2014) 629 at 650 [Bergelson, “Consent”].

²¹ Gardner, “Offences”, *supra* note 17 at 144-145; Gardner, “Justification”, *supra* note 17 at 75-76; Fletcher, *Rethinking*, *supra* note 17 at 568; George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998) at 158; and Green, “Consent”,

offence of assault is still committed. However, the victim's consent serves as an undefeated reason which justifies the violation of the prohibitory norm against assaulting others.²² Allowing the victim's consent to operate in this manner upholds the importance of the victim's autonomy to choose what happens to her body. Importantly, however, the victim's consent does not alter the fact that the underlying harm sought to be avoided by prohibiting assault was caused. The harm is simply counterbalanced by the autonomy interests of the victim.²³

B. Consent as an Element of Offences Only

More recent scholarship has challenged the rationale advanced above. It is arguably confusing to assert that the purpose of the assault prohibition is to protect individuals from harm, while simultaneously holding that such harm is justified by the consent of the victim.²⁴ If the law values the victim's autonomy more than protecting the victim from harm, it would be sensible to conclude that the purpose of assault is to protect personal autonomy. By so doing, however, it must be recognized that the consenting victim is merely exercising her right to individual autonomy.²⁵ If true, her consent eliminates the harm to which the assault provisions are directed as opposed to justifying its infliction.²⁶

Yet, autonomy itself cannot explain the scope of the consent principle. This is evidenced by the fact that Anglo-American criminal law generally places limits on the types of assaults to which a victim may consent.²⁷ An

supra note 19 at 2519-2520.

²² *Ibid.*

²³ *Ibid.*

²⁴ See Luis Chiesa, "Consent is not a Defense to Battery: A Reply to Professor Bergelson" (2011) 9 Ohio State J Crim L 195 at 198-200 [Chiesa, "Consent"]; Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117 Yale LJ 1070 at 1113-1116; Malcolm Thorburn, "Two Conceptions of Equality before the (Criminal) Law" in Francois Tanguay-Renaud & James Stribopoulos, eds, "Re-thinking Canadian Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law," (Oxford: Hart Publishing, 2012) 3 at 18; and Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, (Burlington: Ashgate, 2004) at 111-112.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See for instance *Jobidon*, *supra* note 7 (fist-fights); *R v Brown*, [1994] 1 AC 212 (HL) [*Brown*] (sodomasochism); and *People v Jovanovic*, 263 AD 2d 182 (NY App Div 1999) (sodomasochism).

obvious example concerns cutting off a limb without medical necessity.²⁸ As a result of this public policy aspect to consent, Luis Chiesa recently suggested that consent is better understood as occupying an “offence-modification” role in criminal law theory.²⁹ Although the legislature *did* intend for consensual maiming to come within the ambit of the assault provisions, it *did not* intend acts such as contact sports, tattooing, and ear piercing to come within the scope of the criminal law.³⁰ The reason for the latter exemption is simple: these activities are permissible.³¹

Although I will defend the view that “permissibility” partially underlies the consent principle, I nevertheless disagree that consent cannot operate as a defence to assault. I take this position for three reasons. First, it is implicit in Chiesa’s argument that the legislature’s purpose will shift over time, as what is impermissible today might become permissible as society’s values change. The fact that duelling and consensual fights which did not result in maiming have previously been viewed as permissible provides an example of how the law, despite legislative intent at the time it was enacted, changes with social opinion.³² To impute such “intent” to the legislature is a legal fiction. It is unclear why allowing such a legal fiction is preferable to imputing to the legislature the intent to prohibit all forms of assault, no matter how socially desirable (contact sports, ear piercing, tattooing etc.) and then concluding that such harms are justifiable.

Second, it is not unreasonable to assume that a legislature would purposefully draft an assault offence in such a broad manner. Consider the following options. First, assaults are defined as non-consensual applications of force. The consent element is left to be defined by the common law, as creating an exhaustive list of acts that might be consented to is extremely difficult.³³ Alternatively, all assaults are prohibited, and the common law or

²⁸ The disease, known as “Bodily Integrity Identity Disorder,” involves accused persons who feel a desire to dismember parts of their body. See Tim Bayne & Neil Levy, “Amputees by Choice: Body Integrity Identity Disorder and the Ethics of Amputation” (2005) 22 J Applied Philosophy 75.

²⁹ Chiesa, “Consent”, *supra* note 24 at 205.

³⁰ *Ibid* at 205-206.

³¹ *Ibid* at 206.

³² See *Rex v Rice* (1803), 3 East 581 for the Court’s change of view with respect to duelling. See also *Brown*, *supra* note 27 for the reasons of Lord Templeman. As he observes, “in the old days, fighting was lawful provided the protagonists consented because it was thought that fighting inculcated bravery and skill and physical fitness.”

³³ As Lord Mustill observed in *Brown*, *supra* note 27: “I doubt whether it is possible to give

a statute provides a “consent defence.” Both options provide consent with a legal meaning, which the citizen requires a profound understanding of law to decipher. Option two, however, at least puts citizens on notice that they will be responsible for convincing the court that consent made the activity permissible.

Finally, defining the offence of assault in such a broad manner is within the scope of the criminal law. Prohibiting consensual assaults generally forwards the goals of protecting public health and safety, two of the primary goals of criminal law.³⁴ Whether the criminal law may extend its reach to convict people for acts such as contact sports, tattooing, and ear piercing is doubtful as a matter of constitutional law; as a matter of the conceptual reach of criminal offences, however, it is difficult to understand why it must be so limited.

To conclude otherwise would lead to some absurd results. Consider the following example. The same type of harm is committed by throwing an individual to the ground in self-defence as doing the same to gain leverage in a sporting contest. Both acts are obviously permissible. If anything, the accused acting in self-defence is seen to act rightfully,³⁵ while the sport participant can claim no higher moral ground. It is simply anomalous to conclude that the accused with the higher moral claim commits an assault but has a defence, while the sporting participant commits no assault.

It may be countered that relying on the *prima facie* wrong distinction will also lead to absurd results. Consider the law of sexual assault. On the one hand, consent, in its moral innocence form, must constitute part of the offence for typical sexual assaults. However, what of sexual encounters with a violent element, such as sadomasochistic sex? If violence constitutes a *prima facie* wrong regardless of consent, an accused charged with such a sexual assault would be required to plead consent as a defence, thus bifurcating the role of consent with respect to the crime of sexual assault. One might counter that there is no violent aspect to sadomasochistic sex, as “the presence of negotiation and consent... remove[s] core features of

a complete list of the situations where it is conceivable that one person will consent to the infliction of physical hurt by another.”

³⁴ See *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 74 [*Malmo-Levine*] aff'g *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 [*Margarine Reference*] at 49-50.

³⁵ See most recently *R v Ryan*, 2013 SCC 3 at para 31 [Ryan].

violence.”³⁶ However, as numerous scholars have retorted, the actual causing of pain, whether consensual or not, is difficult to paint as entirely non-violent, especially as that word is legally understood.³⁷

It is also likely that consent as a defence to sexual assault involving sadomasochistic acts would have to be plead under a different principle, thus further complicating consent’s role in the context of sexual assault cases. In essence, sadomasochistic sex involves a desire to see another individual endure pain for sexual gratification.³⁸ Whether consensual or not, it seems inherently difficult to conceptualize causing pain for sexual gratification as “rightful” or morally innocent. As I explain in more detail below, if aspects of consensual sadomasochistic sex are defensible, it is because they have come to be viewed as morally permissible, not that they constitute inherently innocent acts.

Which of these circumstances should be tolerated? In my view, the broader rationale of the Anglo-American structure of criminal law requires that those flowing from the *prima facie* wrong distinction be tolerated. As criminal offences must forward public policy aims such as “peace, order, security, health, [or] morality,”³⁹ the fact that criminal offences are drafted broadly enough to encompass “rightful” acts is contrary to the morality purpose. If there is anything criminal offences are *not* seeking to curtail, it is rightful actions. Similarly, it is difficult to imagine a circumstance where prohibiting a rightful act could forward any of the other valid purposes of the criminal law.

The distinction between purely innocent acts, which are not offences, and *prima facie* wrongs, which are offences but may be offset by the accused’s reasons for committing the offence, is the only tenable explanation of which I am aware that makes the Anglo-American structure of criminal law coherent.⁴⁰ In other words, the inherent disconnect between the purposes of offences and the moral rationale for justificatory defences is only tolerable

³⁶ Monica Pa, “Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex” (2001) 11 Tex J Women & L 51 at 77.

³⁷ For a review of the literature see Theodore Bennett, “Persecution or Play? Law and the Ethical Significance of Sadomasochism” (2015) 24:1 Soc & Leg Stud 89 [Bennet, “Persecution”]; See also Cheryl Hanna, “Sex is not a Sport: Consent and Violence in Criminal Law” (2001) 42 Boston College L Rev 239 at 240 nn 8 [Hanna, “Sex is not a Sport”].

³⁸ *Ibid.*

³⁹ *Malmo-Levine*, *supra* note 34 at para 74.

⁴⁰ See Gardner, “Offences”, *supra* note 17 at 145-146.

if we accept that *prima facie* wrongs are sufficient to constitute an offence. The admittedly strange result concerning the role of consent within the offence of sexual assault is therefore an inevitable consequence of the Anglo-American structure of criminal law.

C. Inconsistency with the Structure of Justifications

Recent scholarship has also questioned whether consent fits within the logic of justificatory defences. As Chiesa contends, consent cannot operate as a justification because justifications defeat liability as a result of the accused choosing the lesser evil.⁴¹ According to this argument, it is difficult to conceptualize a consensual assault as a reason to be weighed against competing reasons. In the context of committing a generic assault,⁴² consent is simply not a reason for anyone to do anything.⁴³ Put another way, “it is borderline incoherent to contend that the infliction of such an evil on the victim is justified because it averts the evil of not acquiescing to the victim’s wishes.”⁴⁴ It does not avert any evil. As such, Chiesa argues that consent does not fit within the logic of justification-based defences.

This criticism is not, however, dispositive of whether consent can act as a justification. The requirement that the accused choose the “lesser evil” gives short shrift to the potential breadth of justificatory defences. If the accused’s crime constitutes the lesser evil, courts have generally concluded that the act was rightful based on utilitarian principles.⁴⁵ However, scholars have also insisted that justifications encompass permissible conduct.⁴⁶

⁴¹ Chiesa, “Consent”, *supra* note 24 at 200. Bergelson, “Consent”, *supra* note 20 at 651 is susceptible to this criticism as she relies on the argument that consent constitutes the “lesser evil.”

⁴² I mean to exclude assaults such as surgeries which obviously do have a reason for their performance.

⁴³ Gardner, “Justification”, *supra* note 17 at 78. The author provides a succinct summary of this argument.

⁴⁴ Chiesa, “Consent”, *supra* note 24 at 201.

⁴⁵ See for instance *Perka v The Queen*, [1984] 2 SCR 232 at 246, 13 DLR (4th) 1.

⁴⁶ See Kimberly Kessler Ferzan, “Justification and Excuse” in John Deigh & David Delinko (eds) *Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239 at 239-242 citing JL Austin, “A Plea for Excuses” in Alan White, ed, *The Philosophy of Right* (Oxford: Oxford University Press, 1968) 19 at 19-20. See also Joshua Dressler, “New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 University of California at Los Angeles L Rev 61. In Canada, my work has developed the idea of “moral permissibility” as one of three principles that form the moral basis for granting

Indeed, as criminal law is only meant to prohibit wrongful conduct, I and others maintain that there must be room for justifications to include permissible acts.⁴⁷

As I explain elsewhere,⁴⁸ morally permissible conduct encompasses two circumstances. The first is where the competing interests of the accused and victim are identical.⁴⁹ In this scenario, a balancing of the relevant harms cannot lead to a conclusion that one person's interests ought to be placed above the others.⁵⁰ The second scenario, which is relevant to the consent principle, concerns circumstances where the moral foundation of an act is exceedingly difficult to categorize.⁵¹ For instance, weighing the benefits of sporting activities against the likelihood that serious injuries may occur during a match involves weighing two difficult-to-quantify factors. In this scenario, it is better to rely upon a more general notion of permissibility as the basis for granting an accused a defence. Using force in sport would be justified, not because it is "rightful," but because the state cannot prove it is wrongful.

My description of permissible conduct finds further support in John Gardner's influential theory of the role of justifications in the criminal law. In his view, an act is justified if two criteria are met. First, the reasons in favour of an act are not outweighed or excluded by reasons against committing the act.⁵² It is irrelevant whether the reason in support of doing an act also outweighs the competing reasons against doing that act.⁵³ Nor is it necessary that the reasons for committing the act be noble or admirable.⁵⁴ Second, the accused must have acted for the reasons supporting the justification. In other words, the accused must have committed the assault because of the consent, and not for some other motive.⁵⁵

criminal defences. See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

⁴⁷ *Ibid.*

⁴⁸ See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

⁴⁹ *Ibid.* The "innocent attacker" scenario is illustrative. It is discussed at length in both of my articles, as well as by Hamish Stewart, "The Constitution and the Right to Self-Defence" (2011) 61 UTLJ 899 at 916-917.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Gardner, "Justification", *supra* note 17 at 79.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 81.

⁵⁵ *Ibid* at 80-81.

Although Gardner does not divide justifications into multiple categories, his baseline requirement for a justification aptly describes the idea of moral permissibility. A permissibility defence is not one that outweighs competing reasons but is rather one which is undefeated by competing reasons. This provides a principled approach to justificatory defences as it is sometimes difficult, if not impossible, to ascribe a label of right or wrong to an act. In these scenarios, it is better for the criminal law to demonstrate some epistemic modesty and admit that our understanding of morality may not always lead to satisfactory conclusions. If our conception of justification is expanded to include the idea of permissibility, I see no difficulties with bringing the defence of consent within the scope of justificatory defences.

III. CONSENT AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

If the analysis in Part II is forceful, the consent principle occupies conceptual space on both sides of the offence/defence divide. This does not, however, fully account for the principles underlying consent. Nor does it answer the question of whether those principles qualify as principles of fundamental justice. To better understand the conceptual and constitutional bases of consent, it is necessary to develop a more robust understanding of the relationship between consent and two principles of fundamental justice: moral innocence and moral permissibility.

A. Moral Innocence

The principle that the morally innocent not be subject to criminal sanction is a well-recognized principle of fundamental justice.⁵⁶ Its relation to the consent principle is illustrated by considering the offences of sexual assault and theft. As outlined earlier, if the offence of sexual assault did not include an absence of consent, the offence would effectively be the act of having sex. Similarly, if the offence of theft did not have absence of consent as an element, possessing another's property would constitute an offence. As basic sexual acts⁵⁷ and borrowing other people's property are not at all morally blameworthy acts, to define an offence in such a manner threatens

⁵⁶ See *R v Beatty*, 2008 SCC 5 at para 34.

⁵⁷ I will discuss more controversial questions, such as sadomasochism, in more detail below.

an innocent individual's liberty.⁵⁸ As such, where absence of consent must be an element of an offence, the constitutional reason is that to do otherwise would infringe the liberty interests of a morally innocent individual.

B. Moral Permissibility

The moral permissibility principle is of recent vintage, only being developed in a pair of articles two years ago.⁵⁹ Although the principle was originally developed to explain controversial aspects of the defences of duress, necessity, and self-defence, consent provides another illustration of the principle's broad applicability in the criminal law. To explain this point in more detail, it is necessary to first review the historical development of the consent principle. After so doing, it will be possible to test whether the moral permissibility principle aptly captures the consent defence and, if so, whether it qualifies as a principle of fundamental justice.

1. *Historical Development of the Consent Defence*

Volenti non fit injuria—no wrong is done to one who consents—is the Latin term that first formed the basis of the consent defence.⁶⁰ The *volenti* principle originally provided a defence to virtually any consensual conduct.⁶¹ Over time, however, the common law developed limited exceptions. In *Wright's Case*,⁶² one of the first English cases to assess the issue of consent to an assault, the victim consented to have his hand cut off as it gave him “more colour to beg.”⁶³ The Court did not allow consent to serve as a defence. In the Court's view, by maiming what was a capable man, the King was deprived of the aid and service of one of his subjects.⁶⁴

⁵⁸ See for instance John Kleinig, “The Nature of Consent” in Franklin Miller and Alan Wertheimer, eds, *The Ethics of Consent* (Oxford: Oxford University Press, 2010) 3 at 4.

⁵⁹ See Fehr, “(Re-)Constitutionalizing”, *supra* note 16; Fehr, “Self-Defence”, *supra* note 16. As suggested above, however, it was inspired by the writings of several leading authors in criminal law theory.

⁶⁰ Bergelson, “Consent”, *supra* note 20 at 642.

⁶¹ Terence Ingman, “A History of the Defence of Volenti Non Fit Injuria” (1981) 26 *Jurid Rev* 1 at 3. See also *Jobidon*, *supra* note 7 at para 30 citing JW Cecil Turner, *Russell on Crime*, 12th ed (London: Stevens & Sons, 1964) at 678; Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed (Toronto: Carswell, 1987) at 469-470.

⁶² *Wright's Case* (1603), Co Litt f 127 a-b.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

The scope of the consent principle was further narrowed in the seventeenth century with the rise of the state and its monopolization of the criminal law.⁶⁵ The state's interest in stopping disturbances in society became central to the defence.⁶⁶ Beginning with *Matthew v Ollerton*,⁶⁷ an assault case decided in the late seventeenth century, the victim's consent to the assault was found not to be a defence "because 'tis against the peace."⁶⁸ This reasoning would be applied later in the eighteenth and nineteenth centuries to prevent consent from providing a defence to participating in prize fights, which tended to cause broader public disturbances.⁶⁹

The Supreme Court of Canada added to the above rationales for barring consent as a defence in *Jobidon*. The case arose from a consensual fist-fight which resulted in the unintentional death of one of the participants. In the Court's view, allowing consent to operate as a defence to such serious violence risked encouraging disrespect for the law.⁷⁰ Relying on George Fletcher's foundational work in *Rethinking Criminal Law*,⁷¹ the Court observed:

[T]he self-destructive individual who induces another person to kill or to mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or the mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not.⁷²

In other words, if individuals could legally consent to have such violence committed against their person, the person who commits the violent act might be more inclined to commit similar acts in the future.⁷³ Such an attitude might also breed a broader contempt for the law that could result in more overall crime.

⁶⁵ See Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 Geo Wash L Rev 165 at 172.

⁶⁶ *Ibid* at 172-173.

⁶⁷ *Matthew v Ollerton*, (1692) 90 Eng Rep 438 (KB).

⁶⁸ *Ibid*.

⁶⁹ See *Boulter v Clark*, (1747) Bull NP 16; *R v Lewis* (1844), 1 Car & K 419, 174 ER 874; and *R v Coney* (1882), 8 QBD 534. A prize fight is a non-official boxing match. See section 83 of the *Criminal Code*.

⁷⁰ *Jobidon*, *supra* note 7 at para 116

⁷¹ *Supra* note 17.

⁷² *Jobidon*, *supra* note 7 at para 116 citing Fletcher, *supra* note 17 at 770-771.

⁷³ *Jobidon*, *supra* note 7 at para 117.

Finally, the Court in *Jobidon* recognized the sanctity of the human body as a consideration in determining whether an individual may consent to harm.⁷⁴ This rationale militates against allowing consensual harms that violate the victim's dignity.⁷⁵ Although vague in nature, this rationale holds that dignity is so essential to people's humanity that at some point it must take precedence over the autonomy interests of victims.⁷⁶

The Court's application of these principles in *Jobidon* is illustrative of the type of case-by-case balancing required for determining the appropriate application of the consent principle. In determining that the accused committed an "unlawful act" (being the assault) that resulted in death, the Court concluded that any force intended to cause and actually causing serious hurt or non-trivial bodily harm falls outside the boundaries of consent.⁷⁷ This decision turned on considerations of public policy. The social uselessness of fist-fights, their tendency to lead to larger breaches of the peace, the need to deter fights, and the desire to protect the sanctity of the human body, all contributed to the Court's ruling.⁷⁸ The conclusion that it is permissible to consent to fights that are not intended to cause non-trivial bodily harm derives, presumably, from the respect the law has for individual autonomy.

The Court was, however, quick to stress that the mere causing of bodily harm does not necessarily serve to vitiate consent in all contexts.⁷⁹ Consensual activities that cause high degrees of harm, such as boxing, were found to be permissible despite meeting the other elements of the offence of assault.⁸⁰ Whether a type of bodily harm can be consented to must be determined on a case-by-case basis with full understanding of the social

⁷⁴ *Ibid* at para 118.

⁷⁵ The Court does not expand upon what it means by sanctity of the human body. Other commentators, however, link this concern to a broader desire to uphold human dignity. See Bergelson, "Consent", *supra* note 20 at 649.

⁷⁶ Bergelson, "Consent", *supra* note 20 at 649 citing R George Wright, "Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively" (1995) 75 BUL Rev 1397 at 1399; Meir Dan-Cohen, "Basic Values and the Victim's State of Mind" (2000) 88 Cal L Rev 759 at 777-778; and Markus Dubber, "Toward a Constitutional Law of Crime and Punishment" (2004) 55 Hastings LJ 509 at 570.

⁷⁷ See *R v Paice*, 2005 SCC 22 at paras 11-14. The "intended" requirement therefore permits consent to be a defence even where the harm actually caused (if not intentional) qualifies as serious bodily harm.

⁷⁸ See *Jobidon*, *supra* note 7 at paras 111-124.

⁷⁹ *Ibid* at para 124.

⁸⁰ *Ibid* at para 130.

utility of the act in question. This conclusion, however, does nothing more than beg the question: what underlying principle determines when an act has sufficient utility?

2. Consent and Moral Permissibility as a Defence

In many assault cases, it is easy to identify the reasons why society allows consent to protect individuals from criminal liability. Contact sports serve obvious developmental functions,⁸¹ and constitute a form of recreation. Allowing people to have piercings serves an adornment function. Yet, fitting these cases into the current framework for criminal defences is problematic. As outlined earlier, under current Canadian criminal law theory, justification-based defences connote “rightful” conduct, and excuse-based defences connote “wrongful” but “morally involuntary” conduct.⁸² It is difficult to see why allowing athletes to pummel each other during a game, and in so doing risk serious injury to themselves and others, is “rightful” or “morally involuntary.” Similarly, the assault inherent in puncturing a person’s skin to attach a piece of jewelry does not easily fit into these categories.

As Chiesa observes, the reason these acts are not punishable is because they are viewed as permissible.⁸³ Applying the framework developed by the Court in *Jobidon* to the consensual violence that occurs in contact sports illuminates this point.⁸⁴ There is a slight, but difficult to quantify, risk that contact sports will make those involved public discharges, cause disturbances of the peace, or make people less likely to abhor violence outside of the arena. However, contact sports also allow for personal development, health, and happiness. All these considerations are important but inherently vague. Weighing them against one another does not, therefore, allow for any distinct moral conclusion about the activity of contact sports. As with Chiesa, then, I suggest that the only viable moral conclusion is that such acts are permissible.

It may be retorted that there are instances where the consent defence can be invoked without relying upon the moral permissibility principle.

⁸¹ See Hanna, “Sex is not a Sport”, *supra* note 37 at 255.

⁸² See most recently Ryan, *supra* note 35 at paras 23-24.

⁸³ Chiesa, “Consent”, *supra* note 24 at 206.

⁸⁴ It is notable that some extreme acts of violence in the sporting context are deemed outside the realm of consensual conduct. See *R v Bertuzzi*, 2004 BCPC 472, 26 CR (6th) 71.

Instead, consent would make an act “rightful” or “morally innocent” under the lesser evils’ conception of criminal defences. Performance of a consensual surgery is exemplary. Where a doctor is able to obtain consent before conducting surgery, it may be queried whether the doctor commits an assault at all and, if so, what principle might be invoked in the doctor’s defence. Applying the *prima facie* wrong distinction, it is not possible to consider the doctor’s reason(s) for committing the assault. However, when one weighs the competing considerations under the traditional lesser-evils conception of a justificatory defence, it is clear that the doctor is doing a good deed.

In my view, consent would not form the basis of the doctor’s defence. The following examples illustrate this point. Imagine that a doctor conducts two identical surgeries—one with the patient’s consent and the other when obtaining consent is impossible. The consent principle obviously has no role to play in the latter scenario. Yet, we would still conclude that the surgery is a good deed and thus justified based on the lesser evils rationale underpinning a traditional necessity defence.⁸⁵ In my view, it must follow from the identical nature of the surgeries that consent is only an *additional* factor weighing in favour of the doctor performing the surgery. The doctor’s justification, I suggest, is only nominally implicated by the consent principle as the desire to preserve the well-being of the patient drives the moral reasoning.

3. *Moral Permissibility as a Principle of Fundamental Justice*

The predecessors to this article explained at length why the moral permissibility principle is not only an important principle underlying criminal defences, but also meets the requirements for qualifying as a principle of fundamental justice.⁸⁶ That analysis need not be repeated here. However, one potential criticism has yet to be addressed. This criticism asks whether the moral permissibility principle is distinguishable from the harm principle.⁸⁷ The latter principle, developed by John Stuart Mill,⁸⁸ purports that state use of the criminal law must be limited to acts that physically, not

⁸⁵ I would categorize the act as a necessity defence. See Fehr, “(Re-)Constitutionalizing”, *supra* note 16 at 125-126.

⁸⁶ See Fehr, “(Re-)Constitutionalizing”, *supra* note 16; Fehr, “Self-Defence”, *supra* note 16.

⁸⁷ This criticism was raised when I presented this article at a faculty seminar at the University of Alberta, College of Law.

⁸⁸ John Stuart Mill, *On Liberty and Considerations on Representative Government* (Oxford: Blackwell, 1946).

morally, harm others.⁸⁹ Despite its surface appeal, the Court found that Mill's harm principle failed to meet any of the requirements set out for qualifying as a principle of fundamental justice.⁹⁰

Although the Court suggested that the harm principle did not qualify as a legal principle, the Court's main concerns were with the other requirements for qualifying as a principle of fundamental justice.⁹¹ First, the Court found that there is no consensus that Mill's conception of "harm" was the sole justification for criminal prohibition.⁹² The Court cites cannibalism, bestiality, and cruelty to animals as "crimes that rest on their offensiveness to deeply held social values rather than on Mill's 'harm principle.'" ⁹³ The Court also found that there is no consensus that criminal conduct is limited to harm caused to others. Offences such as requiring citizens to wear seatbelts or helmets are clearly designed to "save people from themselves."⁹⁴

Second, if the term "harm" were read broadly enough to bring the aforementioned acts within the principle's ambit, it would render the harm principle an unmanageable standard upon which to measure deprivations of life, liberty, and security of the person.⁹⁵ As Bernard Harcourt explains in an article which was cited approvingly by the Court in *Malmo-Levine*:

The proliferation of harm arguments in the debate over the legal enforcement of morality has effectively collapsed the harm principle. Harm to others is no longer today a *limiting* principle. It no longer *excludes* categories of moral offenses from the scope of the law. It is no longer a *necessary (but not sufficient) condition*, because there are so many non-trivial harm arguments. Instead of focusing on whether certain conduct causes harm, today the debates center on the types of harm, the amounts of harm, and our willingness, as a society, to bear the harms. And the harm principle is silent on those questions.⁹⁶

⁸⁹ *Ibid* at 8-9. See also *Malmo-Levine*, *supra* note 34 at para 121.

⁹⁰ *Malmo-Levine*, *supra* note 34 at paras 102-129.

⁹¹ *Ibid* at para 114. The Court suggested that the harm principle was better categorized "as a description of an important state interest" than a legal principle.

⁹² *Ibid* at para 115.

⁹³ *Ibid* at para 117.

⁹⁴ *Ibid* at paras 123-126.

⁹⁵ *Ibid* at paras 127-129 citing Bernard Harcourt, "The Collapse of the Harm Principle" (1999) 90 J Crim L & Criminology 109 at 113.

⁹⁶ See Harcourt, "Collapse", *supra* note 95 at 182 [emphasis in original]; See also *Malmo-Levine*, *supra* note 34 at para 127.

Whereas the harm principle originally served as a means for determining what acts cause harm and are thus properly categorized as criminal acts, the debate now allows for most anything to constitute a “harm.” Without a narrower definition of the term, the Court quite reasonably concluded that the harm principle provided an unworkable constitutional standard.⁹⁷

The moral permissibility principle, however, does precisely what the harm principle was not designed to do. Whereas the harm principle sought to restrict what types of acts in the abstract might be made an offence, the moral permissibility principle requires courts to assess the merits of the reasons to convict an individual offender. This weighing function has not prevented other principles from receiving constitutional protection. Notably, balancing of harms is central to the Court’s own conception of duress, necessity, and self-defence.⁹⁸ As the principles underlying these defences have or can be expected to receive constitutional protection,⁹⁹ it is reasonable to conclude that a similar weighing function could serve a constitutional role with respect to the consent defence.¹⁰⁰ As I illustrate below, when complimented by deep understandings of the various evaluative factors relevant to criminal defences,¹⁰¹ the moral permissibility principle can help the law come to reasonable conclusions about which acts should be afforded a consent defence.¹⁰²

⁹⁷ *Ibid* at 140-181 providing an extensive overview of how harm in relation to pornography, prostitution, disorderly conduct, homosexuality, and alcohol/drug consumption, among other crimes, took on significantly broader meaning over the last half-century.

⁹⁸ See generally Fehr, “(Re-)Constitutionalizing”, *supra* note 16; Fehr, “Self-Defence”, *supra* note 16.

⁹⁹ *Ibid*.

¹⁰⁰ In *Malmo-Levine*, *supra* note 34 at para 101, the Court tersely suggests otherwise. However, in light of the various roles played by proportionality with respect to constitutionalized criminal defences, this statement is not defensible. Notably, other constitutional principles—such as the prohibition against cruel and unusual punishment found in section 12 of the *Charter* and the prohibition against gross disproportionality under section 7 of the *Charter*—utilize similar weighing functions at the rights stage of analysis.

¹⁰¹ As Harcourt observed, resolving these questions requires that we “access larger debates in ethics, law and politics—debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values that give meaning to the claim that an identifiable harm matters.” See Harcourt, “Collapse”, *supra* note 95 at 183 (emphasis in original).

¹⁰² See Fehr, “(Re-)Constitutionalizing”, *supra* note 16; Fehr, “Self-Defence”, *supra* note 16.

IV. APPLYING THE CONSENT PRINCIPLE

Application of the constitutional framework described in Part III provides a principled means for assessing the constitutionality of some of the most controversial applications of the consent principle. The role of consent in relation to three issues—pre-consent to sexual touching; sadomasochism; and incest—will illustrate this point. It should be emphasized, however, that my goal is not to provide a comprehensive constitutional answer to whether such conduct must be allowed. Each topic is complex and merits its own article. However, by identifying the sites of contestation, the constitutional framework offered above will help frame the relevant issues.

A. Pre-Consent to Sexual Touching

In *R v JA*,¹⁰³ the Court concluded that consenting to sexual activity in advance of becoming unconscious was prohibited.¹⁰⁴ As the Court made clear, the issue was not whether an exception that permits pre-consent to sexual activity while unconscious should be developed, but instead whether the statutory scheme permitted such an interpretation.¹⁰⁵ In the majority's view, the statutory language prohibited consenting to any sexual conduct while unconscious.¹⁰⁶ The merits of this conclusion are unimportant for present purposes.¹⁰⁷ What is important is the fact that the Court did not fully consider the reasons for permitting pre-consensual sex. As the Court made clear, such reasons would only be relevant in the context of a constitutional challenge to the scope of the consent provisions.¹⁰⁸

The complexity of the issue is illustrated by the range of facts which could fall under the category of pre-consent to sexual touching. Consider the Court's struggle with how to acquit the husband who obtains pre-

¹⁰³ *R v JA*, 2011 SCC 28 [JA].

¹⁰⁴ *Ibid.* Earlier cases also rejected this idea. See *R v Humphrey* (2001), 143 OAC 151, 49 WCB (2d) 420 (ONCA); *R v Ashlee*, 2006 ABCA 244, 61 Alta LR (4th) 226.

¹⁰⁵ See JA, *supra* note 103 at para 33.

¹⁰⁶ *Ibid.* at para 34-43. For a competing interpretation of the relevant provisions see the reasons of Justices Fish, LeBel and Binnie, concurring, at paras 92-108.

¹⁰⁷ For a critique of the majority's reasons, see Joshua Sealy-Harrington, "Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent" (2014) 18 Can Crim L Rev 119.

¹⁰⁸ See JA, *supra* note 103 at para 65.

consent to kiss his spouse goodnight while sleeping.¹⁰⁹ The *de minimis non curat lex* defence is offered as a reason to acquit.¹¹⁰ However, the *de minimis* doctrine is based on a determination that the act is not *wrongful enough* to attract criminal liability.¹¹¹ Yet, kissing a sleeping spouse who has pre-consented does not intuitively seem “wrongful.” If anything, the accused’s conduct is entirely innocent, as such affection is directed at fostering a loving and caring relationship.¹¹² As such, the *de minimis* defence provides an unsatisfactory basis to acquit.

A similar conclusion may be drawn with respect to those who participate, with full consent, to more explicit (though non-violent)¹¹³ sexual acts while unconscious. If only the activity consented to is performed, it is again difficult to conclude that the act is not morally innocent.¹¹⁴ To be sure, there is a risk that the boundaries of what is consented to will not be clearly delineated in advance, will deliberately not be followed, or that information that would otherwise be revealed during conscious activity would result in revocation of consent.¹¹⁵ However, those risks do not alter the inherently innocent nature of those who stay strictly within the boundaries of fully informed and consensual sexual activity. As section 7 rights are individual rights, it is only necessary that a criminal law threaten the liberty interests of one person in violation of the principles of fundamental justice.¹¹⁶ As those who respect the boundaries of consent are innocent actors, the burden must shift to the Crown to demonstrate that

¹⁰⁹ *Ibid* at para 58.

¹¹⁰ *Ibid* at paras 63 and 121.

¹¹¹ See Colton Fehr, “Reconceptualizing *De Minimis Non Curat Lex*” (2017) 64 Crim LQ 200 for a review of the defence.

¹¹² As Sealy-Harrington, “Tied Hands”, *supra* note 107 at 140 observes, pre-consent to non-violent sex allows for a mutually beneficial intimate experience. Hamish Stewart further contends that “it would be a significant limit on the sexual autonomy of each individual to say that, as a matter of law, no-one can consent in advance to being sexually touched while asleep or unconscious.” See Hamish Stewart, *Sexual Offences in Canadian Law*, loose-leaf (Aurora: Canada Law Book, 2004) at 25.

¹¹³ I will discuss sadomasochism and erotic asphyxiation below. Here I am referring to more traditional sexual acts.

¹¹⁴ See Sealy-Harrington, “Tied Hands”, *supra* note 107 at 140, 149-151.

¹¹⁵ See generally Hilary Young, “R. v. A. (J.) and the Risks of Advance Consent to Unconscious Sex” (2010) 14 Can Crim L Rev 273. See also JA, *supra* note 103 at paras 60-61.

¹¹⁶ See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 127.

the competing risks of harm are sufficiently pressing to override constitutional rights.¹¹⁷

Whether a law prohibiting all pre-consent to sex strikes the appropriate balance between individual autonomy and the need to protect vulnerable parties is an immensely complex issue for which there are competing views.¹¹⁸ Presumably the sexual autonomy of many individuals would be implicated, and it may be difficult to determine just how grave a threat authorizing pre-consent to sex may pose to vulnerable parties.¹¹⁹ A clear line may also be drawn between consent to sex while unconscious as a result of being asleep, as opposed to more controversial scenarios such as when a victim is intoxicated¹²⁰ or rendered unconscious with physical violence.¹²¹ To justify its current prohibition on all pre-consensual sex, which was explicitly reaffirmed by recent amendments to the *Criminal Code*,¹²² Parliament would have to show why a prohibition broad enough to result in convictions of the morally innocent is necessary to prevent the evil caused by those who ignore the boundaries of consent identified by an unconscious partner.

B. Sadomasochism

As described earlier, sadomasochism involves giving or receiving pleasure from the infliction of pain or humiliation. Causing consensual bodily harm during sexual intercourse is not expressly prohibited in the *Criminal Code*.¹²³ As such, it falls to the common law to determine the constitutionally appropriate scope of consent in relation to sadomasochistic

¹¹⁷ *Ibid.*

¹¹⁸ Contrast Sealy-Harrington, “Tied Hands”, *supra* note 107; Young, “Risks”, *supra* note 115.

¹¹⁹ See Young, “Risks”, *supra* note 115 at 304.

¹²⁰ See *Ashlee*, *supra* note 104.

¹²¹ Erotic asphyxiation can sometimes result in one partner being rendered unconscious (often by choking) while the other continues sexual activity with the other’s unconscious body. However, as Karen Busby observes in her article, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24 CJWL 328 at 339, usually the “desired result [of erotic asphyxiation] is the heightened sexual pleasure or a sense of euphoria or light-headedness that comes when one is taken just to the point of unconsciousness *but not past it*.” As such, erotic asphyxiation cases ought not to be treated as an advanced consent issue, instead as a sadomasochistic issue.

¹²² See s 273.2(a.1) of the *Criminal Code* which came into force in 2018.

¹²³ See s 273.1(1).

sex.¹²⁴ As in *Jobidon*, the Court's task is to balance the relevant harms, risks, and benefits inherent in the activity, and come to a principled conclusion as to what activities warrant criminal sanction.

Although the Court has explicitly declined to decide whether individuals may consent to sadomasochistic acts,¹²⁵ lower courts have concluded it should be prohibited for two main reasons. The first may be categorized as moral outrage.¹²⁶ It is arguably cruel and immoral to make another person (even if consensual) face "pain for pleasure,"¹²⁷ as such activities are arguably inhumane, degrading, and viewed as perpetuating negative power structures in society.¹²⁸ These criticisms derive from the fact that sadomasochistic activities generally use power imbalances—guard and prisoner, cop and suspect—as themes to make the activity seem realistic.¹²⁹ It is questionable whether borrowing from inequitable and abusive situations makes the conduct non-egalitarian or, worse, non-consensual.¹³⁰

The second concern is that such activity will inevitably go too far and cause serious harm to a participant.¹³¹ In *R v Emmett*,¹³² for instance, the accused became so caught up in his own pleasure that he left a bag on the victim's head—a practice known as "erotic asphyxiation"—much longer than consented to, nearly resulting in the victim's death.¹³³ More disturbingly, in

¹²⁴ See *R v Welch* (1995), 101 CCC (3d) 216, 25 OR (3d) 665 (ONCA).

¹²⁵ See *Barton*, *supra* note 1 at para 180; *JA*, *supra* note 103 at para 21.

¹²⁶ See *Welch*, *supra* note 124 at para 88. In the United States see *Barnes v Glenn Theater*, 501 US 560 at 574-575 (1991) where the Court stated: "Our society prohibits...certain activities not because they harm others but because they are considered...immoral. In American society, such prohibitions have included, for example, sadomasochism."

¹²⁷ See *Brown*, *supra* note 27 where Lord Templeton stated at 236-237: "[t]he violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous...Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized."

¹²⁸ See generally Bennett, "Persecution", *supra* note 37.

¹²⁹ *Ibid* at 95 citing Pat Califia, "Feminism and Sadomasochism" (1981) 12 *Heresies* 30 at 32.

¹³⁰ *Ibid* citing Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (New York: Routledge, 1995) at 85.

¹³¹ See for instance *R v Hancock*, 2000 BCSC 1581 at para 66. See also *Brown*, *supra* note 27 at 245-262 where Lord Jauncey made such an argument and Hanna, "Sex is not a Sport", *supra* note 37 at 275.

¹³² *R v Emmet*, [1999] EWCA 2651.

¹³³ *Ibid* at para 29.

R v Hancock,¹³⁴ the sadist endured many third degree burns, lacerations, and fractured bones during an apparently consensual sadomasochistic encounter.¹³⁵ The victim eventually died as a result of internal bleeding and a collapsed lung.¹³⁶

The debate within feminist and other academic literature as to the extent to which these concerns with sadomasochism are legitimate is deeply divided.¹³⁷ Some view sadomasochism as replication of power inequalities for the purpose of perpetuating those inequalities.¹³⁸ These predominantly feminist scholars view sadomasochism as “the basic sexual perversion of Patriarchy”¹³⁹ and the “eroticization of violence.”¹⁴⁰ Later feminist scholars, however, contended that sadomasochism merely simulated power differentials so as to recontextualize or redeploy them.¹⁴¹ Importantly, the presence of consent, precautions such as “safe words,” and the mutual pleasure derived from the activity divorces the power differentials inherent in sadomasochism from the history of oppression it is thought to perpetuate.¹⁴² To ignore these aspects of sadomasochism is to “read theatre for reality.”¹⁴³

Still other authors reject the theatre analogy, observing that the actual harm caused not only distinguishes sadomasochism from theatre,¹⁴⁴ but also glosses over the psychological aspect central to sadomasochism.¹⁴⁵ As such,

¹³⁴ *R v Hancock*, 2000 BCSC 1581.

¹³⁵ *Ibid* at paras 3-8.

¹³⁶ *Ibid*.

¹³⁷ See Bennett, “Persecution”, *supra* note 37 at 96.

¹³⁸ *Ibid* citing Cheri Lesh, “Hunger and Thirst in the House of Distorted Mirrors” in Robin Linden et al., eds, *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto: Frog in the Well, 1982) 202 at 203.

¹³⁹ See Bennett, “Persecution”, *supra* note 37 at 96 citing John Stoltenberg, “Eroticized Violence, Eroticized Powerlessness” in Robin Linden et al., eds, *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto: Frog in the Well, 1982) 124 at 126.

¹⁴⁰ *Ibid*.

¹⁴¹ See Bennett, “Persecution”, *supra* note 37 at 98 citing Gayle Rubin, “The Leather Menace: Comments on Politis and S/M” in Samois, ed, 3rd ed, *Coming to Power: Writings and Graphics on Lesbian S/M* (Boston: Alyson Publications, 1981) 194 at 224.

¹⁴² *Ibid*.

¹⁴³ See Bennett, “Persecution”, *supra* note 37 at 99 citing Anne McClintock, “Maid to Order: Commercial S/M and Gender Power” (1993) 37 *Social Text* 87 at 87.

¹⁴⁴ See Bennett, “Persecution”, *supra* note 37 at 100 citing Terry Hoople, “Conflicting Visions: S/M, Feminism, and the Law. A Problem of Representation” (1996) 11:1 *CJLS* 177 at 206.

¹⁴⁵ See Bennett, “Persecution”, *supra* note 37 at 100 citing Nils-Hennes Stear,

these authors contend that sadomasochism is more akin to game playing, wherein the audience of a production “play along” with the fiction on the screen, actually feeling emotions and reacting physically to the story.¹⁴⁶ The ethical implications of this theory are similar to those who view sadomasochism as simulation:

Under this model, enjoying a make-believe sadomasochistic game involving power differentials premised on sexual or racial inequalities is no different to (*sic*) enjoying a film or television show that touches on similar themes. Accordingly, sadomasochism’s power inequalities are not inherently problematic simply because of the fact that they draw on historical narratives of oppression in the same way that art or movies that draw on such narratives are not inherently problematic.¹⁴⁷

In other words, the mere fact that sadomasochists often use common power inequalities as props in their sexual activities does not inexorably lead to the conclusion that they support or validate those same inequalities.¹⁴⁸

Finally, other scholars view the moral implications of sadomasochism as context dependent.¹⁴⁹ Relying less on ideology and more on empirical evidence, these authors note that “sadomasochistic activities ‘have differential effects’ that cannot be captured by ‘a political reading of [sadomasochism] on a formal dichotomy between transgression and reification of social hierarchies.’”¹⁵⁰ As such, it is possible that sadomasochism is empowering for all parties in some circumstances, while in other circumstances is meant to (and actually does) perpetuate negative stereotypes about groups of people.¹⁵¹ It follows that “sadomasochism can ‘reproduce material relations of inequality through mimesis or repetition’ but ‘can also produce new racial, gendered, and sexual knowledges, positionalities, and possibilities through resignification.’”¹⁵² If true, it is necessary to assess each act on a case-by-case basis.¹⁵³

The limited appellate jurisprudence in Canada has failed to consider the potential justifications for sadomasochistic sex in any detail. Without

“Sadomasochism as *Make Believe*” (2009) 24:1 *Hypatia* 1 at 29.

¹⁴⁶ See Bennett, “Persecution”, *supra* note 37 at 101 citing Stear, *supra* note 145 at 23-32.

¹⁴⁷ See Bennett, “Persecution”, *supra* note 37 at 101 citing Stear, *supra* note 145 at 30.

¹⁴⁸ *Ibid.*

¹⁴⁹ See Bennett, “Persecution”, *supra* note 37 at 102-103.

¹⁵⁰ *Ibid* at 102, citing M Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Durham: Duke University Press, 2011) at 24.

¹⁵¹ *Ibid* at 103.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

considering the possible benefits accrued to practitioners of sadomasochistic sex or any of the competing theories underlying its practice, the Ontario Court of Appeal in *R v Welch*¹⁵⁴ held that the appropriate balance between individual autonomy and societal interests in protecting vulnerable persons was the same degree of harm that vitiates consent in the context of a fist-fight: non-trivial bodily harm.¹⁵⁵ The Nunavut Court of Appeal has since adopted this approach.¹⁵⁶ As sadomasochistic acts often cross the non-trivial bodily harm threshold, these courts concluded that consent will generally not provide a valid defence.

In *R v Zhao*,¹⁵⁷ however, the Ontario Court of Appeal recently expressed reservations about its earlier opinion. In so doing, it concluded that “the social utility of intimate sexual relationships is significantly different from that of consensual fights.”¹⁵⁸ Although the Court did not explain what those differences were, it asserted that “the underlying policy reasons for the ruling in *Jobidon* cannot be generally applicable in a sexual context as suggested by the ruling in *Welch*.”¹⁵⁹ This is a defensible conclusion, as the sexual autonomy interests of individuals are more important than the “socially useless” fist-fights at issue in *Jobidon*.

Discussion of the purpose of sadomasochism was again, however, absent from the Court’s reasoning. This is unfortunate, as adoption of any one of the theoretical understandings of sadomasochism would inform the appropriate threshold of harm permissible during sadomasochistic sex. If sadomasochism is meant to perpetuate inequality, then it serves a negative social function, and a degree of permissible harm similar to that advocated for in *Welch* seems reasonable. On the other hand, if sadomasochism only serves sexual gratification purposes, then the sexual autonomy of the individual should justify a higher threshold of harm as suggested in *Zhao*. Finally, if sadomasochism is utilized to perpetuate inequities in some instances, but only serves sexual gratification in others, the question for the

¹⁵⁴ *R v Welch*, (1995), 101 CCC (3d) 216, 25 OR (3d) 665 (ONCA). The Court relied heavily on the House of Lord’s decision one year earlier in *Brown*, *supra* note 27.

¹⁵⁵ *Welch*, *supra* note 124 at para 88.

¹⁵⁶ See *R v Atagootak*, 2003 NUCA 3. The decision was six paragraphs and did not consider any counter arguments.

¹⁵⁷ *R v Zhao*, 2013 ONCA 293.

¹⁵⁸ *Ibid* at paras 79, 98.

¹⁵⁹ *Ibid*.

law would be whether it can distinguish between the two scenarios without jeopardizing the well-being of potentially vulnerable victims.¹⁶⁰

With respect to the latter concern, courts must consider the fact that sadomasochists generally have built-in safety functions, such as the use of “safe words,”¹⁶¹ and can be confined to a regulatory context.¹⁶² Moreover, the ever-growing empirical evidence shows that sadomasochists are no more psychologically damaged or dangerous than the rest of the population.¹⁶³ As a result, the *Diagnostic and Statistical Manual of Mental Disorders* no longer lists sadomasochism as a pathology, instead as a paraphilia.¹⁶⁴ This modern understanding of sadomasochism is likely responsible for a changing societal attitude towards the practice. As recent studies have shown, as many as one in ten people experiment with sadomasochism.¹⁶⁵ And as the *Fifty Shades of Grey*¹⁶⁶ phenomenon illustrates, its popularity is showing no signs of fading.¹⁶⁷

As stated at the outset, my goal is not to resolve the constitutionality of the prohibition against sadomasochism. My more modest aim is to show how focusing on the relevant issue—whether society views an act that constitutes a *prima facie* wrong as morally permissible—can help focus attention on the relevant theories and arguments with respect to whether activities such as sadomasochism should be tolerated and, if so, to what extent. If the physical and social dangers identified above are not present in

¹⁶⁰ In *R v Barton*, 2017 ABCA 216 at para 307, for instance, the Alberta Court of Appeal contemplated, without deciding, whether the equality interests of sex workers might affect whether any consensual violence should be permitted. The Supreme Court did not entertain such an analysis.

¹⁶¹ Bennett, “Persecution”, *supra* note 37 at 98-99.

¹⁶² Hanna, “Sex is not a Sport”, *supra* note 37 at 267-268 citing William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Harvard: Harvard University Press, 1999) at 262.

¹⁶³ See Juliet Richters et al., “Demographic and Psychological Features of Participants in Bondage and Discipline, ‘Sadomasochism’ or Dominance and Submission (BDSM): Data from a National Survey” (2008) 5 *Journal of Sexual Medicine* 1660 at 1660-1661 citing numerous studies in support thereof.

¹⁶⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington: American Psychiatric Publishing, 2013).

¹⁶⁵ Hanna, “Sex is not a Sport”, *supra* note 37 at 243-244. See also Lodro Rinzler, “How Many People are Actually Doing S & M? We Decided to Find out” *Marie Claire* (21 February 2015), online: <www.marieclaire.com/sex-love/news/a13435/who-is-doing-bdsm/> [perma.cc/4TG4-DZU4] [Rinzler, “How Many People”].

¹⁶⁶ EL James, *Fifty Shades of Grey* (2011). See also the remaining books in the trilogy. The novels were adapted into major Hollywood movies.

¹⁶⁷ Rinzler, “How Many People”, *supra* note 165.

a given case, the sexual autonomy interests of those who wish to practice sadomasochism should weigh heavily in favour of allowing non-life-threatening conduct under the moral permissibility analysis.

C. Incest

Absence of consent is not included as an element of the incest offence in section 155 of the *Criminal Code*. If incest is an inherently “innocent” act, then omitting absence of consent as an element of the offence would violate the moral innocence principle. If incest constitutes a *prima facie* wrong, however, then it would fall to the common law to define the scope of any consent defence. This follows as consent is neither included in the offence or, as in the case of pre-consent to sexual touching, excluded by a specific provision of the *Criminal Code*.¹⁶⁸

Although the Court has not heard a constitutional challenge to the incest provision, it has expressed general agreement with Parliament’s rationale for prohibiting incest. In *R v GR*,¹⁶⁹ citing the reasons of Justice Roscoe in *R v FRP*,¹⁷⁰ the Court provided four main reasons for criminalizing incest. The first is that it is immoral. As incest has traditionally been viewed as “unacceptable, incomprehensible and repugnant to the vast majority of people,” the criminal law has a vested interest in its prohibition.¹⁷¹ Second, the prohibition against incest is integral to preserving the integrity of the family as it avoids any confusion in roles that result from incestuous sexual relationships.¹⁷² Third, there is a significantly increased risk of genetic defects to any children who arise from incestuous relationships.¹⁷³ Finally, prohibiting incest serves to protect younger and potentially vulnerable parties from exploitation.¹⁷⁴

Although incest evokes feelings of moral condemnation, the ability of the law to criminally punish citizens strictly on moral grounds is famously

¹⁶⁸ Section 150.1(1), which broadly defines the offences to which consent provides no defence, does not list section 155.

¹⁶⁹ *R v GR*, 2005 SCC 45 [GR].

¹⁷⁰ *R v FRP*, 1996 NSCA 72 [FRP].

¹⁷¹ GR, *supra* note 169 at para 18 citing FRP, *supra* note 170 at 445.

¹⁷² GR, *supra* note 169 at para 17 citing FRP, *supra* note 170 at 443-444.

¹⁷³ GR, *supra* note 169 at para 19 citing a 1984 report of the Criminal Law Revision Committee in England on Sexual Offences. Others question whether the empirical evidence is sound. See Markus Dubber, “Policing Morality: Constitutional Law and the Criminalization of Incest” (2011) 61 UTLJ 737 at 755 [Dubber, “Policing Morality”].

¹⁷⁴ See FRP, *supra* note 170 at para 23.

controversial.¹⁷⁵ Morality is nevertheless a stand-alone ground for criminal prohibition under section 91(27) of the *Constitution Act, 1867*.¹⁷⁶ From a doctrinal perspective, it is therefore reasonable to conclude that genuine moral condemnation is sufficient to engage the criminal law power. Importantly, however, this cannot also be used to dispose of the question of whether a consent defence ought to be constitutionally preserved in response to a criminal prohibition grounded in moral outrage. That determination, as seen above, turns on whether the reasons underlying the conclusion that an act is a *prima facie* wrong can withstand scrutiny. As such, it is necessary to assess the merits of the other reasons offered for criminalizing incest.

The notion that incest corrupts the institution of the family is frequently invoked as the main justification for prohibiting incest.¹⁷⁷ Two reasons are generally offered in support of this argument. First, incest causes “sex rivalries” and “jealousies” among family members.¹⁷⁸ If incest is allowed, the family unit will presumably be ridden with strife, making it highly unlikely that the family will serve its broader purpose of raising good citizens. Second, the prohibition assures that children have suitable role models to prepare them for assuming parental roles in the future.¹⁷⁹ Presumably, those engaged in incest are incapable of raising children in a way that would satisfy societal expectations.

As Vera Bergelson observes, the institution of the family has survived a variety of different types of rivalries, such as sibling rivalries. As such, it is not clear that incest will have the effect feared.¹⁸⁰ Further, rivalries and jealousies may be less apparent if the incestual relationship is between adults

¹⁷⁵ This was the central issue in the Hart/Devlin debate.

¹⁷⁶ *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. See *Malmo-Levine*, *supra* note 34 at para 74 for the conclusion that “morality” constitutes a sufficient reason to define conduct as an offence pursuant to the federal criminal law power. At para 118, the Court further cites *FRP*, *supra* note 170 for the conclusion that incest comes within the scope of the criminal law power.

¹⁷⁷ Several countries, for instance, do not categorize incest as a sexual offence, instead as an offence against the institution of marriage and family. As sexual autonomy is already protected by the offences of sexual assault and statutory rape, it seems that the incest offence is more directed at protecting marriage and the family. See Dubber, “Policing Morality”, *supra* note 173 at 742-743.

¹⁷⁸ See Vera Bergelson, “Vice is Nice but Incest is Best: The Problem of a Moral Taboo” (2013) 7 *Crim L & Philosophy* 43 at 48 [Bergelson, “Incest”].

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

no longer living within the main family unit. If the incestual couple lives alone, or start their own family, it is unclear how the institution of the family suffers.¹⁸¹

The desire to ensure children have suitable role models is further inapplicable in scenarios where incestuous couples do not have children. This rationale is also suspect in light of the variety of accepted types of family units that currently exist. As Bergelson observes in her comprehensive discussion of the incest offence:

Only recently all the arguments that we hear today with respect to incestuous marriages (confusing social roles; embarrassing children; going against the traditional notion of a family) were used against homosexual marriages too (and before that against interracial marriages). And yet, decriminalization of homosexual sex and lifting the ban on homosexual marriages did not defeat the traditional family.¹⁸²

The rationale that those in incestual relationships are inherently less capable of raising good citizens is not intuitive. Without an evidentiary basis for this assumption, it is difficult to use the inability of incestual couples to raise children as a reason to prohibit incest.

The argument that incest creates a significant risk of birth deformities is the next most common reason for prohibiting incest. In Bergelson's view, this consideration is arbitrary, as numerous other people with defective genes do not face criminal sanction for having sex.¹⁸³ Nor do parents who choose to bring a child to term knowing that there are genetic abnormalities face criminal sanction.¹⁸⁴ Those who have contracted HIV are also not prohibited from having sex if they take necessary precautions.¹⁸⁵ In these situations, complete prohibition of sexual intercourse would cause moral outrage in society.¹⁸⁶ If the state chooses not to criminalize in these circumstances, then it is arguably unfair to use the risk of birth deformities as a reason to criminalize incest.

This argument presumes, however, that the state must treat similar harms the same way. At least as a matter of constitutional law, this is not the case. As the Court observed in *R v Malmo-Levine*; *R v Caine*:¹⁸⁷

¹⁸¹ *Ibid.*

¹⁸² *Ibid* at 49.

¹⁸³ *Ibid* at 47-48.

¹⁸⁴ *Ibid.*

¹⁸⁵ See *R v Mabior*, 2012 SCC 47.

¹⁸⁶ See Bergelson, "Incest", *supra* note 178 at 48.

¹⁸⁷ *Malmo-Levine*, *supra* note 34.

[I]f Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances [such as alcohol and tobacco] whose health and safety effects could arguably justify similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.¹⁸⁸

Prohibiting incest and not those with defective genes from reproducing may make the former prohibition less logical as a matter of policy. In the constitutional context, however, it is inappropriate for courts to use this rationale to justify changing a democratically enacted law.

For other more obvious reasons, the complete prohibition on incest nevertheless fails to further the purpose of preventing genetic abnormalities in children. First, contraceptive drugs have significantly lessened the link between sex and reproduction.¹⁸⁹ Second, the risk of birth deformity becomes moot when the incestual sex occurs with members of the same sex, post-menopausal females, castrated males, adopted siblings, or includes acts other than penile penetration of a vagina.¹⁹⁰ As such, the incest provision catches a considerable amount of conduct which does not involve the possibility of defective child birth.

With respect to the exploitation of parties involved in incestual relationships, it is frequently argued that prohibiting incest is necessary to ensure young or dependent members of a family are not sexually abused. However, such a prohibition is both overbroad and redundant.¹⁹¹ Adult members who live outside of the family unit may well choose to enter into an incestual relationship for reasons that do not involve any exploitation.¹⁹² Although protecting those that are vulnerable is a pressing policy goal, it is unclear how prohibiting incest furthers this goal, as modern criminal codes

¹⁸⁸ *Ibid* at para 139.

¹⁸⁹ Bergelson, "Incest", *supra* note 178 at 46-47.

¹⁹⁰ *Ibid*. For the reasoning behind interpreting the Canadian incest provision as barring incestual anal sex, see *R v KH*, 2015 ONSC 7760, 126 WCB (2d) 599.

¹⁹¹ See Bergelson, "Incest", *supra* note 178 at 49. Contra see *FRP*, *supra* note 170 at para 23 citing the Law Reform of Canada's 1980 Report of the Canadian Committee on Sexual Offences and Children and Youth. It is notable, however, that two years earlier the Commission had advocated to abolish the incest offence. See Law Reform Commission of Canada, *Sexual Offences* (Working Paper 22) (Ottawa: Law Reform Commission of Canada, 1978) at 30.

¹⁹² See Bergelson, "Incest", *supra* note 178 at 49.

typically prohibit statutory rape (thus protecting minors) and exploitive sexual relations (the strict rules around the law of consent).¹⁹³

Whether a moral permissibility defence should be developed for the incest offence can only be resolved by scrutinizing the above arguments in much more detail than is possible here. Weighing the relevant considerations, it is possible that the dangers posed to the institution of the family and to vulnerable persons more generally outweigh any limitations on the sexual autonomy interests of those who desire to have incestual relations. However, the underlying reasons for prohibiting incest are highly contentious. It is therefore likely that the incest provision catches some conduct which fails to further any of its purposes, aside from expressing moral condemnation towards incest.

If incest only serves the purpose of moral condemnation in readily definable circumstances, this squarely raises the question of whether the constitution should allow strictly morality-based criminal convictions. Although the Court in *Malmo-Levine* concluded that morality is a sufficient basis to make an act an offence, it correctly left open the question of whether defences may counter any morally-based offence.¹⁹⁴ To do otherwise would be to subscribe to the legal moralism thesis, a reading of the Court's jurisprudence which does not seem sustainable. Society's general view that incest is immoral, however, must still count for something. After all, the criminal law is in part a vehicle for expressing society's moral opinions. Weighing the autonomy interests of those who wish to practice incest against society's moral judgment, in my view, bars those who practice incest from claiming that their conduct is morally innocent. With time, it is possible that this attitude will change, making the conduct morally innocent, and thus requiring consent as an element of the incest offence. Until that time, however, the notion of permissibility more appropriately captures the criminal law's moral judgment.

V. CONCLUSION

In this article, I have contended that the moral innocence and moral permissibility principles track the distinct role of consent in criminal law. Where consent must be an element of the offence, this is because to do otherwise risks convicting the morally innocent. However, if a consensual

¹⁹³ *Ibid.*

¹⁹⁴ See generally *Malmo-Levine*, *supra* note 34.

act qualifies as a *prima facie* wrong, then the accused must provide a defence to the conduct by showing that her conduct is morally permissible. As the Court has constitutionalized the right to be acquitted for wrongful but morally involuntary conduct, it would be unprincipled if accused did not also have a constitutional right to be acquitted for morally innocent and morally permissible conduct. Adopting this framework for criminal defences can, alongside with adopting the *prima facie* wrong rationale underlying criminal offences, better explain the relationship between consent, criminal law, and the constitution. In turn, this framework can help resolve the role of consent within controversial offences such as those involving pre-consent to sex, sadomasochism, and incest.

Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice?

KATHRYN M. CAMPBELL *

ABSTRACT

Miscarriages of justice,¹ in the form of wrongful convictions, are evidence of the failings of the criminal justice system. The revolution sparked by the potential of DNA forensic analysis in the 1990s demonstrates on an almost daily basis that errors are frequently made and innocent people are convicted of crimes they did not commit. Furthermore, a growing body of what has been termed innocence scholarship has evinced a discernible number of contributing factors that have influenced wrongful convictions. Despite the fact that this literature has established that those factors routinely cause wrongful convictions, the means to exoneration and compensation are fraught with legal and procedural obstacles. While it has been argued elsewhere that a wrongful conviction, in and of itself ultimately raise questions of legitimacy,² the focus of this essay will be on understanding how access to and availability of schemes of post-conviction review and compensation in Canada also raise similar questions.

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¹ There are many different terms used to define what constitutes a miscarriage of justice and for the most part the term will be used interchangeably with wrongful conviction and both refer to situations where an innocent person has been convicted for a crime they did not commit. At the same time, while this broad term covers many eventualities, there are some cases where a trial may be procedurally impeccable but result in a mistaken conviction nonetheless.

² Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004).

Keywords: wrongful conviction; exoneration; compensation; legitimacy; post-conviction review

I. INTRODUCTION

While political philosophers have long grappled with concepts of legitimacy and authority, it has only been recently that researchers in criminal law and criminal justice have begun to question not only how states derive legitimacy from the population, but also what actions serve to foster “de-legitimation.” Early theorizing on legitimacy in political philosophy focused on Weber’s seminal work³ examining types of political authorities which claim legitimacy, and whose own conceptions of legitimacy are further pre-conditions for subordinate legitimacy.⁴ In recent years, criminal justice scholars have focused on legitimacy, in a conceptually different manner, where procedural justice is viewed as constitutive of legitimacy.⁵ Procedural justice, in this way, can be understood as occurring when citizens feel they have been treated fairly by law enforcement authorities (reflective of the quality of decision making) and when law enforcement authorities treat citizens with proper respect (reflective of the quality of treatment).⁶ These aspects of decision-making and treatment are also evidence of greater or lesser beliefs in the legitimacy of criminal justice actors and institutions.

Post-conviction review, as a means of redressing wrongful convictions, exists in a variety of formats in a number of common law jurisdictions. Occurring outside of the normal court system, it serves as a further level of review substantiated through either legislation or policy for those who believe they have been wrongfully convicted. It has been argued that while such schemes are a necessary part of the criminal justice system in

³ Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich (New York: Bedminster, 1922, 1968).

⁴ Anthony Bottoms & Justice Tankebe, “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice” (2012) 102:1 J Crim L & Criminology 119.

⁵ Justice Tankebe & Alison Liebling, “Legitimacy and Criminal Justice: An Introduction” in Justice Tankebe & Alison Liebling, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 1.

⁶ Tom R Tyler, *Why People Obey the Law*, (New Haven: Yale University Press, 1990) [Tyler I].

investigating alleged wrongful convictions, the appropriate scope for such schemes is an open question.⁷ At the same time, compensation in the form of monetary indemnification for a wrongful conviction seems an appropriate means of addressing established errors. It represents an acknowledgement of state responsibility for error and serves as an attempt to rectify what was lost, albeit in a very limited manner. In reality, however, such awards often have onerous thresholds attached to them and are far from automatic. Given that a wrongful conviction will naturally call the legitimacy of the criminal justice system into question, it is intuitively logical to question whether such schemes in place to not only overturn a wrongful conviction, but also provide monetary compensation, can serve to re-store lost legitimacy. Towards this end and for the purposes of this analysis, schemes of post conviction review and compensation as they take place in Canada will be examined.

II. LEGITIMACY

Modern day theorizing on legitimacy can trace its roots to Weber's early writings on authority and its related social dynamics.⁸ Legitimacy in this sense is not based on the power wielded by authority, *per se*, but is rather a consequence of people's faith in that power that creates voluntary deference. For Weber the most common form of legitimacy is the "belief in legality."⁹ This is related to notions of authorization¹⁰ and the development of moral values through obligations and responsibilities¹¹ but what is essential is that the development of self-regulation leads to deference to external authorities. Beetham, on the other hand views power as legitimate when it is acquired and exercised according to established rules (legality), it is normatively justifiable as it conforms to expected beliefs about its rightful purpose and exercise and those in positions of power are acknowledged

⁷ Fiona Leverick, Kathryn Campbell & Isla Callendar, "Post-Conviction Review: Questions of Innocence, Independence, and Necessity" (2017) 47:1 Stetson L Rev 45.

⁸ Weber, *supra* note 3.

⁹ *Ibid* at 37.

¹⁰ Herbert C Kelman & Lee V Hamilton, *Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility*, (New Haven: Yale University Press, 1989).

¹¹ As per Freud and Durkheim, referred to in Martin L Hoffman, "Moral Internalization: Current Theory and Research" (1977) 10 Advances Experimental Soc Psychology 85.

through actions by relevant subordinates (legitimation).¹² From this perspective then legitimacy becomes a property of legal authorities that is reinforced when people feel that police and courts act in ways that are appropriate, just and fair and that foster voluntary compliance. People relate to the powerful as both moral agents and self-interested actors.¹³ Conversely, deference to authorities that is legitimacy-based and not based on fear of sanctions or promise of rewards will exist outside of the immediate presence of legal authorities.¹⁴

The focus of the study of legitimacy conforms to one's perspective and as Beetham himself notes, the term legitimacy means different things to the political philosopher and the social scientist:

Legitimate power for the philosopher is power which is *rightful* according to rationally defensible standards or principles. Legitimate power for the social scientist is power which is *acknowledged as rightful* by relevant agents, who include power-holders and their staff, those subject to the power and third parties whose support or recognition may help confirm it.¹⁵

Thus, for the social scientist, legitimacy is dependent upon a population that accepts and defers to power-holder legitimacy, although it is not reducible to simply a subjective belief in legitimacy. This is essentially perceptual legitimacy, as opposed to normative legitimacy which is more concerned with the status conferred on government agents based on an appropriate use of power by the norms generally accepted by the population. It is of significance that such claims be attached to a "discursive investigation of the grounds or criteria on which a claim to legitimacy is based and of the credibility of those grounds to relevant agents in a given social and historical context."¹⁶ Thus, according to Beetham, for the social science study of legitimacy what is required is an understanding of the context through which the legitimacy claim emerged as well as how such claims have evolved and developed. Understanding how legitimacy is re-established when lost also requires a similar discursive investigation.

¹² David Beetham, "Revisiting Legitimacy, Twenty Years On" in Justice Tankebe & Alison Liebling, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 19.

¹³ Tyler I, *supra* note 6.

¹⁴ Tom Tyler et al, "Legitimacy and Criminal Justice: International Perspectives" in Tyler et al, eds, *Legitimacy and Criminal Justice: An International Perspective*, (New York: Russell Sage Foundation, 2007) 9 [Tyler II].

¹⁵ Beetham, *supra* note 12 at 19 [emphasis in original].

¹⁶ *Ibid* at 20.

A. Wrongful Convictions: Evidence of a Legitimacy Deficit

There are few working in the criminal justice system who now doubt that wrongful convictions can occur and we have moved far from Justice Learned Hand's pronouncement in 1923 that "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."¹⁷ Many legal researchers now agree that the estimate rate of wrongful convictions in the United States is approximately half of one percent to one percent of all criminal convictions annually;¹⁸ this number translates into several thousand felony convictions. What is significant about the data collected on these cases is that they represent the ones that have been overturned; there are countless others who do not possess the necessary evidentiary burdens to establish innocence, but may not have committed the crime for which they were found guilty. Regardless of the actual figure, estimates based on data from surveys and successful exonerations demonstrate that errors frequently occur and that the wrong people end up in prison for crimes they did not commit.¹⁹

When a wrongful conviction does occur, it raises questions about the legitimacy of the criminal justice process. Normative expectations dictate that when a crime happens²⁰ that the police will seek out evidence that factually supports a charge that the prosecution will seek to ascertain the truth and if a conviction results, it will be safe. Innocence scholarship, however, is replete with many examples as to how the system, at times, fails to convict the "right" suspect. They include, *inter alia*, the following types of errors:

- Eyewitnesses who failed to identify the correct suspect or were coerced in some manner by the police to identify the accused;
- Confessions to the commission of a crime that are false, in response to the psychological pressures involved in a police interrogation;
- Convictions obtained through the use of perjured testimony from a jailhouse informant who receives a benefit;

¹⁷ *United States v Garsson*, 291 F 646 at 649 (SD NY 1923) (Hand J).

¹⁸ See Marvin Zalman, "Qualitatively Estimating the Incidence of Wrongful Convictions" (2012) 48:2 Crim L Bull 221.

¹⁹ See e.g. Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) [Campbell I].

²⁰ In some cases a wrongful conviction can result when no crime at all has occurred, for example where an accidental death is construed as a homicide.

- Expert testimony that may be based on faulty forensic science that is used to convince a jury of the defendant's guilt.

When a wrongful conviction results from these types of errors and it is followed by a wrongful imprisonment, it seems natural to lose faith in the credibility of the criminal justice system. This may be manifest in a further “de-legitimation” of the role of the police and courts regarding their capacity to effectively perform their functions and arrest and convict the “true” suspect of a crime; this certainly is the case from the perspective of the wrongly convicted themselves. What is of particular significance to the case of wrongful convictions is that it is only after many years of fighting and campaigning that others, outside of the circle of the wrongly convicted person, become aware of the wrong committed. Further consequences of a lack of legitimacy through a wrongful conviction contribute to mistrust of the criminal justice system overall, which may manifest in a reticence to report crime to the police, a decrease in co-operation from witnesses, and demands for change in the administration of justice.²¹

B. For Criminology: Questions of Procedural Justice

Legitimacy as a concept for philosophical study relates to political theory and especially the sources and limits of government. For social science, and criminal justice, the concept has more to do with public perceptions regarding the system itself. As a result, the sources of legitimacy in this sense are multi-faceted and are influenced by culture, norms and state action, which are not static concepts. Thus, for criminal justice the notion of legitimacy depends on, *inter alia*, public perceptions that the system is just and effective, and on concepts of distributive justice, racial justice, access to justice, celerity, political obligation, accountability, normative (ethical) justice, the extension of legitimate authority of the state, and existence of a system without corruption and public malfeasance.²²

Packer was one of the first to theorize about types of legitimacy as they related to the norms, controls and breadth of the criminal justice system. His 1968 work, *The Limits of the Criminal Sanction*, stands today as a seminal treatise regarding the nature and limits of the criminal sanction and also about the struggle between opposing views of the purpose of the criminal

²¹ Julian V Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends 2004-05* (Ottawa: Public Safety and Emergency Preparedness, 2004).

²² Forst, *supra* note 2.

process.²³ He delineates this conflict as occurring between types of legitimacy: due process legitimacy and crime control legitimacy. Due process legitimacy centres around the legitimacy that the system derives from the protection of rights of individuals against the coercive practices of the state. While crime control legitimacy results from the legitimacy or authority of state practices that focus on law enforcement functions of controlling and preventing crime. These competing models of due process and crime control are apposite for understanding the study of miscarriages of justice. The former is concerned with due process and procedural protections for defendants so that convictions are based on the evidence that will ultimately be considered safe by the courts; whereas the latter focuses on enhancing crime control strategies of the police and prosecutors, and solving crime. While somewhat uni-dimensional, these divergent models emphasize a conflict between on the one hand society's interest in convicting the guilty and on the other, the rights of criminal defendants.²⁴

From a public perception perspective, the idea of procedural justice as a barometer for the study of legitimacy began with Tyler²⁵ who explored why people choose to obey the law and what factors motivated them to comply with authorities, outside of utilitarian benefits.²⁶ A great majority of the research in the area of legitimacy and procedural justice over the previous two decades has focused on police power and citizen reaction to it,²⁷ as well as the study of questions of procedural justice in prisons²⁸ and the courts. More recently the field has broadened to the study of questions of procedural justice linked to the international financial sector²⁹; state

²³ Herbert Packer, *The Limits of the Criminal Sanction*, (Stanford: Stanford University Press, 1968).

²⁴ *Ibid* at 153-157.

²⁵ Tyler I, *supra* note 6.

²⁶ Ian Loader & Richard Sparks, "Unfinished Business: Legitimacy, Crime Control, and Democratic Politics" in Justice Tankebe & Alison Liebling, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 105.

²⁷ Tyler I, *supra* note 6.

²⁸ Alison Liebling, "Threats to Legitimacy in High Security Prisons" in Justice Tankebe & Alison Liebling, eds, *Legitimacy in Criminal Justice: An International Exploration* (Oxford: Oxford University Press, 2013); Richard Sparks, Anthony Bottoms & Will Hay, *Prisons and the Problem of Order* (Oxford: Clarendon Press, 1996).

²⁹ Beetham, *supra* note 12 at 32-35.

responses to terrorism³⁰ and public international law.³¹ The interest of criminologists in this area seems to have been more focused on “normative compliance with the law, and especially the concept of legitimacy: that is to say, citizens’ recognition of the rightness of the authority of criminal justice officials, and the consequences of this recognition for behavior.”³² A great deal of this interest has been specifically focused on the fairness of the procedures employed by legal authorities.

For Tyler, procedural justice can be understood as embodying both the quality of decision-making, whether citizens are treated fairly when law enforcement authorities make decisions about them and the quality of that treatment, whether law enforcement officers treat citizens with proper respect and dignity as human beings.³³ Decision-making is seen as fair if authorities are neutral and unbiased and decisions are based on objective indicators and not their personal views.³⁴ Similarly, the quality of treatment by the authorities is a further element of procedural fairness and when present, according to Tyler’s model, it is more likely to lead to immediate decision acceptance and an initial ascription of legitimacy to the law enforcement authority. Other authors have underscored the centrality of fair treatment to perceptions of legitimacy.³⁵ As Beetham further notes, procedural justice can be understood as:

the idea that the behaviour of those subject to authority, whether it be cooperation of the public with the police or obedience of prisoners to prison staff, depends on their being treated fairly and with dignity to their interactions with power-holders. It is the quality of these interactions that determines how far those exercising authority are regarded as legitimate, and the extent to which those subject to authority are prepared to cooperate in turn.³⁶

³⁰ Jacqueline Hodgson, “Legitimacy and State Responses to Terrorism: The UK and France” in Justice Tankebe & Alison Liebling, eds, *Legitimacy in Criminal Justice: An International Exploration* (Oxford: Oxford University Press, 2013) 178.

³¹ Lukas H Meyer, *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009).

³² Tankebe & Liebling, *supra* note 5 at 1.

³³ Tyler I, *supra* note 6.

³⁴ Tyler II, *supra* note 14 at 283.

³⁵ Beetham, *supra* note 12; Tyler I, *supra* note 6.

³⁶ Beetham, *supra* note 12 at 23.

Tyler has consistently argued that it is the procedural justice (as opposed to distributive justice) aspect of personal experience that most strongly influences legitimacy.³⁷

Although the concept of legitimacy within the context of the study of miscarriages of justice has been raised to a limited degree in the past,³⁸ there has been no systematic study of the role of state responses to these state created errors. Clearly, the question of legitimacy of the criminal justice system extends beyond errors of justice *per se*,³⁹ and it will be argued that it is through the state actions of rectifying errors of justice that the system attempts to regain its legitimacy. Thus, the focus of the next part of the paper will be on understanding how the practices of post-conviction review and compensation, while recognized as attempts to re-establish the legitimacy of the criminal justice system that was lost through a wrongful conviction, in fact fail in this endeavour.

It seems prudent to make an important distinction regarding legitimacy. Given that a mistaken conviction can occur in cases where the trial procedure is flawless, and the defendant is treated with respect, this in itself does not undermine legitimacy and thus not every mistaken conviction will challenge or threaten legitimacy. Arguably, legitimacy in the criminal justice system is affronted by erroneous convictions that flow from some procedural injustice or impropriety, but that a merely mistaken conviction does not by itself threaten legitimacy. The real threat to legitimacy will be outlined below: which is essentially failing to take adequate steps or make sufficient provisions to address such mistakes when they do inevitably occur.⁴⁰ Furthermore, given that the foundation of legitimacy in the criminal justice system is based on public perceptions about procedural fairness as evidenced through fair and equal treatment by law enforcement personnel, at the same time beliefs in legitimacy in this instance go beyond simple subjectivity. Legitimacy will certainly be undermined if police, courts and state officials act in ways inconsistent with such criteria, and even in cases where the public is unaware that the criteria for legitimacy are not

³⁷ See also Tom Tyler, et al, "Maintaining allegiance toward political authorities: The Role of Prior Attitudes and the Use of Fair Procedures" (1989) 33:3 *American J Political Science*, 629.

³⁸ C Ronald Huff, Arye Rattner & Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks: Sage Publications, 1996).

³⁹ Forst, *supra* note 2.

⁴⁰ Thanks to Antony Duff for clarifying this distinction.

satisfied (i.e. unfairness). A procedurally improper or unjust conviction undermines legitimacy even when it has not been detected; if what mattered was whether or not people were aware of the injustice then legitimacy might be preserved by concealing the injustice, which is clearly not the case.

III. POST-CONVICTION REVIEW⁴¹

In Canada post-conviction review or Ministerial review represents the power to revisit a conviction at the post appeal stage and can occur through either the Royal Prerogative of Mercy⁴² which allows for the granting of pardons or conviction review by the Minister of Justice. Prior to the establishment of the Criminal Conviction Review Group (CCRG) in 1992, the Minister of Justice had the power to investigate cases, order new trials and refer cases or points to the Court of Appeal for its opinion.⁴³ While he or she retains that power,⁴⁴ investigations are now done by attorneys working for the CCRG who make recommendations to the Minister on individual cases.⁴⁵ The opportunity for conviction review is available to those who have been convicted of an offence under criminal law, whether on indictment or on a summary conviction; moreover, sentence review is

⁴¹ Some of the ideas discussed regarding the conviction review process in this section can also be found in Kathryn M Campbell, "The Fallibility of Justice in Canada: A Critical Examination of Conviction Review" in C Ronald Huff & Martin Kiliyas, eds, *Wrongful Convictions: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008) 117 [Campbell II].

⁴² *Criminal Code* RSC 1985, c C-46, ss 748, 748.1 authorizes the Governor in Council to grant the following types of clemency: 1. Free Pardon: based on innocence, it recognizes that the conviction was in error and erases the consequences and records of the conviction. 2. Conditional Pardon: criminal record is kept separate and apart from other criminal records prior to pardon eligibility under the *Criminal Records Act*, RSC 1985, c C-47 (five years for a summary offence, ten years for an indictable offence); or parole in advance of eligibility date under the *Corrections and Conditional Release Act*, SC 1992, c 20 for offenders serving life and indeterminate sentences who are ineligible for parole by exception. 3. Remission of fine, forfeiture and pecuniary penalty: erases all, or part of the monetary penalty that was imposed.

Canada, Department of Justice, Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal Code*, A consultation paper (Ottawa: DOJ, 1998) [Department of Justice, "Addressing Miscarriages of Justice"].

⁴⁴ *Criminal Code*, *supra* note 42, ss 696.1-696.6

⁴⁵ The power to make decisions whether to refer a case to the court of appeal or dismiss it remains with the Minister, based on investigations carried out by the CCRG lawyers, and their subsequent recommendations.

available for those who have been designated as dangerous or long-term offenders. In all cases review does not occur until all avenues of appeal have been exhausted (provincial Court of Appeal and, in some cases, the Supreme Court of Canada⁴⁶), and must be based on new and significant information that was not previously considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.

The Minister has the prerogative, if he or she is “satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,”⁴⁷ to: 1. order a new trial; 2. order a new hearing in the case of dangerous or long-term offender; 3. refer the matter to the Court of Appeal of a province or territory as if it were an appeal by the convicted person, dangerous or long-term offender. In cases where a new trial has been ordered, a number of alternative remedies are available to Crown Counsel of the originating province, including: the conduct of a new trial, entering a stay of proceedings, the withdrawal of charges and the offering of no evidence by the prosecution, resulting in a not guilty verdict.⁴⁸ Further, the conviction review process has a relatively inquisitorial function that differs greatly from the post-review process in which the courts are engaged; differing actors, differing levels of court involvement and differing procedures, bind each level of review. In order to be viewed by the public as legitimate, such a system of review must necessarily be independent from government and accessible to all – two key criteria for claims of legitimacy.

A. Lack of Independence/Externality⁴⁹:

As noted, the CCRG defers to the Minister of Justice, and decisions regarding granting an application for review are made by the Minister based

⁴⁶ A recent case has established that the Minister has the power to decide when an applicant has exhausted all of his or her rights of judicial review or appeal (*McArthur v Ontario* (AG), 2013 ONCA 668 at para 4), which may open the door for review earlier on in the process.

⁴⁷ *Criminal Code*, *supra* note 42, s 696.3

⁴⁸ Kent Roach, *Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2006), online (pdf): Driskell Inquiry <www.driskellinquiry.ca/pdf/roachreport.pdf> [perma.cc/U8EP-Y2HB].

⁴⁹ Thanks to Sandra Marshall for pointing out the distinction between independence and externality.

on recommendations from the CCRG lawyers. The CCRG is effectively part of the Department of Justice and its own policy, procedures and practices are dictated both by statute and also by departmental policy; its connection to the state is self-evident. While legislative changes occurred in 2002 that enhanced guidelines for review, non-legislative changes also took place that included movement of the CCRG to a building separate from the Department of Justice and the assignment of a special advisor to oversee review in high profile cases. The idea of creating a system of review, separate from government and similar to the United Kingdom's Criminal Cases Review Commission (CCRC), was considered at that time, but rejected. This was based on the argument that the provinces were satisfied that the review process should remain in the hands of the Minister of Justice, and that the Canadian prosecutorial system was too dissimilar to that of the UK for such a commission to work in Canada.⁵⁰

Furthermore, the Department of Justice has argued that a review mechanism similar to the CCRC would detract from the notion of judicial finality by creating another level of appeal, would be too costly, and would result in many more requests. It also stated that as it stands, the review process is considered independent from the prosecutions conducted by the provincial Attorneys General and in its view, satisfies the requirement for independence.⁵¹ The review process, however, is clearly not independent as an elected official, who may have a vested interest in the outcome, ultimately makes review decisions. While in some sense the CCRG is external to the Department of Justice, it is no way independent and does not function as a separate entity. Furthermore, the principal of finality is not meant to foster injustice; errors made at an earlier point in the process must and should be later acknowledged and rectified. Given that a wrongful conviction should no longer be considered as an infrequent matter,⁵² it makes sense that measures to address this problem are no longer out of the ordinary, but accessible to those who believe they have been wrongly convicted.

A number of ad hoc commissions of inquiry have taken place in Canada over the years that have addressed the unique circumstances of individual

⁵⁰ *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* (2002) C Gaz I, 2977.

⁵¹ Department of Justice, "Addressing Miscarriages of Justice", *supra* note 43.

⁵² Given Zalman's estimate rate of wrongful convictions in the United States as approximately 0.5 to 1 percent (half of one percent to one percent) of all criminal convictions annually, as discussed earlier, *supra* note 18.

cases of wrongful conviction and have sought to investigate why these errors occurred, as well as making policy recommendations. While commissions of inquiry help to re-establish the legitimacy of the criminal justice system by examining the sources of error, ascribing responsibility and making sweeping recommendations for change, the extent to which their recommendations are implemented is somewhat deficient.⁵³ Since 1986 there have been six Commissions of Inquiry⁵⁴ examining the circumstances of the wrongful conviction of eight individuals in Canada and all six endorsed the creation of a new body to undertake conviction review that would be independent from government intervention. Subsequent governments have ignored these recommendations. Advantages to a separate, independent, non-executive based review commission are evident.⁵⁵ Primarily, and for the purposes of legitimacy, such a commission would likely secure greater symbolic significance to the public at large and to those who claim to be wrongly convicted. Given that the current Canadian system of review is attached, however peripherally, to the criminal justice system that made the original conviction in error it raises questions about whether such a commission will ever be able to impartially police errors.

*1. An Example of System Failure*⁵⁶

David Milgaard's wrongful conviction for the murder of Gail Miller in 1970 and his subsequent wrongful conviction stands as a stark example of how the system is unable to police its own errors. Milgaard, a 16-year-old youth, was driving through the town of Saskatoon, Saskatchewan at the time of Gail Miller's murder. He was ultimately convicted of sexual assault and murder largely based on testimony from juvenile witnesses that had been coerced by the police; he was sentenced to life imprisonment. Milgaard attempted to overturn his conviction on several occasions through the

⁵³ See Gary Botting, *Wrongful Conviction in Canadian Law* (Toronto: Lexis Nexis Canada, 2010).

⁵⁴ These Commissions of Inquiry examined the wrongful convictions of: Donald Marshall Jr, Guy Paul Morin, Thomas Sophonow, James Driskell, Ronald Dalton, Randy Druken, Gregory Parsons and David Milgaard.

⁵⁵ Clive Walker & Kathryn Campbell, "The CCRC as an Option for Canada: Forwards or Backwards?" in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (London: Palgrave MacMillan, 2010) 191.

⁵⁶ This example is discussed in greater detail in *Campbell II*, *supra* note 41.

system of appeals during the 1970s but was unsuccessful. In 1988, having exhausted all of his appeals, Milgaard applied for ministerial review based on new evidence that a serial rapist was in the area at the time of the murder and the recantation of witness testimony. In consideration of his application at that time, the Minister of Justice found the evidence to be insufficient and Milgaard was denied review in February 1991; a second similar application was also denied in August 1991. Due to unrelenting media coverage of Milgaard's case and lobbying by his mother, the Minister of Justice reversed her original opinion months later and directed the Supreme Court⁵⁷ to review Milgaard's conviction and consider whether a miscarriage of justice had occurred and what remedial action was advisable.⁵⁸

In 1992, Milgaard's conviction was set aside by the Supreme Court and a new trial ordered based on fresh evidence that "could reasonably be expected to have affected the verdict of the jury" at the original trial.⁵⁹ The charges against Milgaard were stayed when the Attorney General for the province of Saskatchewan declined to pursue another trial; Milgaard was freed in 1992, after almost 23 years in prison. He was only formerly acquitted five years later when DNA identification evidence provided unequivocally that he was innocent. In 1999, the Saskatchewan government issued a formal apology to Milgaard and his family and distributed a payment of \$10 million dollars, which was the largest compensation settlement for a case of wrongful conviction at that time in Canada. Regardless of or in spite of his innocence, Milgaard's experience demonstrates how the process initially failed to prove that a miscarriage of justice occurred. He was forced to apply to the Minister on two occasions and it was only after much public lobbying and media pressure⁶⁰ that his

⁵⁷ This request was considered to be unprecedented at that time, as in essence the Minister of Justice was asking the Supreme Court, which normally interprets law, to interpret fact. See Neil Boyd & Kim Rossmo, "David Milgaard, the Supreme Court and Section 690: A Wrongful Conviction Revisited" (1994) *Can Lawyer* 28. This reference was made as one of Milgaard's original lawyers, Calvin Tallis, had since been appointed to the Saskatchewan Court of Appeal and thus could not hear the review.

⁵⁸ *Reference re Milgaard*, [1992] 1 SCR 866, [1992] SCJ No 35 (QL).

⁵⁹ *Ibid* at 871.

⁶⁰ In 1990, the media covered Joyce Milgaard (David's mother) attempting to physically hand a forensic pathologist's report to then federal Justice Minister, Kim Campbell, which outlined details and evidence that would exonerate her son. Headlines that followed this incident amidst a growing popular sentiment that Milgaard was in fact innocent, such as "Joyce Milgaard snubbed by Kim Campbell" were indicative that the popular press conveyed this behavior as appalling. *Campbell I*, *supra* note 19 at 443.

case was reconsidered and he was finally exonerated.⁶¹ The difficulties he and his family encountered in attempting to rectify this wrongful conviction after so many years illustrate the problems inherent to the current system of post-conviction review. The consequences for legitimacy are evident: Milgaard's experience is an example of unfair decision making as well as evidence of procedural unfairness.⁶² This blatant lack of procedural justice around the application of a measure that is meant to effectively restore the legitimacy the system detracts from public perceptions regarding the system's overall efficacy.

B. Inaccessibility

A further argument as to why the conviction-review process fails to restore the legitimacy lost through a wrongful conviction relates to its relative inaccessibility. While ostensibly available to any person convicted of a summary or indictable offence (or given a long-term sentence or dangerous offender designation) the number of applicants contradict such claims. Although the number of applications received by the CCRG in a given year remains relatively stable at approximately twenty-one received annually, the actual number of applications completed in the same year is relatively small. This is in part due to the complexity of the process, the amount of information needed to assess the merits of a claim, and the protracted nature of the investigation. Furthermore, the number of applications received for conviction review in a year is clearly not indicative of the virtual numbers of convictions in error occurring in a jurisdiction. In fact, over a thirteen-year period, from 2002-2015 the CCRG received 272 applications, however only sixteen cases were granted review by the Minister of Justice and of those fifteen convictions were overturned. Given that the annual number of applicants received in a year remains stable at twenty applications, this represents only a small fraction of all convictions, since the annual application rate translates to approximately 0.00005 per cent of the population of Canada, or 0.008 per cent of convicted persons.⁶³ While

⁶¹ Larry Fisher was convicted of the rape and murder of Gail Miller in 1999 and in 2004, the Supreme Court of Canada refused to hear Fisher's appeal, thus allowing for an inquiry to proceed on Milgaard's case in 2005. The mandate of the Commission of Inquiry was to examine the investigation into the death of Gail Miller and the criminal proceedings against David Milgaard, chaired by Justice Edward P MacCallum.

⁶² *Tyler I*, *supra* note 6.

⁶³ Ashley Maxwell, "Adult Criminal Court Statistics, 2013/2014" (2015) 35:1 *Juristat* 1.

the success rate of referrals made back to provincial courts of appeal is quite high (93 per cent) the actual referral rate of cases is quite low at 5.8 per cent.⁶⁴

Other oft-cited criticisms⁶⁵ of the conviction-review process also relate to procedural issues around time delays in processing applications and costs involved with procedures.⁶⁶ The thorough, detailed, application requires many hours of legal research and investigation and unless a lobby group or innocence project takes on a case, the costs for private counsel are likely to be prohibitive. Other difficulties surround the fact that there is little clarity regarding what is required in terms of the evidentiary burden of proof, the criteria for review, and the overall relative secrecy attached to the application process. Amendments to the *Criminal Code* in 2002 served to clarify aspects of the review process, including specifying that the remedy itself is extraordinary and should not be considered as a fourth level of appeal. In terms of evidence, in order for a case to be eligible for conviction review it must be “based on new matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted.”⁶⁷ The Department of Justice⁶⁸ specifies that information is significant if it is reasonably capable of belief, relevant to the issue of guilt and could have affected the verdict if it had been presented at trial.⁶⁹ The assessment of

⁶⁴ Leverick, Campbell & Callendar, *supra* note 7.

⁶⁵ Many of these criticisms are also discussed in Walker & Campbell, *supra* note 55.

⁶⁶ Patricia Braiden & Joan Brockman, “Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the *Criminal Code*” (1999) 17 Windsor YB Access Just 3. The Department of Justice justifies the inordinate delays that occur through a conviction review as simply part of the thorough nature of the process; however, this is likely exacerbated given the considerable time it takes to exhaust all appeals in order to be considered for review at all (see Boyd & Rossmo, *supra* note 57).

⁶⁷ Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2013 Minister of Justice* (Ottawa: DOJ, 2013) at 6 [DOJ, “Applications for Ministerial Review”].

⁶⁸ Department of Justice, *Applying for a Conviction Review*, (Ottawa: DOJ, 2003) at 2, online (pdf): <justice.gc.ca/eng/cj-jp/ccr-rc/rev.pdf> [perma.cc/238E-QTHN] [Department of Justice, “Conviction Review”].

⁶⁹ Furthermore, information that would support a conviction review application as both new and significant would include information which: establishes or confirms an alibi; includes another person’s confession; identifies another person at the scene of the crime; provides scientific evidence that points to innocence or another’s guilt; proves that important evidence was not disclosed; shows a witness gave false testimony; or

whether information is “new and significant” is similar to the test applied by the courts in determining the admissibility of new or “fresh” evidence on appeal.⁷⁰

Furthermore, applicants need not convince the Minister of their innocence, *per se*, but rather that “there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”⁷¹ The test created by the Minister of Justice to get a court hearing through conviction review is thus considered higher than the test that will be applied at a court hearing.⁷² Also considered problematic is that the Minister’s opinion on a file remains a discretionary matter, as there is no statutory test to specify what remedy should be ordered once the Minister is satisfied that a remedy is required.⁷³ While the 2002 amendments may have clarified aspects of the review, it still remains a process cloaked in secrecy, as recommendations made to the Minister by CCRC lawyers are considered protected due to solicitor-client privilege. At the same time, the language of exceptionality further perpetuates myths about the infallibility of the judicial process.

It is conceivable that the standard of presenting new and significant information in order for a conviction to be reviewed may in fact contribute to the very low number of applicants and to its overall inaccessibility. For some cases, it is old and not new information that caused the original wrongful conviction that requires further re-examination, however, this is not permitted under this process, as issues raised earlier on appeal cannot be re-litigated at this stage. For those claiming that incompetent counsel contributed to their wrongful conviction, this claim would not meet the standard unless they could establish that counsel had blatantly ignored important evidence. For those who have been wrongly convicted due to erroneous eyewitness identification, the most frequent cause of wrongful convictions, they would be required to establish that these original witnesses had lied. Finally, those claiming to have falsely confessed to the crime for which they have been wrongly convicted due to psychologically based police

substantially contradicts testimony at trial (*Campbell II*, *supra* note 41 at 368-369).

⁷⁰ As found in *R v Palmer* [1980] 1 SCR 759.

⁷¹ Department of Justice, “Conviction Review”, *supra* note 68 at 4.

⁷² Hersh Wolch & Joan McLean, “In the Matter of the Commission of Inquiry into the Wrongful Conviction of David Edgar Milgaard: Submissions” online (pdf): *Milgaard Inquiry* <www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/FinalSubmissions/341421.pdf> [perma.cc/MBZ8-G84Q] at 65.

⁷³ Department of Justice, “Conviction Review”, *supra* note 68.

interrogation tactics must re-investigate and eventually solve the crimes for which they have been convicted. Clearly, the requirement to present new and significant information in order to establish their innocence is a difficult standard for many wrongly convicted persons to meet.

As discussed, reticence on the part of the Minister of Justice in revisiting older cases presenting for conviction review may also be influenced by the principle of finality, which requires that courts cannot re-litigate the same issues, *ad nauseum*. The principle of finality seems at odds with the conviction review procedure, given that in and of itself, conviction review requires revisiting some of the same issues from these cases.⁷⁴ In fact, it is often through revisiting some of the same evidence, in a different light, that mistakes may be revealed. If those same mistakes were not caught on appeal, however, the legal parameters of evidentiary procedure preclude them from being raised at conviction review. Appellate courts are also reticent to disturb early convictions, as they have been found to take a restrictive approach.⁷⁵ Also problematic is the fact that the conviction review procedure does not require proof of innocence, nor that a miscarriage of justice has actually occurred, but rather that it likely occurred.

Importantly, this notion of the likelihood of occurrence of a miscarriage of justice is not a legislative standard, *per se*, but rather a matter of policy for the exercise of the powers of the Minister under section 696.1 of the *Criminal Code*. Consequently, this ‘satisfaction’ is inherently a subjective matter to which precedent cannot be followed. Each case is thus decided on its own merit, with little guidance as to what exactly constitutes ‘satisfying’ proof to the Minister.⁷⁶

IV. COMPENSATION – RATIONALE

Compensating the wrongly convicted for the losses they have suffered due to errors on the part of government officials is a reasonable expectation.⁷⁷ It has long been established that a wrongful conviction and

⁷⁴ The issue of finality is a complex one, particularly with respect to wrongful conviction cases— as the system demands some type of finality in criminal cases. At what juncture that would best be determined, however, is difficult to discern.

⁷⁵ Braiden & Brockman, *supra* note 66 at 21.

⁷⁶ *Campbell II*, *supra* note 41 at 126.

⁷⁷ Some of these ideas have been previously discussed in Kathryn M Campbell, “Policy Responses to Wrongful Conviction in Canada: The Role of Conviction Review, Public Inquiries and Compensation” (2005) 41:2 *Crim L Bull* 145 [*Campbell III*].

imprisonment likely causes destructive and long-term consequences. Grounds has found evidence for enduring personality change in the many wrongly convicted individuals he has interviewed, thought to be brought about by years of suffering, countless losses, pain and humiliation, often occurring several years following exoneration and release.⁷⁸ Monetary compensation, as an attempt to redress the wrongs suffered, acknowledges accountability. This rationale for compensation exists not only on the societal level, whereby society is expected to assume responsibility for the miscarriage of justice, but compensation must also address the devastating effects on the individual.⁷⁹

While a wrongful conviction is always accompanied by a number of specific losses, some can be enumerated, others not. In attempting to assess the many losses suffered by Thomas Sophonow, who had been wrongly convicted and considered a murderer for fifteen years, Justice Peter Cory, formerly of the Supreme Court of Canada examined a number of factors in ascertaining damages. These factors included:⁸⁰ the many deprivations of prison, foregone developmental experiences, humiliation and disgrace, pain and suffering, accepting and adjusting to prison life, effects on the claimant's future, and effects of post-acquittal statements made by public figures, police officers and the media.⁸¹ As these factors indicate, all aspects of an individual's life are affected through the victimization of a wrongful conviction. While a monetary award cannot restore lost years, lost livelihoods, lost opportunities and lost relationships, there is symbolic importance attached to societal acknowledgement of responsibility for the suffering caused by a wrongful conviction.⁸² Kaiser further outlines the

⁷⁸ Adrian Grounds "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Corr at 165.

⁷⁹ H Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 Windsor YB Access Just, at 100.

⁸⁰ These factors were borrowed from Mr. Justice Evans, in the Commission of Inquiry Concerning Adequacy of the Compensation Paid to Donald Marshall, Jr, Report of the Commissioner (Nova Scotia, 1990), which included suggestions from Professor H.A. Kaiser.

⁸¹ The last point was added by Justice Cory in specific reference to Thomas Sophonow's experience (Peter Cory, *The Inquiry Regarding Thomas Sophonow*, Manitoba Justice, (2001) online: <digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1> [perma.cc/LAG7-KJEP].

⁸² Kathryn Campbell & Myriam Denov, "The Burden of Innocence: Coping With a Wrongful Imprisonment" (2004) 46:2 Can J Corr, 139.

benefits said to accrue from compensation, which include: minimizing social stigma, contributing to a feeling of vindication, helping to integrate the accused in mainstream society, assisting in future planning, and contributing to sustaining dependents.⁸³ In essence, the payment of compensation represents a partial fulfillment of the obligations of the state in the face of its injustice, as well as restoring public respect by assuming responsibility.⁸⁴

A. State Obligations

State governments that are signatories to the *International Covenant on Civil and Political Rights* (ICCPR)⁸⁵ have an obligation to provide compensation to the wrongly convicted. Two articles in this Covenant specifically address the issue of compensation:

- Article 9(5) - Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.
- Article 14(6) - When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time was wholly or partly attributable to him.⁸⁶

In essence, signatories to this covenant have an obligation to create a statutory or regulatory provision to meet these obligations.

Canada ratified the ICCPR in 1976, but there is no current existing statute in Canadian law that dictates federal, provincial or territorial obligations for compensation to the wrongly convicted. In recognition that the state bears (some) responsibility for the actions of its agents, in 1988, the Canadian government adopted a set of guidelines which assign the necessary conditions for compensation to be awarded to persons wrongfully convicted and imprisoned in Canada. These Federal-Provincial-Territorial Guidelines address the rationale for compensation, the conditions of eligibility for compensation, and the criteria for quantum of compensation. The guidelines developed to address compensation have been referred to as

⁸³ Kaiser, *supra* note 79 at 102.

⁸⁴ *Ibid*

⁸⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁸⁶ *Ibid*, arts 9(5), 14(6).

a “discretionary oversight system” and have “been criticised as ad hoc, unjust, and manifestly inadequate”⁸⁷; whereby the right to compensation is recognized and exists but the decision to grant the award is left to an administrative body.⁸⁸ The conditions of eligibility for compensation include the fact that not only should a wrongful conviction have resulted in an imprisonment, but also if compensation⁸⁹ is awarded, it must only be available to the actual person who has been wrongfully convicted⁹⁰ and imprisoned as a result of a *Criminal Code* or other federal penal offense. Furthermore, eligibility requires either a free pardon or a verdict of acquittal through s. 696 of the *Criminal Code*, all appeals exhausted and new information now demonstrates that there has been a miscarriage of justice.⁹¹

Despite the fact that the entitlement criteria under the guidelines are broader than under the ICCPR, there are other measures attached to them that are essentially limiting. They include the fact that there must have been a wrongful imprisonment as well as a wrongful conviction and that compensation is only available to the wrongly convicted person, him or herself. By including only those who have been wrongly imprisoned, this in fact unfairly excludes those who have suffered the stigma attached to a

⁸⁷ Christine E Sheehy, “Compensation for Wrongful Conviction in New Zealand” (1999) 8 Auckland UL Rev 977 at 980. Given that any payment made in compensation of a wrongful conviction is done in a discretionary manner, such payments are considered *ex gratia*. Further, such awards may be considered arbitrary as they are done in secret. See Myles Frederick McLellan, “Innocence Compensation: The Private, Public and Prerogative Remedies” (2012) 45:1 Ottawa L Rev 84.

⁸⁸ Jason Costa, “Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction” (2005) 19 Emory Intl L Rev 1615.

⁸⁹ The Attorneys General of each province and territory have the right to recommend compensation awards outside of this reference and have done so through other *ex gratia* payments.

⁹⁰ As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), further criteria would require either a pardon (under s 749 of the *Criminal Code*) or reference made by the Minister of Justice that the person did not commit the offence (under s 696.1(b)(c)).

⁹¹ “Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons” (last visited 26 July 2019), online (pdf): <www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/En_Anglais/_centredoc/publications/programmes-services/ej_lignes_directrices-a.pdf> [perma.cc/D2WU-WWQQ] [Compensation Guidelines].

wrongful accusation or conviction, but narrowly avoid imprisonment. Clearly these individuals also suffer some of the losses enumerated above, such as deprivations attached to reputation, humiliation and disgrace, but remain ineligible for compensation for these experiences. Further, relatives of the wrongly convicted have their own set of deprivations and humiliations to contend with. Not only do they lose an important source of support in some cases, but they are also stigmatized by having a family member imprisoned, however unjustified. They may spend countless time, effort and finances working towards exoneration of their loved ones, however, under these guidelines their losses are neither recognized nor compensated.⁹²

Due to the fact that to receive compensation, one must either receive a pardon or have been successful at conviction review, both criteria narrow the numbers of eligible applicants considerably. What is even further limiting is that the guidelines require that the Court of Appeal make a finding that “the individual did not commit the offence” in order to be considered eligible for compensation.⁹³ The normal mandate of the court is limited to the binary guilty/not guilty and the guidelines effectively require the courts to make a statement or finding to the effect that the person is technically “innocent.” Given the narrow nature of this designation, the courts appear reticent to make this finding and it seems that they rarely if ever do so.⁹⁴ To obtain compensation, a wrongly convicted person must convince politicians to support their application for relief, and in turn that person must convince their provincial or federal counterparts that a claim is meritorious. Following this initial support, a judicial or administrative inquiry must take place to examine a claimant’s request; if compensation does follow it is considered a discretionary matter and represents solely a moral responsibility and not a legal one.⁹⁵ Also problematic is that when a compensation award is granted, the guidelines fail to delineate how it should be divided between municipal, provincial and federal governments;

⁹² Nevertheless, in a number of cases compensation has also been awarded to family members, particular the mother of the accused, e.g. the mothers of David Milgaard, Guy Paul Morin, and Donald Marshall Jr. all received some limited compensation.

⁹³ Compensation Guidelines, *supra* note 91 at 1.

⁹⁴ Graeme Hamilton, “Fighting ‘distinct society of injustice’”, *National Post* (5 October 2005).

⁹⁵ Myles McLellan, “Innocence Compensation: A Comparative Look at the American and Canadian Approaches” 2013 49:2 Crim L Bull 1218.

this has proved challenging in some cases.⁹⁶ Furthermore, a particular type of case has been barred from compensation through these guidelines, where the evidence is questionable and the case has been overturned by the courts on special appeal or special leave that results in the ordering of a new trial, but where the state decides not to prosecute again.⁹⁷ In such instances, refusal of compensation seems blatantly unfair, given that the person has been wrongly convicted but ineligible for compensation due to a legal technicality.⁹⁸ Another rationale for denying compensation is based on the idea that legislators are reticent to risk doling out taxpayer's money to someone who is exonerated on a legal technicality, but may in fact be guilty.⁹⁹

The courts' and governments' reticence to visit these wrongful convictions for the purposes of compensation is highly problematic. Data from known cases of wrongly convicted persons in Canada who have received compensation to date clearly reflects this disparity: from seventy known/proven wrongful convictions in Canada,¹⁰⁰ only thirty-three have received compensation, which is approximately 47 per cent. The time period the wrongly convicted had to wait following an exoneration ranged from three years to forty-nine years, while the average time period was 16.2 years from date of the original conviction. Further, the amount of

⁹⁶ In Thomas Sophonow's case, as discussed above, Commissioner Cory apportioned blame and responsibility and ordered that the total of \$2.6 million dollars compensation was to be divided as follows: 50% from the city of Winnipeg, 40% from the province of Manitoba and 10% from the government of Canada. Regardless, Sophonow experienced substantial delays in collecting this compensation. "Sophonow to receive full compensation", *CBC News* (16 June 2002), online: <www.cbc.ca/news/canada/sophonow-to-receive-full-compensation-1.321655> [perma.cc/NY36-N7MJ].

⁹⁷ *Costa*, *supra* note 88 at 1625.

⁹⁸ Robert Baltovich was convicted in 1992 for the murder of his girlfriend; her body has never been found. He served eight years in jail, and in 2004 a conviction review of his case found that the trial judge's orders to the jury were prejudicial and his conviction was set aside and a new trial was ordered. Baltovich was acquitted moments before the new trial was to take place, as the Crown had no evidence to support a conviction. He has never been compensated, nor is he considered eligible for compensation, but is technically not guilty of the murder for which he was imprisoned for eight years.

⁹⁹ Karen Brown, "Life after wrongful conviction", *New York Times* (28 May 2016), online: <www.nytimes.com/2016/05/29/opinion/sunday/life-after-wrongful-conviction.html> [perma.cc/5VT3-63ZK].

¹⁰⁰ See *Campbell I*, *supra* note 19.

compensation ranged from \$36,000 to \$13.1 million, and appears to be largely based on the number of years an individual has spent in prison and the amount of time he or she has waited for compensation. The guidelines present very narrow avenues for obtaining compensation at present. What these low numbers reveal is that, similar to post-conviction review, compensation as a measure to address the legitimacy deficit left by a wrongful conviction is relatively unattainable.

1. An Example of System Failure – Compensation

One case example, particularly illustrative of the inherent contradictions evident in the compensation process in Canada, is that of Michel Dumont. Dumont was wrongly convicted of sexual assault in June 1991 in the province of Québec and served 34 months in prison before he was released; his conviction was quashed in February 2001 by the Québec Court of Appeal and he was acquitted. Dumont has unsuccessfully sought compensation since that time from various authorities (including from the Attorneys General of Québec and Canada). In 2010, Dumont brought a claim to the United Nations Human Rights Committee accusing Canada of being in violation of its obligation to compensate him under art. 14, para. 6 of the ICCPR, as per the Federal/Provincial/Territorial Guidelines.¹⁰¹

Essentially, Dumont brought the claim against the Canadian government through the Optional Protocol, which functions as a complaint mechanism allowing individuals to bring allegations that a party has violated the ICCPR directly to the Human Rights Committee. The State party (Canada) had a number of arguments against Dumont's claim – principle among them the fact that he had never been proven innocent of the crime in question and was thus not eligible for compensation (an acquittal without more in this case was not seen as indicative of a finding of innocence). Rather, the victim claimed to have some doubts as to whether or not Dumont was the perpetrator and the Court of Appeal concluded that the victim's statements gave rise to a reasonable doubt as to Dumont's guilt – hence he was acquitted, but the court did not rule on his innocence. While finding in Dumont's favour, the committee required the State party (Canada) to provide an effective remedy to Dumont in the form of adequate compensation – as well as ensuring that “similar violations do not occur in

¹⁰¹ UNHRC, Communication No 1467/2006, *Michel Dumont c Canada*, UN Doc CCPR/C/98/D/1467/2006, online (pdf): <www.worldcourts.com/hrc/eng/decisions/2010.03.16_Dumont_v_Canada.pdf> [perma.cc/SM4F-UZXJ].

the future.”¹⁰² Similarly, the committee required that the State party provide evidence about the measures taken within 180 days¹⁰³; however, no action has been taken since the decision.

B. Questions of State Accountability/Legitimacy

Compensating the wrongly convicted monetarily for their suffering represents a moral and legal obligation on the part of the state towards its members who have fallen victim to errors of the criminal justice system. As it stands in Canada the current compensation scheme is difficult to access, arbitrarily applied and in need of overhaul. The thirty-three cases that have received compensation thus far reflect the fact that few individuals are ever compensated for a wrongful conviction, and when they are they must wait many years and the amounts awarded vary considerably. The number of people who receive compensation is far below the actual number who have been wrongly convicted. What it does reveal is that being compensated for a wrongful conviction is a legal long shot, dependent on media influence, individual perseverance and political will. Admittedly, while it is acceptable that state governments establish particular criteria for eligibility for compensation, at present it is unclear who exactly is eligible, under what circumstances and for how much. The restrictive nature of how successive governments have interpreted the compensation Guidelines in Canada reveals a great deal about the government's perception of its obligation to citizens whom it has dealt with in an unfair manner.

When considering the role of the state with respect to wrongful convictions, questions of moral responsibility¹⁰⁴ are fundamental and concern the nature of the state and the relationship of the individual to the state and by extension, to the law.¹⁰⁵ Kaiser invokes Dworkin's concept of moral harm in attempting to situate the issue of wrongful convictions within a larger framework.¹⁰⁶ In this instance, bare harm that is said to result from the loss of liberty *per se*, is differentiated from the iniquity of moral harm

¹⁰² *Ibid* at para 25.

¹⁰³ *Ibid* at para 26.

¹⁰⁴ See *Campbell III*, *supra* note 77.

¹⁰⁵ Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification*, (Cambridge: Polity Press, 1985) at 22.

¹⁰⁶ *Kaiser*, *supra* note 79.

occurring from wrongful imprisonment. These harms require differing levels of responses. As Justice Cory notes in the *Sophonow Inquiry*:

in the case of wrongful conviction, it is the State which has brought all its weight to bear against the individual. It is the State which has conducted the investigation and prosecution on the individual that resulted in the wrongful conviction. It is the State which wrongfully subjected the individual to imprisonment.¹⁰⁷

What is clear is that in cases of wrongful conviction, the state has improperly exercised its powers. And in such cases, it is not the powerful who become the victims of a wrongful conviction, in fact it is most often the more marginalized individuals of a society who are unable to protect themselves from the system. Such vulnerable individuals include members of racialized groups,¹⁰⁸ those living in poverty, and those who lack access to justice. Consequently, their marginalization may also further hinder their success in seeking exoneration and ultimately compensation. Moreover, the earlier distinction made between a mistaken conviction and a procedurally injustice conviction may matter with respect to compensation. It could be argued that more may be owed to someone who has suffered procedural injustice resulting in a wrongful conviction than to the unlucky victim of a procedurally just but mistaken conviction (particularly if the latter case was properly addressed in a timely fashion). At the same time, the simple provision of a monetary award fails to address the fact that justice is administered within a larger societal context, influenced by a variety of other factors that exist outside of such remedies. What compensation does is demonstrate that the state is capable of error and that it must be held accountable. It is how the state rectifies that error that can serve to restore, enhance or destroy its legitimacy.

¹⁰⁷ Cory, *supra* note 81 at “Compensation Recommendation”, 3.

¹⁰⁸ See Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” (2015) 17:2 Flinders LJ 203, for an overview of how Indigenous Canadians are overrepresented in the criminal justice system, relative to their numbers in the general population.

V. DISCUSSION: DO POST-CONVICTION REVIEW AND COMPENSATION SCHEMES ADDRESS THE LEGITIMACY DEFICIT?

The previous sections have illustrated that as responses to a perceived legitimacy deficit, both post-conviction review through the CCRG and compensation via the guidelines are flawed measures. When a wrongful conviction occurs, and the court and appellate procedures in place are unable to rectify it, then other schemes set up to address such eventualities have a role to play in enhancing legitimacy through procedural justice. What this paper has demonstrated is that both schemes fail to meet these objectives, but for varying reasons. The CCRG lacks independence, which affects its overall credibility as an institution and detracts from its appearance as a body that is impartial and free from political influence. Ultimately it is the Minister, an elected official, who makes the final decision as to whether or not a miscarriage of justice “likely” occurred in a particular case. At the same time, the CCRG process is relatively inaccessible to most individuals; its conspicuously low referral numbers and arduous and lengthy review procedures further reflect its inability to provide post-conviction relief to only but a very select few wrongly convicted persons. In addition, its evidentiary threshold for admission requires the wrongly convicted to demonstrate the existence of “matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted”¹⁰⁹ which in turn further restrict access to this procedure to only those who are able to meet this high standard. While it could be argued that although few cases are ever referred by the Minister back to the courts of appeal, those that do reach that level of consideration have a greater likelihood of being overturned.¹¹⁰ This is small comfort to the many wrongly convicted who are unable to meet the admissibility standards required for this process to move forward and it surely does little to enhance procedural justice when the process itself is so inaccessible that it appears to be unfair.

On its face compensation as representing state accountability for the wrong committed via monetary indemnity could ostensibly serve as another

¹⁰⁹ DOJ, “Applications for Ministerial Review”, *supra* note 67 at 6.

¹¹⁰ Fifteen of sixteen referrals were overturned by appellate courts from 1999-2015, see also Leverick, Campbell & Callendar, *supra*, note 7.

means of enhancing procedural justice. When a wrongly convicted person is exonerated, awarding them financial assistance is a way of allowing them to partially rebuild their life and at the same time represents an acutely visible instance of state accountability for the errors that occurred. In spite of the fact that the Canadian state is a signatory to the ICCPR and has established guidelines to provide such compensation, in reality such awards are infrequent, only occur following many years of lobbying and in most cases are woefully inadequate. While forty per cent of the known Canadian cases of wrongful conviction have received compensation for their ordeal, the majority have not. Given that the guidelines require more than an acquittal of charges, *per se*, but rather an admission by the court that the person did not in fact commit the offence, this narrows the number of eligible cases considerably and appears unjust; a verdict of not guilty does not in fact “equate to a verdict of innocence.”¹¹¹ Tyler¹¹² and others note that fair treatment is central to notions of procedural justice, as such the compensation procedure itself and the statistics regarding awards are indicative of unfair treatment as those seemingly deserving of compensation for a wrongful conviction are often denied. In a general sense then this practice falls short of restoring legitimacy lost through a wrongful conviction. Michel Dumont’s case discussed earlier is a clear example of a lack of respect for his dignity; even following a UN Committee’s recommendation that he was deserving of compensation through the ICCPR Optional Protocol, the Canadian government failed to give him an award.

What this analysis has demonstrated is that while both post-conviction review and compensation represent policy statements on the part of the Canadian government as strategies to address wrongful convictions, there are clear deficits in their ability to do so. While a wrongful conviction unequivocally demonstrates that errors can occur in the criminal justice system on a number of levels that result in the wrong person being convicted and imprisoned for a crime they did not commit, when uncovered such errors represent glaring flaws in the system, and detract from its legitimacy. In theory, post-conviction review affords governments the opportunity to address these legitimacy deficits by providing a means to rectify errors. Given the inherent limitations to the CCRG in addressing most wrongful

¹¹¹ Myles Frederick McLellan, “Compensation for Wrongful Convictions and the Innocence Continuum” (2016) 52:2 Crim L Bull 346 at 367.

¹¹² Tyler I, *supra* note 6.

convictions due to its high evidentiary threshold, it fails to restore legitimacy for errors that occur by government action that result in a wrongful conviction. Further, the relative inaccessibility of monetary indemnity through the guidelines is another example of a failed attempt to enhance procedural justice.

One question to be addressed is whether the deficits identified in these schemes truly contribute to a lack of legitimacy which is constitutive of the criminal justice system overall, or rather simply represent examples of injustice? While individual injustices may result as a consequence of the inability of post-conviction review to rectify wrongful convictions in only but a few select cases, the larger picture is of a scheme that is unable to do so in a systematic and fair manner. The same arguments apply to compensation schemes – their relative inaccessibility related to a high threshold for eligibility appear to occur systemically, to the degree that less than half of the small number of eligible exonerees are ever compensated. Thus, both schemes lose some of their normative justification when they fail to exercise their rightful purpose.¹¹³ Clearly, citizens seeking relief from a wrongful conviction cannot rely on the system in place to rectify such errors or to compensate them once their convictions are overturned. As Tyler¹¹⁴ and other authors have noted, fair treatment by authorities is a central part to perceptions of legitimacy. When the quality of interactions with power-holders (or state authorities) is such that dignity and respect are disregarded through an inability to re-visit or re-examine those factors that contributed to state errors, such practices influence perceptions of legitimacy as well as the extent to which those subject to authority are willing to cooperate. The criminal justice system is inherently discretionary and as a result will sometimes make decisions that seem unfair or are unfair. While a difficult concept to accept for some, Tyler states that “Legal authorities also seek empowerment from the public...the public must be willing to accept the use of discretion by legal authorities.”¹¹⁵ While at the same time, both schemes are highly discretionary and such discretion may work against the system’s ability to re-legitimate itself. The discretion that exists at both

¹¹³ Beetham, *supra* note 12.

¹¹⁴ Tyler I, *supra* note 6.

¹¹⁵ Tom R Tyler, “Procedural Justice, Legitimacy, and the Effective Rule of Law” (2003) 30 *Crime & Justice* 283 at 291.

levels in this process has contributed to a perception of a highly inaccessible procedure.

The focus of this paper on questions of legitimacy regarding post-conviction schemes of exoneration and compensation is also an attempt to fill the gap in criminological research and innocence scholarship regarding the so-called “aftermath” of a wrongful conviction, an area of research that could use greater sustained attention. The bulk of innocence research¹¹⁶ over the previous two or three decades has tended to focus more on examining the many contributing factors to a wrongful conviction, a great deal of it quantitative in nature, with little attention paid to the lived experience of the exonerated or how they navigate the criminal justice system in seeking justice.¹¹⁷ By outlining the many barriers to these processes that exist within the Canadian jurisdiction, and underscoring their inefficacy, it is hoped that regulatory and legislative change may follow. While ambitious, this analysis can be construed as a framework for movement toward a more just (and legitimate) system for addressing wrongful convictions, one that not only speaks to its current deficits, but also provides avenues for improvement based on greater access, independence and expediency.

A. Concluding Remarks

This overview of Canadian post-conviction schemes of exoneration and compensation for the wrongly convicted has illustrated that while these schemes represent both policy and practice aimed at addressing miscarriages of justice, realistically they fall somewhat short. Given that a wrongful conviction raises a number of questions about the inherent ability of the system to correctly convict only those who are guilty and acquit the innocent, government policies on post-conviction review and compensation are an attempt, albeit ineffective in most cases, to rectify these miscarriages of justice. Clearly, both schemes are normatively unjustifiable as they do not conform to expected beliefs about their rightful purpose and exercise. At

¹¹⁶ Those contributing to the field of innocence scholarship include a number of noted legal scholars, including: Kimberley Cook, Keith Findlay, Jon Gould, C. Ron Huff, Richard Leo, Bruce MacFarlane, Carole McCartney, Daniel Medwed, Robert Norris, Hannah Quirk, Kent Roach, Christopher Sherrin, Clive Walker, Lynne Weathered, Sandra Westervelt and Marvin Zalman.

¹¹⁷ There are some exceptions. See Campbell & Denov, *supra* note 82; Sandra D Westervelt & Kimberly J Cook, *Life After Death Row: Exonerees' Search for Community and Identity* (New Brunswick, NJ: Rutgers University Press, 2012).

the same time, this examination of questions of legitimacy regarding systems of post-conviction review and compensation does not fall neatly into categories that are either easily observable or quantifiable. This analysis has revealed that given that aspects of the schemes themselves are highly problematic in their application, neither can truly address the magnitude of cases that present for review, nor do many cases meet the threshold for review or compensation. While both schemes refuse most requests they receive, it is unclear as to whether that is due to too high an evidentiary burden or the exercise of too much discretionary power. Regardless, the wrongly convicted would be mistaken to have faith that either system is an effective means of rectifying the aftermath of a conviction in error.

As opposed to earlier legitimacy work that examined citizen reactions to law enforcement¹¹⁸ and prisoner responses to penal authorities,¹¹⁹ questions regarding legitimacy around post-conviction review and compensation may not hinge on measures of law-abiding behavior per se, but rather on measures of faith in legal institutions to exercise their rightful purpose. Evidence of a lack of confidence in such schemes may be reflected in the low percentages of individuals that take advantage of them and the even lower percentages that are successful on review or who are compensated. Those who believe they have been wrongly convicted and have exhausted legal remedies through the courts have little choice but to apply for review if they wish to overturn their original conviction. Furthermore, the exonerees who seek compensation for their ordeal are attempting to make up for the numerous losses they experienced as a result of their wrongful conviction. Given that such schemes lack legitimacy, it may logically follow that they are unable to enhance the procedural justice of the system and as a consequence many wrongful convictions remain unacknowledged and unindemnified. The advent of future wrongful convictions is no doubt inevitable and consequently systems of review and compensation that retain legitimacy in the eyes of the public are sorely needed.

¹¹⁸ See Tyler I, *supra* note 6.

¹¹⁹ See Leibling, *supra* note 28.

Evaluating Judicial Delay After *Jordan*: Don't Throw the Baby Out with the Bathwater

J O N A T H A N A V E Y *

I. INTRODUCTION

When the Supreme Court of Canada issued its decision in *R v Jordan*, the majority decision did more than simply provide a new metric for evaluating whether delay rises to the level of a *Charter* infringement.¹ It also issued a stinging criticism of the “culture of complacency” pervading the criminal justice system, and placed the onus on “all participants in the justice system [to] work in concert to achieve speedier trials.”² Less than a year later, the Court doubled-down on *Jordan* in its decision in *R v Cody*.³ Examining the *Jordan* framework in the light of questions surrounding what constitutes defence delay, the *per curiam* decision emphasized again the seriousness of delay and the importance of all parties to take a proactive approach in preventing it by targeting its “root causes.”⁴

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¹ *R v Jordan*, 2016 SCC 27 [*Jordan*].

² *Ibid* at paras 4, 40, 104, 116, 135 [emphasis added].

³ *R v Cody*, 2017 SCC 31 [*Cody*].

⁴ *Ibid* at para 36. For commentary on the significance of a *per curiam* decision, see Peter McCormick, “The Political Jurisprudence of Hot Potatoes” (2002) 13 NJCL 271 at 276; see also André Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” (1993) 26 Can J Political Science 3 at 25; Stephen Coughlan, Editorial Comment on *R v Cody*, 2017 CarswellNfld 251.

The Supreme Court has provided guidance specifically towards the Crown and defence. This guidance has been supplemented in discrete circumstances, such as in the context of jointly charged accused where the actions of just one accused delay the proceedings,⁵ and whether delay caused by one accused should result in severance of accused.⁶ However, while the Supreme Court stated in *Jordan*, and reiterated in *Cody*, that judges have an important role to play in addressing and preventing delay, its comments primarily surrounded the exercising of case management discretion by trial judges.⁷ The Court has not yet addressed how the time accrued while a judge's decision is reserved will be evaluated under s. 11(b). This delay, which I will refer to as 'judicial delay' or 'decision delay,' can impact proceedings primarily in two ways, which I divide into pre-trial and post-trial delay.

Pre-trial delay can occur where a judge reserves their decision on a pre- or mid-trial application. Depending on the scheduling of the application relative to the trial and the amount of time taken, this delay may result in adjourning the start of the trial, or recessing the trial and scheduling a continuance.⁸ Post-trial delay is the delay caused by the time taken when a judge sitting without a jury reserves their ultimate decision.

The case of *R v K.G.K.* will bring the question of post-trial decision delay squarely before the Supreme Court of Canada for the first time. The trial in *K.G.K.* was completed in just over 33 months; however, the trial judge gave his decision nine months later, causing the accused to file an application asserting a violation of his 11(b) rights.⁹ The application was dismissed, and the accused appealed to the Manitoba Court of Appeal. Cameron and Monnin JJA dismissed the appeal, but for differing reasons.¹⁰ Hamilton JA dissented. She would have stayed the proceedings, holding that there had been an unreasonable delay.

⁵ See e.g. *R v Manasseri*, 2016 ONCA 703, leave to appeal to SCC refused, 37322 (13 April 2017).

⁶ See e.g. *R v Singh*, 2016 BCCA 427.

⁷ See e.g. *Cody*, *supra* note 3 at paras 38-39; *Jordan*, *supra* note 1 at para 63.

⁸ It should be borne in mind that an adjournment may result even where the application decision is delivered in advance of the scheduled trial date. In an application pertaining to admissibility of evidence, for example, the judge's decision may significantly impact the parties' trial strategy, and counsel must have adequate time to prepare once they are aware of the ruling.

⁹ *R v KGK*, 2017 MBQB 96 at para 3 [KGK (QB)].

¹⁰ *R v KGK*, 2019 MBCA 9 [KGK (CA)].

Once again, the Supreme Court will be left to grapple with competing constitutional demands. On one side is the right of an accused to be tried within a reasonable time. Conversely, restricting the ability of judges to reserve and take the necessary time to render a decision threatens the principle of an independent judiciary.¹¹ This may also impact the fairness of the trial process apart from judicial independence.

The Court will have to consider how it will reconcile the presumptive ceilings it laid out in *Jordan* in the context of judicial delay. Specifically, it will first need to determine whether judicial delay is to be evaluated within the *Jordan* ceilings, and if not, what standard is to be applied.

There are also practical issues at stake. In the criminal justice system, judges are often called on to adjudicate emotionally-charged and complex matters. They are typically presented with perspectives that are diametrically opposed. They may hear evidence that is highly technical, or hear from so many witnesses that the sheer volume necessitates a thoughtful review. Finally, they often hear evidence that is admissible, but only for a particular purpose, or evidence that they subsequently hold to be inadmissible.

How judges deal with the evidence they hear is of immense importance to all parties in the justice system. It is trite to say than an accused is entitled to a fair trial. But while the decisions in *K.G.K.* have so far focused on the portion of s. 11(d) requiring an independent judiciary, I am of the view that the right to a fair hearing also encompasses the judge's fact-finding process. In my opinion, the right to a fair trial includes a decision made by a finder of fact who does not feel so rushed to make a decision that they are unable to give thoughtful consideration to the evidence presented. In this vein, I agree with the comments of Doherty JA in *R v N.S.* that:

Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader societal interests. Those broader interests place a premium on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused.¹²

This article is not intended to propose a solution to the question of how to evaluate decision delay. Instead, I will focus on the challenges inherent in the judicial reasoning process and the value of judges being able to reserve

¹¹ See Canadian Charter of Rights and Freedoms, s 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11. [Charter].

¹² *R v NS*, 2010 ONCA 670 at para 50 [NS (Ont CA)], aff'd 2012 SCC 72 [NS (SCC)] [emphasis added].

their decision to conduct a detailed and thoughtful analysis. In doing so, I will assert that the requirement for judges to provide reasons for their decisions provides an important safeguard against the inadvertent misuse of evidence, and that reserving a decision provides judges the best opportunity to reflect on the evidence and its application, a process that puts judges in the best position to deliver an accurate and reliable verdict. It is in this careful contemplation that judges will be in the best position to determine what is true, and what is just a good story.

It cannot be disputed that delay is a substantial issue within the criminal justice system, and that judicial delay is a contributing factor. However, I am of the view that the value of a judge's ability to reserve their decision is compelling, and that when balancing an accused's right to be protected from unreasonable delay with the need for a judge to carefully evaluate the evidence presented, it is the latter that should be given weight – not only from the perspective of judicial independence, but because of the underlying goal of the criminal justice system: to seek the truth. Accordingly, however the Court chooses to resolve the issue, I am of the view that the Court should err on the side of caution before restricting – whether explicitly or in effect – a judge's ability to reserve.

II. *K.G.K.*: WAITING FOR AN ANSWER

Turning to the case of *K.G.K.*, the trial judge was faced with determining the veracity of allegations of ongoing sexual misconduct spanning about ten years. The complainant, who was 14 years old at the time initially disclosed the abuse in 2013, reporting that she had been abused since she was a child. She provided a videotaped statement to police, and three years later testified at the trial. When he was arrested, the accused also made a statement. He denied some of the allegations, but admitted to some of the conduct alleged. He was ultimately charged with sexual offences from two different time periods; the first being September 2002 – April 2008, and the second being May 2008 – April 2013. In addition to the complainant, the accused testified in his own defence.¹³

The decision of the trial judge to reserve his decision is entirely understandable. He was faced with determining the truth of serious allegations, with a key element of the Crown's case being the evidence of a

¹³ *KGK (CA)*, *supra* note 10 at paras 179-182.

17-year-old complainant testifying about events that had occurred during her childhood; the first of which when she was four years old.¹⁴ In assessing her evidence, the trial judge was required to determine her credibility in a manner appropriate to her presentation at trial; however, he had to separate that from his determination of her evidence's reliability, as her perception from childhood would be different than those of an adult.¹⁵ Taking time to thoughtfully consider the evidence was appropriate; the problem was how much time passed before a decision was issued.

The timeline relevant to the delay issue is straightforward: the accused was charged on April 11, 2013. The preliminary inquiry proceeded as originally scheduled in October 2014, and the trial was completed – again as initially scheduled – on January 21, 2016. The trial judge reserved his decision, and after some time passed indicated that it would be delivered on October 25, 2016. The accused filed his delay motion the day before, and requested that the trial judge recuse himself from hearing it, which he did.¹⁶ In the midst of these events, the Supreme Court of Canada released its decision in *Jordan* on July 8, 2016.¹⁷

As is evident from the timeline, this was not a circumstance similar to many other cases where delay has been an issue, in that it was not marked by numerous adjournments and discrete delays.¹⁸ Rather, the dominant portion of the delay at issue was the nine months taken by the trial judge to render a decision. The issue to determine was how that delay impacts an 11(b) evaluation, vis-à-vis the *Jordan* framework.

A. The First Look: Going All the Way Back

As the trial judge recused himself, Jolay CJQB heard the delay application.¹⁹ Reviewing the legal framework for unreasonable delay, he summarized the *Jordan* approach and noted that the Supreme Court did not

¹⁴ *Ibid* at paras 233-234, 237.

¹⁵ See *R v W(R)*, [1992] 2 SCR 122 at 134, 13 CR (4th) 257.

¹⁶ KGK (QB), *supra* note 9 at paras 2, 4, 7-14; KGK (CA), *supra* note 10 at paras 1, 24-39.

¹⁷ *Jordan*, *supra* note 1.

¹⁸ The only period of time that was argued to fall on defence surrounded the scheduling of the trial date; there was an approximately 11-week period where the Crown and court was available but the defence was not. However, even if attributed to the defence, this period would not reduce the delay below the *Jordan* ceiling. See KGK (QB), *supra* note 9 at paras 41, 83.

¹⁹ KGK (QB), *supra* note 9 at para 4.

consider decision delay in that decision.²⁰ He agreed with the Crown's submissions that "the principle of judicial independence and the right to a trial within a reasonable time must both be given their full effect and, at the same time, reconciled in a way that respects the place of both the principles in our Constitution."²¹

Ultimately, Joyal CJQB held that while judicial delay can be considered under 11(b), it does not fall within the *Jordan* framework.²² He concluded that the application of presumptive ceilings to such delay would result in one constitutional principle "trumping" the other, and also recognized that inclusion of decision delay in the presumptive ceilings would present practical problems both in the context of scheduling and in the way a judge approaches their decision.²³

To determine a standard that would appropriately reconcile the competing constitutional interests presented, Joyal CJQB relied on the Supreme Court of Canada decision in *R v Rahey*.²⁴ *Rahey* is a decision from before even the well-known cases of *R v Askov* and *R v Morin* – a time where the approach to 11(b) was quite unsettled. This is demonstrated by *Rahey* itself: it features four separate judgements, each from two judges (with some overlap between decisions), and has been described as being "notoriously difficult to analyze" as a result.²⁵ Despite this, the focus of *Rahey* was a judicial delay of 11 months stemming from a defence motion for a directed verdict, and so, correctly interpreted, it may provide some precedential authority.²⁶ While the Court in *Rahey* was divided on fundamental aspects of the analysis, it was unanimous in concluding that the delay at issue was unreasonable. Lamer J (as he then was) stated:

[T]he eleven-month delay was the result of inaction on the part of the trial judge when faced with a decision that generally is made within a few days. Glube C.J.T.D. called his delay "shocking, inordinate and unconscionable". The Court

²⁰ *Ibid* at para 29.

²¹ *Ibid* at paras 46-47, citing *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 50 [*Same-Sex Marriage*], and *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 70, 137 DLR (4th) 142.

²² *KGK (QB)*, *supra* note 9 at paras 43, 64, 66.

²³ *Ibid* at para 6, 54-55.

²⁴ *R v Rahey*, [1987] 1 SCR 588, 2 WCB (2d) 217 [*Rahey* cited to SCR].

²⁵ Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 446.

²⁶ *Rahey*, *supra* note 24 at 604-605.

of Appeal referred to his “disgraceful slowness”. In the words of s. 11(b), the delay is unreasonable[.]²⁷

Relying on the above passage, Joyal CJQB held that the standard for evaluating judicial delay is whether it is “shocking, inordinate and unconscionable.”²⁸ In his view, this “high threshold” is necessary as it is only that standard that will allow the competing constitutional interests to be reconciled and balanced.²⁹ He then applied the transitional exceptional circumstance from *Jordan* to the 33-month delay that occurred before the judicial delay, and the *Rahey* standard to the decision delay. He concluded that neither delay infringed 11(b) and dismissed the application.³⁰

B. Appellate Review: A Three-Way Split

Given the novel issue and the recently revamped approach to 11(b), it is unsurprising that the matter was appealed. What may be surprising is that the Manitoba Court of Appeal – which rarely offers a dissent – issued three separate judgements, each of which advocate for a different approach to the evaluation of judicial delay. It is ironic in that the multiple approaches and lack of clear direction harken back to *Rahey*; however, it departs from *Rahey* in that the panel was not unanimous in their conclusions.

1. Justice Hamilton Assesses Under the *Jordan* Framework

Hamilton JA (in dissent) disagreed with Joyal CJQB’s conclusion that the Supreme Court had established a test of “shocking, inordinate and unconscionable” for evaluating judicial delay. In her view, those words were simply the way a lower-court judge described the delay in *Rahey*, and the Supreme Court decision simply related the judge’s description.³¹ She interpreted *Rahey* as establishing the test as, “whether the decision-making time, in the context of all of the circumstances of the case, is unreasonable for the purposes of addressing an accused’s section 11(b) motion for a stay of proceedings.”³²

In her detailed analysis, Hamilton JA considered a number of pre-*Jordan* Supreme Court decisions that dealt with 11(b) to provide context for

²⁷ *Ibid* at 612.

²⁸ KGK (QB), *supra* note 9 at para 65, citing *Rahey*, *supra* note 24 at para 43.

²⁹ KGK (QB), *supra* note 9 at para 77.

³⁰ *Ibid* at paras 83, 94-95, 103-105.

³¹ KGK (CA), *supra* note 10 at paras 161-170.

³² *Ibid* at para 169.

“considering the majority decision in *Jordan*.”³³ She held that the principle which results from those cases are that decision delay is part of the inherent time requirements of a case. Under the *Morin* analysis, such times were generally considered neutral, but could count against the Crown where the time extended past what was reasonable.³⁴

From that context, she considered the *Jordan* decision, including factual aspects of the proceedings. She noted that the total delay in *Jordan* included two weeks of decision delay after the preliminary inquiry, and that the Supreme Court indicated that the time before the Court is “the time up to when a conviction is entered.”³⁵ Also important to her analysis was that the Court in *Jordan* relied on the *Morin* guidelines for institutional delay in establishing the presumptive ceilings, before adding additional time for other factors. These “inherent time requirements” included a judge’s decision-making time.³⁶

Based on her analysis, Hamilton JA concluded that judicial delay should be evaluated within the *Jordan* ceilings.³⁷ She recognized that judicial independence is a constitutional principle, but concluded that removing decision delay from the *Jordan* framework would effectively remove judges from the actors called to address the culture of complacency addressed in *Jordan*.³⁸ Applying the timelines and the transitional exceptional circumstance to this case, she held that the delay was unreasonable, and would enter a stay of proceedings.³⁹

2. Justice Cameron upholds the Queen’s Bench Decision

Cameron JA agreed with the conclusion that judicial delay falls under 11(b), and adopted the *Rahey* standard.⁴⁰ It was her view that Lamer J’s comments, considered in their totality and in context, amounted to using

³³ See *ibid* at para 76, citing *Rahey*, *supra* note 24; *R v Conway*, [1989] 1 SCR 1659, 34 OAC 165; *R v Askov*, [1990] 2 SCR 1199, 11 WCB (2d) 224; *R v Morin*, [1992] 1 SCR 771, 12 CR (4th) 1; *R v MacDougall*, [1998] 3 SCR 45, 128 CCC (3d) 483; *R v Godin*, 2009 SCC 26; *R v Vassell*, 2016 SCC 26.

³⁴ *KGK (CA)*, *supra* note 10 at paras 99-101, 105.

³⁵ *Ibid* at para 108-109.

³⁶ *Ibid* at para 111, citing *Jordan*, *supra* note 1 at paras 52-53.

³⁷ *Ibid* at paras 7, 115-119, 126-128.

³⁸ *Ibid* at paras 120-122.

³⁹ *Ibid* at paras 171-172.

⁴⁰ *Ibid* at paras 173-174, 219, 228.

the terms “shocking, inordinate and unconscionable” interchangeably with “unreasonable in the circumstance of decision-making delay.”⁴¹

She disagreed that decision delay should fall under the *Jordan* presumptive ceilings. Rather, her view was that the Supreme Court’s silence on this question in both *Jordan* and *Cody* – where the Court did address other steps the judiciary can take to fight delay – indicates that the Court did not intend for judicial delay to be considered in that analysis.⁴² While she agreed with Hamilton JA that the *Morin* analysis classified decision delay as an inherent time requirement, Cameron JA interpreted the ceilings in *Jordan* as referring to “trial process issues and not the time required for judicial decision-making.”⁴³ She also expressly agreed with Joyal CJQB’s assessment of the practical difficulties surrounding scheduling and decision-making that would result if the *Jordan* ceilings were imposed on judicial delay.⁴⁴

Considering the nine months of decision delay, Cameron JA agreed that the time was long, but was not persuaded that Joyal CJQB’s assessment was unreasonable. She was likewise not persuaded that he erred in his assessment under the transitional exceptional circumstances regarding the pre-decision delay time period. Accordingly, she held that 11(b) was not infringed.⁴⁵

3. Justice Monnin calls for a Contextual Assessment

In brief reasons, Monnin JA agreed with the conclusion that judicial delay falls under 11(b), and moreover agreed with Hamilton JA that the Supreme Court in *Rahey* did not intend to establish “shocking, inordinate and unconscionable” as the test for judicial delay. However, he disagreed with Hamilton JA’s approach of evaluating decision delay under the *Jordan* ceilings, instead calling for “a separate and discrete approach recognising the ‘tension’ between the right to trial within a reasonable time and the

⁴¹ *Ibid* at paras 221-223.

⁴² *Ibid* at paras 191-192.

⁴³ *Ibid* at para 194, citing *Jordan*, *supra* note 1 (“the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case” at para 53 [emphasis added]).

⁴⁴ *Ibid* at paras 209-210, citing KGK (QB), *supra* note 9 at paras 54-55.

⁴⁵ *Ibid* at paras 245, 249-250. Cameron JA also dismissed other grounds of appeal raised that had no bearing on the delay arguments; see paras 251-283.

ability of a judge to take the time necessary to render a reasoned and just decision.”⁴⁶

In his view, a contextual approach is required to balance factors such as “the complexity of the trial, the decisions arising from the nature of the evidence, and a judge’s or court’s particular workload” in determining whether the decision delay is reasonable.⁴⁷ In this case, he agreed with the conclusion of Cameron JA that the delay, while long, was not unreasonable.⁴⁸

III. GOOD STORIES MAKE FOR HARD DECISIONS

Judges must develop, maintain and put into practice the mental discipline necessary to (i) only consider evidence deemed admissible, (ii) for the purpose(s) permitted by law, and (iii) apply the law to that evidence properly in order to yield a just result. But as everyone knows, once one has heard something it cannot be unheard.

More subtly, judges often hear evidence that is admissible for a particular purpose – narrative, for example, or to demonstrate a police officer had objectively reasonable grounds to arrest – but is not admissible for the judge to consider it in determining whether the accused committed the charged offence.⁴⁹ This is a challenging situation that requires a judge to compartmentalize their mind, a process that actors in the justice system tend not to question.

How evidence is delivered is also an important consideration for judges. A well-told account from a witness who is articulate, likable, and appears sincere may be difficult to disbelieve on first impression – especially when the witness is ‘sure’ of what they are testifying to. Conversely, the testimony given by a witness who is poorly-spoken and recalcitrant is easily dismissed. These understandable tendencies are not in accordance with a proper critical evaluation of evidence by a finder of fact. Demeanour evidence has,

⁴⁶ *Ibid* at paras 285-287.

⁴⁷ *Ibid* at para 288.

⁴⁸ *Ibid* at para 289.

⁴⁹ See e.g. David M Paciocco, “The Perils and Potential of Prior Consistent Statements: Let’s Get it Right” (2013) 17:2 Can Crim L Rev 181 (“[t]he primary challenge is that they are each rules of ‘restricted admissibility.’ In other words, while each exception permits a prior consistent statement to be proved, the use that can be made of that proof is limited and differs between exceptions” at 182).

therefore, been the subject of extensive commentary by courts, lest it assume a place of prominence in the fact finder's analysis.⁵⁰

William Twining writes that stories are "necessary," explaining that "stories help us to make sense of events, to structure an argument, and to provide coherence."⁵¹ One only needs to observe a criminal trial to see the truth of Twining's observation. Witnesses are often directed to give their evidence in a narrative form, as doing so is more likely to present a clear picture of their testimony than breaking it down in a non-linear fashion. However, Twining opines that stories are not just necessary, but also "dangerous," warning:

[I]n legal practice they are also wonderful vehicles for 'cheating'. For instance, they make it easy to sneak in irrelevant or unsupported facts, to appeal to hidden prejudices or stereotypes, and to fill in gaps in the evidence. 'Good' stories tend to push out true stories-and so on.⁵²

Even when parties do not intend to "cheat" by introducing inappropriate evidence through the story telling mechanism, the same effect can be achieved through negligence or inadvertence. Consider, for example, the recent case of *R v Barton*, where all parties – Crown, defence, trial judge, and witnesses – described the victim as "a prostitute," and a "Native girl" or 'Native woman'" throughout the trial.⁵³ Even if done without any intention of subverting the law of evidence, such pejorative references fall squarely within the types of narrative that Twining is concerned about.

The potential for prejudice is acknowledged in the general rule of evidence itself, under which even relevant evidence is inadmissible if the prejudicial effect outweighs its probative value. The common law has developed numerous exclusionary rules regarding specific types of evidence recognizing that admission would result in improper or prohibited

⁵⁰ See e.g., *NS (Ont CA)*, *supra* note 12 at para 55; *NS (SCC)*, *supra* note 12 at paras 99-108; *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 at para 66 1; *R v PG*, 2012 ONSC 4646 at paras 31-33; 9129-9321 *Quebec Inc v R*, 2007 TCC 2 at para 31, 155 ACWS (3d) 86; *R v Pelletier*, 1995 ABCA 128 at para 18, 165 AR 138; *New South Wales (State Rail Authority) v Earthline Constructions Pty Ltd (In Liquidation)* (1999), 160 ALR 588 (Australia HC); see also Olin Guy Wellborn III, "Demeanor" (1991) 76 Cornell L Rev 1075.

⁵¹ William Twining, "Evidence as a Multi-disciplinary Subject" (2003) 2:2 L Probability & Risk 91 at 102.

⁵² *Ibid* [footnotes omitted].

⁵³ *R v Barton*, 2017 ABCA 216 at paras 116, 124, leave to appeal to SCC granted, 37769 (8 March 2018).

reasoning, or that certain evidence simply has no probative value. Similarly, Parliament has codified the approach to admission of evidence surrounding other sexual conduct, in acknowledgement that it has been used in ways that cannot be supported.⁵⁴

Exclusionary rules are predicated on the notion that if a jury doesn't hear the inadmissible evidence, their deliberations will not be affected by it. In a judge-alone trial, our system depends on the ability of judges to put such evidence out of their mind. When dealing with appropriate uses of evidence, we rely on judges to provide correct and comprehensive jury charges. Naturally, it follows that judges are expected to apply the law properly when they are acting as finder of fact.⁵⁵

A. Judicial Decision-Making is Hard

Even for the judge who is keenly aware of the appropriate and inappropriate uses of a particular piece of evidence, the judicial decision-making process presents numerous challenges. One of the fundamental determinations for a trial judge is the evaluation of a witness's credibility and the reliability of their evidence. Justice Lynn Smith explained the quandary succinctly:

Human beings are not only deceptive but frequently unreliable. Most often this is unintended; we make mistakes for any number of reasons. Our powers of observation and recollection are what they are: imperfect. As well, we may firmly, but wrongly, believe that something happened in a certain way because we are thinking wishfully, or because we are fearful, confused or misled. But sometimes we are unreliable because we knowingly set out to deceive.⁵⁶

On first glance, a determination of credibility seems simple: do you believe the witness is telling the truth? People make similar judgements every day, in matters ranging from the trivial to the vital. Judges, though, bear the onus of explaining their belief: why have they come to the conclusion they have?⁵⁷ Furthermore, they are rarely called on to deal with trivialities: the

⁵⁴ *Criminal Code*, RSC 1985, c C-46, s 276.

⁵⁵ In fact, as a matter of doctrine, judges are presumed to know the law and apply it properly, taking all relevant evidence into account: *R v Pomeroy*, 2007 BCSC 142 at para 39. See also *R v Morrissey*, [1995] 22 OR (3d) 514 at para 27, 26 WCB (2d) 436 (CA); *R v Francis*, 2018 NSCA 7 at para 29.

⁵⁶ Justice Lynn Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNB LJ 10 at 10.

⁵⁷ See *R v REM*, 2008 SCC 51 [REM] ("[t]he object is not to show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show *why* the judge

decisions made by judges, even on the most minor criminal matters, may have far-reaching implications for the parties in the case.

The challenge presented in the ‘basic’ assessment of credibility and reliability was commented on, albeit indirectly, in the recent case of *R v Ryon*.⁵⁸ The appellant in *Ryon* was convicted of sexual assault after a trial in which the only issue was whether sexual intercourse had taken place. The complainant said there had been brief intercourse; the appellant said there had not been. The complainant had consumed LSD and MDMA, and the appellant had drunk alcohol on the evening in question.⁵⁹

Ryon appealed his conviction on several grounds, the first alleging that the trial judge had erred in failing to assess credibility in accordance with *W.(D.)*, referring to the well-known recommended instruction for dealing with circumstances where an accused testifies or calls evidence.⁶⁰ Beginning its comments on that ground, the Court indicated, “Whether ‘*W.(D.)*’ was properly considered and applied is perhaps the most popular ground of appeal arising from criminal trials.”⁶¹ The *per curiam* panel proceeded to explain a myriad of ways that even the simplified approach may be misunderstood and misapplied.⁶²

The fact that an alleged misapplication of the *W.(D.)* test is one of the most popular grounds of appeal is illustrative of the challenge faced by judges. *W.(D.)* itself was a response to a specific issue; it was intended to serve as a warning to the trier of fact to avoid the “credibility contest” or from simply “making a choice between two alternatives” when dealing with conflicting accounts.⁶³ As Smith explained, “it is wrong to draw a straight line from the acceptance of the evidence of a complainant, or a rejection of the evidence of the accused, to a conclusion that the accused is guilty of the alleged crime.”⁶⁴

made that decision” at para 17 [emphasis in original]).

⁵⁸ *R v Ryon*, 2019 ABCA 36 [*Ryon*].

⁵⁹ *Ibid* at paras 1, 4-5, 9, 11-12, 18.

⁶⁰ *Ibid* at para 19. See *R v W(D)*, [1991] 1 SCR 742 at para 11, 12 WCB (2d) 551.

⁶¹ *Ryon*, *supra* note 58 at para 20. See also the comments of Watson JA (“the guidance in *W.(D.)*... appears to have become almost a *pro forma* ground of appeal in both jury and non-jury trial cases” at paras 73-74).

⁶² *Ibid* at paras 26-54.

⁶³ Lisa Silver, “The *WD* Revolution” (2018) 41:4 Man LJ 307 at 308-309, citing *R v Nimchuk*, [1976] 33 CCC (2d) 209, 1977 CarswellOnt 980.

⁶⁴ Smith, *supra* note 56 at 20.

The simplified approach set out by Cory J in 1991 has achieved “iconic status” and is “the principles enshrined in the decision are readily identifiable by mere mention of the case initials.”⁶⁵ Yet despite this predominance in the area of credibility assessments, *W.(D.)* has not made a judge’s job any easier, and as detailed in *Ryon*, may result in misunderstanding or misapplication of the appropriate principles. Notably, the appeal in *Ryon* was allowed and a new trial ordered, on the basis of a misapplication of the *W.(D.)* framework.⁶⁶

The challenges faced by a trial judge in the area of decision-making extend far beyond credibility findings. Judges are often called upon to make findings of fact, sometimes in cases where the evidence is purely circumstantial. Judges, like juries, are expected to do so on the basis of their knowledge and experience with the world. But as Smith explains:

[O]ur assessments of plausibility depend upon our sometimes very modest store of personal or learned experience. To put it bluntly, what might seem wholly plausible to me might seem entirely implausible to someone who has lived a different and more sheltered life than I have, or a less sheltered life...

My point is that in assessment of plausibility, the subjective element is inescapable, often ineffable, and elusive of contradiction.⁶⁷

Thus, even for the judge who is consciously focusing on what she perceives to be the intrinsic believability of the evidence, such an approach still calls for caution. What is clear is that there is no approach or technology that if followed or used will allow judges to easily determine what evidence should be accepted and what should be dismissed.⁶⁸ Instead, judges will have to continue applying the principles summarized in *R v B  land*:

[I]n the resolution of disputes in litigation, issues of credibility will be decided by human triers of fact, using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual’s

⁶⁵ Silver, *supra* note 63 at 308.

⁶⁶ *Ryon*, *supra* note 58 at paras 69-71.

⁶⁷ Smith, *supra* note 56 at 34-35.

⁶⁸ See e.g. *ibid* (“In six laboratory studies [of polygraph effectiveness], false positives were returned for 8% to 15% of participants, while false negatives were returned for 7% to 10% of participants. The results in field studies were even worse: in five studies, false positives were returned for 12% to 47% of participants. One study was an outlier that returned only 1% false negatives, but for the other four studies false negatives were returned between 11% and 17% of participants” at 28-29).

evidence fits into the general picture revealed on a consideration of the whole of the case.⁶⁹

B. The Benefits of Reserving for Consideration

While our system presumes that judges will make decisions in accordance with law, we also require judges to issue reasons for their decisions.⁷⁰ Whether oral or written, the critical functions of judicial reasons are to explain why the result is a conviction or acquittal, to provide public accountability, and permit appellate review.⁷¹ A subset of the latter is that they illustrate how evidence was used. Thus, a judge's reasons act as a check against improper application of evidence.

Of course, simply because a judge is compelled to give reasons does not preclude an improper weighing or application of evidence. If it was that simple, we would simply require judges to give written reasons for all trials and we could do away with 90-percent of appellate matters. Reserving their decision, though, allows a judge time to carefully consider the evidence they have heard and make prudent findings based on a measured weighing of the evidence. The Supreme Court of Canada has repeatedly acknowledged this. In *R v Sheppard*, Binnie J stated that “within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented.”⁷² It was not long after in *R v R.E.M.* that McLachlin CJC wrote:

[R]easons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law. As one judge has said: “Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.”⁷³

Credibility findings are an excellent example of the type of findings that will benefit from this careful consideration. The challenges that may arise in making credibility findings was discussed above in relation to *W.(D.)*.

⁶⁹ *R v B  land*, [1987] 2 SCR 398 at para 68, 36 CCC (3d) 481, cited in Smith, *supra* note 56 at 18.

⁷⁰ REM, *supra* note 57 at paras 10-14.

⁷¹ *Ibid* at paras 13, 15; see also *R v Sheppard*, 2002 SCC 26 [*Sheppard*]; *R c Dinardo*, 2008 SCC 24 at para 24.

⁷² *Sheppard*, *supra* note 71 at para 23 [emphasis added].

⁷³ REM, *supra* note 57 at para 12, citing *United States v Forness*, 125 F (2d) 928 at 942 (2d Cir 1942) [emphasis added].

This section, though, provides assistance in answer to those challenges. Taking credibility findings as an example, in *R v Rhayel*, Epstein JA minimized – nearly to the point of elimination – the use of demeanour when a judge is making credibility findings.⁷⁴ Her concern is obvious: that a judge may accept a witness's evidence simply because they present in a favourable way without conducting a critical examination of the evidence itself. While the position taken by Epstein JA may be viewed as extreme, she is undoubtedly correct that observations of demeanour should not be the lynchpin of a credibility assessment. The trial judge who reserves and conducts a careful review of all the evidence, though, has the opportunity to consider each witness and what value their evidence has. It may even result in a judge deciding opposite to their initial impressions.

In my view, written reasons provide the best opportunity for critical reflection. The judge has the benefit of making an unhurried decision, and, through the writing process, a second opportunity to critique their own reasoning. This permits the cautious judge to also recognize where they may be being influenced by those irrelevant, unsupported facts or hidden stereotypes that Twining is concerned with. Thus, thorough written reasons are invaluable in sorting true accounts from those which are merely good stories. For that reason, it is important for judges at all levels to reserve their decisions and issue written reasons when they feel it necessary. Aside from contributing to the jurisprudence and development of the law in their particular jurisdiction, judges would be assisting themselves in making better-reasoned and more reliable decisions.⁷⁵

⁷⁴ *R v Rhayel*, 2015 ONCA 377, 123 WCB (2d) 255 (“[c]ases in which demeanour evidence has been relied upon reflect a growing understanding of the fallibility of evaluating credibility based on the demeanour of witnesses. It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness” at para 85).

⁷⁵ See *REM*, *supra* note 57 (“Finally, reasons are a fundamental means of developing the law uniformly, by providing guidance to future courts in accordance with the principle of stare decisis. Thus, the observation in H Broom's *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd ed 1885) at 147-148: ‘A public statement of the reasons for a judgment is due to the suitors and to the community at large – is essential to the establishment of fixed intelligible rules, and for the development of law as science’” at para 12).

IV. *K.G.K.*: ONWARD AND UPWARD

The three-way split in the Court of Appeal serves to illustrate just a few of the options that will be available to the Supreme Court of Canada. The Court could adopt any of the appellate decisions, or could go in an entirely different direction. Certainly, the Court has shown its willingness to take a creative approach to delay in *Jordan*, and demonstrated its commitment to creating a more efficient system in *Cody*. The question here is how it will balance the competing constitutional interests at play and what impact its approach will have on trial judges.

A. Principled, but Practical

The question of how to deal with judicial delay engages important constitutional interests. The importance of the right to be tried in a reasonable time was explained in *Jordan*:

As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole. Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial.⁷⁶

Judicial independence is equally important. As Joyal CJQB summarized, it has its roots both in the preamble to the *Constitution Act, 1867* and in s. 11(d) of the *Charter*; has been acknowledged as an unwritten constitutional principle; and is "acknowledged as foundational for public confidence in the proper administration of justice and for the constitutional separation of powers."⁷⁷ The Supreme Court in *R v Beauregard* described judicial independence as:

[T]he complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.⁷⁸

⁷⁶ *Jordan*, *supra* note 1 at paras 19-20, cited in *KGK (QB)*, *supra* note 9 at para 17.

⁷⁷ *KGK (QB)*, *supra* note 9 at para 50, citing *R v Campbell*, [1997] 3 SCR 3, 10 WWR 417; *Ell v Alberta*, 2003 SCC 35 at para 19; *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at paras 37-38.

⁷⁸ *R v Beauregard*, [1986] 2 SCR 56 at 69, 26 CRR 59, cited in *KGK (QB)*, *supra* note 9 at

Dealing with competing, and sometimes conflicting *Charter* rights is one of the most challenging quandaries the courts face.⁷⁹ As a hierarchical approach to specific *Charter* rights has been soundly rejected, it falls to the courts to achieve a balance that “fully respects the importance of both sets of rights.”⁸⁰

In conducting its balancing, the Court will need to bear in mind the practical effects of its decision. In this regard, it would do well to remember its own caution in *Jordan*: “All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.”⁸¹ The majority decision in *Jordan*, which was grounded in a foundation of strong principles, nonetheless strived to be practical. This is illustrated in *Cody*, where the Court stated:

In setting the presumptive ceilings, this Court recognized that an accused person’s right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have “already accounted for [the] procedural requirements” of an accused person’s case. For this reason, “defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay” and should not be deducted.⁸²

This passage indicates that the Court was taking care to be mindful of the practical time requirements of not only a prosecution, but of the defence to prepare its case, including bringing pretrial applications. In *K.G.K.*, a significant practical question was highlighted by Joyal CJQB:

It is also worth noting that the inclusion of judicial reserve time in the presumptive ceiling would put both the Crown and the courts in the untenable position of having to schedule all matters in a manner so as to have them completed many months below the ceiling in order to accommodate potential judicial writing time. As noted by way of example, if as in the present case, nine months (of judicial delay) were considered as a reference point, all Superior Court trials would have to be completed within 21 months, and Provincial Court trials within nine months.⁸³

para 49.

⁷⁹ Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 58.

⁸⁰ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 75, 120 DLR (4th) 12; *Gosselin c Québec (Procureur général)*, 2005 SCC 15 at para 2; *Same-Sex Marriage*, *supra* note 21 at para 50.

⁸¹ *Jordan*, *supra* note 1 at para 139.

⁸² *Cody*, *supra* note 3 at para 29 [citations omitted].

⁸³ *K.G.K. (QB)*, *supra* note 9 at para 55 [emphasis added].

The majority's approach in *Jordan* was aimed at simplifying the 11(b) analysis, which had the desirable effects of providing a layer of predictability and certainty for judicial actors: the Crown can conduct itself with an eye on the constitutional clock, and defence is no longer left guessing as to whether it has been 'long enough' to prevail on a delay application.

It is challenging to reconcile the method of evaluating judicial delay within the *Jordan* framework with the Court's clear intention to provide predictability in the criminal process. Should the Court go this route, it is hoped that it will resolve its earlier approach with the unpredictability that would result from the parties (mainly the Crown) having to guess at how much time a particular judge may require to write a decision. Moreover, in circumstances like those arising in the instant case, one also hopes the Court would provide direction to the parties regarding what steps will need to be taken to remain within the spirit of *Jordan* while still respecting the independence of the judiciary. In short, while the Court must, of course, decide this case in a manner that reflects the purposive approach to *Charter* rights, it must also bear in mind the practical effects of its decision, and provide direction once again to all the actors in the justice system on how to properly exercise each party's particular role.

B. Approach Must Protect a Judge's Ability to Reserve and Consider

What must also not be lost in this analysis is that a trial is a search for truth. The ability of a judge to reserve their decision and conduct a detailed and thoughtful analysis of the evidence they have received is a vitally important tool in that search. In my view, protecting the ability of a trial judge to do that should not be viewed as being contrary to the accused's interests. In fact, there are many circumstances where it is to the accused's benefit.

Another practical impact of applying the *Jordan* ceilings to decision delay that was considered in the lower courts was the varying periods of time that would be allotted to trial judges to make a decision. As Joyal CJQB explained:

[W]ere judges subject to the categorical and unconditional obligation to come to determinations within the presumptive ceilings, the manner in which the case was conducted or unfolded would determine the manner in which a judge approaches and perhaps makes his own or her own decision. In other words, in some cases which might conclude well below the ceiling, a judge would have many months to

render well-crafted written reasons. In other cases which conclude very close to the ceiling, the judge might be left with mere days.⁸⁴

Putting aside the question of how to balance this potential result with judicial independence, the possibility – even likelihood – that trial judges will be placed in a position where their decision is ‘due’ in mere days is alarming. It takes little imagination to consider how rushed a judge in such a position may feel. This circumstance simply does not lend itself to a well-reasoned, thoughtful consideration of the evidence. Rather, it leads to missed details, overlooked nuances, and misunderstandings – all of which may contribute to a wrongful conviction. The comments of Trotter J in *R v Lamocchia* are apt: “Within reasonable limits, it is desirable that judges take the time that they need to prepare carefully reasoned decisions.”⁸⁵

We cannot be so zealous in our quest to eliminate delay that we hamper the ability of judges to properly exercise their judicial decision-making duties. Indeed, while the focus of *K.G.K.* will, quite rightly, be on the analysis to be applied to decision delay under 11(b), this case also provides an opportunity for the Supreme Court to emphasize the useful functions of a well-crafted decision, and encourage judges not to hesitate to take the time reasonably necessary to produce them.

This applies equally to provincial and superior court judges. As Joyal CJQB stated:

Whatever the unique requirements in a given case, it must always be remembered that in every case, judges should aim to provide considered reasons which ‘enhance the qualities of justice in the criminal process in many ways.’⁸⁶

It is well-known that provincial courts across the country are busy. They deal with the vast majority of criminal matters, and their dockets are correspondingly full. The Supreme Court has commented previously in the context of reviewing a trial judge’s reasons on appeal that an appellate court must consider the “time constraints and the general press of business in the criminal courts.”⁸⁷ This principle must also be borne in mind when evaluating decision delay. It is by no means uncommon for unanticipated issues to arise in the course of proceedings that do not lend themselves to

⁸⁴ *Ibid* at para 54 [emphasis added].

⁸⁵ *R v Lamocchia*, 2012 ONSC 2583 at para 7 [*Lamacchia*].

⁸⁶ *KGK (QB)*, *supra* note 9 at para 76, citing *Lamacchia*, *supra* note 85 at para 7 [emphasis added].

⁸⁷ *Sheppard*, *supra* note 71 at para 55; see also *REM*, *supra* note 57 at para 45.

an immediate ruling.⁸⁸ Nor can a judge be expected to focus all their time and energy on one matter. As Trotter J observed:

[I]t is not reasonable to expect judges in a busy trial court...to drop or re-arrange all other obligations when it becomes necessary to take time to consider a legal issue that surprisingly arises during a trial.⁸⁹

The Supreme Court in *Jordan* stated that all courts must be mindful of the practical impacts of their decisions on future cases.⁹⁰ It is hoped that the Court will heed its own caution when deciding *K.G.K.*, and will ensure that the ability of judges to reserve their decisions and conduct the vitally important process required of them is strongly protected.

V. CONCLUSION

We expect much of our judges. We expect them to adjudicate emotionally-charged and complex matters dispassionately, taking into account evidence from complainants, accused persons, police officers and third parties. They are required to not only know the law of evidence, but also have the mental discipline to disregard evidence they have heard that they subsequently deem inadmissible, and to only use admissible evidence for the appropriate purposes. We require them to determine who is telling the truth, who is lying, and who may be mistaken, and come to a conclusion of what happened in a particular circumstance. And after they have done all that, we expect and require them to explain why they have concluded as they have.

There is no denying that delay is a problem within the criminal justice system, and that all parties – including the judiciary – have a role to play in ameliorating it. The culture of complacency criticized by the *Jordan* majority simply must be addressed at all levels. Regardless of what framework the Supreme Court of Canada chooses to implement regarding decision delay, however, we cannot be so focused on delay that we fail to pay adequate attention to other important aspects of the trial process that by their very nature take time.

The value in a well-crafted decision that is the product of careful and thoughtful reflection cannot be understated. While being held to a

⁸⁸ See e.g. *Lamacchia*, *supra* note 85 at paras 5-6.

⁸⁹ *Ibid* at para 7.

⁹⁰ *Jordan*, *supra* note 1 at para 139.

reasonable standard, judges must be free to reserve their decision and take the time that is reasonably necessary to analyze the evidence, consider the issues, make their findings and properly apply the law. It is hoped that the Supreme Court in *K.G.K.* will reaffirm and protect this vitally important exercise, as it is in this careful reflection that judges are best able to sort true accounts from those which are merely good stories.

The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry into its Origins; and Repercussions in the Case of Hassan Diab

M A E V E W . M C M A H O N *

ABSTRACT

In 1999 Canada's *Extradition Act* came into force. Its objectives included facilitating Canadian cooperation with the impending International Criminal Court as well as with international war tribunals, for example concerning Rwanda, and the former Yugoslavia. It also sought to improve Canada's ability to respond to requests from states that operate under civil law. The subsequent high success rate in securing extraditions has arguably been at the cost of adequate consideration of human rights issues. Critics argue that the role of extradition judges is akin to that of a 'rubber stamp.'

The case of Hassan Diab reflects *par excellence* the shortcomings of the Act, and proceedings and processes associated with it. Arrested in 2008 in connection with the bombing near a synagogue in Paris in 1980, the proceedings stretched over six years. Following extradition to France in 2014, Diab was subject to over three years of incarceration. He was finally released in January of 2018 and was able to return to Canada. Despite this lengthy deprivation of liberty, Hassan Diab had never been charged. Meanwhile, during his release, French prosecutors continued to seek its termination and have Diab brought to trial in France.

* Associate Professor, Department of Law and Legal Studies, Carleton University, Ottawa. Acknowledgements: Thanks to Professor Robert J. Currie of the Schulich School of Law, Dalhousie University, for his helpful insights on issues in Canadian extradition law. Thanks also to members of the Hassan Diab Support Committee for numerous and informative discussions of his case over the years.

In addition to providing some information about Hassan Diab's case, this article reviews how the legislation was presented in Parliament in 1998-99. Of note is how the lowering threshold of evidence involved was glossed over, and justified, by officials in their presentations and rationales. Arguably the information provided lends support for calls for a public inquiry into Diab's case, including a detailed review and reform of the legislation.

Keywords: extradition; evidence; record of the case; innocence; threshold; manifestly unreliable; Supreme Court; Hassan Diab; *Ferras*; Canadian Senate

[I]t would be a grave injustice to extradite me for a crime that even the evidence shows I did not commit. My life has been turned upside down because of unfounded allegations and suspicions. I am innocent of the accusations against me. I have never engaged in terrorism...I am not an anti-Semite. I have always been opposed to bigotry and violence.¹

- Hassan Diab, 13 April 2012

'There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial'...I found the French [handwriting] expert report convoluted, very confusing, with conclusions that are suspect...the case presented by France against Mr. Diab is a weak case; the prospects of conviction in the context of a fair trial seem unlikely. However, it matters not that I hold this view.²

- Justice Robert Maranger, 6 June 2011

The guilt or innocence of the person sought is not a relevant consideration in the extradition context.³

- Justice Minister, Rob Nicholson, 4 April 2012

¹ Hassan Diab, "Hassan Diab Press Conference, Ottawa, April 13, 2012" (13 April 2012) at 00h:04m:19s (in response to Justice Minister Rob Nicholson's agreeing to the extradition surrender order for Hassan Diab on April 4), online (video): *YouTube* <www.youtube.com/watch?v=Ht-SEs-OGfg&feature=youtu.be> [perma.cc/5LHB-FBW2].

² *Attorney General of Canada (The Republic of France) v Diab*, 2011 ONSC 337 at paras 11, 121, 191 [Diab] citing *United States v Anderson*, 2007 ONCA 84 at para 28 [emphasis added].

³ Letter from Justice Minister, the Honourable Rob Nicholson to lawyer Donald Bayne responding to submissions concerning the possible surrender of Hassan Diab to France, (4 April 2012) at 27.

I. INTRODUCTION: ISSUES ABOUT THE RATIONALES FOR CANADA'S *EXTRADITION ACT*, 1999

From his arrest on November 13, 2008 until the present (August 2019), the treatment of Canadian citizen and sociology professor Hassan Diab, as facilitated by a request from French authorities under Canada's *Extradition Act* of 1999, has bewildered many socio-legal observers. Principles of fundamental justice have often seemed absent with an emphasis on Canada's diplomatic commitment to international legal cooperation taking precedence. The deck seems stacked in favour of the requesting country while the rights of the person sought, as reflected in Hassan Diab's case, are minimized.

In an effort to illuminate issues concerning extradition in the Canadian context this narrative provides a brief summary of events concerning Hassan Diab's case to date. In addition, and stimulated by Diab's case, my objective is to provide a retrospective on the origins of the 1999 Act, which enabled the scenario experienced by Diab to ensue. I document rationales for the legislation as presented by Department of Justice officials in the late 1990s. I also highlight early concerns about the legislation expressed by advocates, practitioners, and scholars. These included expressions of serious concern about lowering the threshold of evidence against persons sought that was embodied in the Act, and the potential that this dropping of the evidence bar involved for potential human rights violations against persons sought. Arguably the case of Hassan Diab reflects, *par excellence*, the validity of the concerns of these early commentators.

By examining historical discussions introducing, and responding to, the 1999 legislation, it is hoped that this article will provide support for a meaningful review of the *Extradition Act* and the implementation of reform, in particular concerning the low evidentiary threshold it embodies. Arguably, a need exists for an increased role of judges in weighing the evidence. Another aspiration is to encourage further socio-legal scholarly attention on what has been a neglected topic.

II. THE EXTRADITION OF HASSAN DIAB (2014); HIS DETENTION IN FRANCE; HIS RELEASE (2018) AND THE AFTERMATH

On November 13, 2014 – following a total of six years of extradition proceedings – the Supreme Court of Canada announced its refusal to grant leave to appeal in the extradition case of Dr. Hassan Diab. Less than 23 hours later, Hassan Diab was removed from his cell at the Ottawa Carleton Detention Centre. He was taken to Montreal and put on a flight to France. Diab was subsequently incarcerated at Fleury-Mérogis Prison, located within a southern suburb of Paris.

The context of the extradition was the allegation by French authorities that Diab was the primary suspect in a bombing directed at a synagogue on rue Copernic in Paris, on October 3, 1980. The bombing resulted in four deaths and the injuries of at least forty other people.

On January 12, 2018, the lead *juge d'instruction*, Jean-Marc Herbaut, together with his deputy Richard Foltzer, issued a final order of release. This followed eight previous calls for release by Justice Herbaut along with three other judges. No charges had been laid. The ruling in January 2018 reiterated previous evidence that Hassan Diab had been not in Paris, but in Beirut taking exams at the time of the bombing. Further exonerating evidence included Diab's fingerprints, palm prints, and a physical description, none of which matched those of the suspect. In the view of the judges, there was insufficient evidence to proceed to trial.⁴ Hassan Diab was released from Fleury-Mérogis Prison on the same day. He arrived back in Ottawa in the early hours of Monday January 15, 2018.

Although no charges had ever been laid, and despite arguably incontrovertible evidence of Hassan Diab's innocence, both prosecutors in France and lawyers representing some Copernic victims and their families

⁴ Chris Cobb, "Updated: French courts drop terror allegations against Ottawa prof Hassan Diab", *Ottawa Citizen* (12 January 2018), online: <ottawacitizen.com/news/local-news/french-courts-drop-terror-allegations-against-ottawa-prof-hassan-diab> [perma.cc/E6G7-K4TU] (Chris Cobb provided extensive media coverage of this final order); see also Tu Thanh Ha, "Judges order dismissal of terrorism case against Ottawa academic jailed in France", *Globe and Mail* (12 January 2018), online: <www.theglobeandmail.com/news/national/judges-order-dismissal-of-terrorism-case-against-ottawa-professor-jailed-in-france/article37589093/> [perma.cc/NZ2R-4PSB]; see generally Justice for Hassan Diab, online: <www.justiceforhassandiab.org> [perma.cc/T26W-FUQF].

continued to appeal his release and to press for a trial. A decision on these matters was scheduled for July 6, 2018. However, on that date the matter was re-scheduled for October 26, 2018. At that time, the French Court of Appeal's decision was yet again postponed. Instead the French judges ordered another review of the handwriting analysis which had been used to extradite Diab. The review was to be concluded by February 15, 2019.⁵ As of August, 2019, no further information about the status of the review, nor of any prosecutorial efforts to re-ignite the case, had been made publicly available.

Over 10 years after his arrest in 2008, and in the absence of charges or meaningful evidence, Hassan Diab and his family continued to go through this nightmarish ordeal

The case of Hassan Diab merits close attention for a variety of reasons, but chiefly because this case offers unique insights into extradition law in Canada. These insights arise in part because of the protracted length of the proceedings, and the intense litigation involved every step of the way. Although extradition law is intended to be a straightforward and expeditious process, the legal proceedings in this instance stretched from November 13, 2008, through to November 14, 2014. From Hassan Diab's point of view, however, the stress actually began back in the fall of 2007. At that point, he had been told by a French journalist (Jean Chichizola of *Le Figaro*), who had travelled to Ottawa, that he was the primary suspect in the synagogue bombing case. From the outset, Hassan Diab asserted his innocence, his lack of anti-Semitism, and his generally pacifist stance. With the names 'Hassan' and 'Diab' being relatively common in the Arab world, he believed that this was a case of mistaken identity.

The initial extradition decision by Justice Robert Maranger in Ottawa was issued on June 6, 2011. In his judgement, Justice Maranger commented on the unusual length of the extradition hearing. In his words:

The jurisprudence at the appellate level is replete with reminders that an extradition hearing in Canada is meant to be an expeditious, summary process...This proceeding was anything but expeditious or summary...Once the person was arrested it seems as though battle lines were drawn, and virtually every part of the process was intensely litigated. Matters such as bail, admissibility of defence evidence, *Charter* applications, translation issues, etc. went on for days,

⁵ Michelle Zilio, "French court delays appeal decision in Hassan Diab case, orders new handwriting analysis", *Globe and Mail* (26 October 2018), online: <www.theglobeandmail.com/politics/article-french-court-delays-appeal-decision-in-hassan-diab-case-orders-new/> [perma.cc/U42A-2QQX].

sometimes weeks; the result was a protracted, at times acrimonious, extradition case that spanned more than two years.⁶

After the initial extradition, it was another ten months before the Justice Minister signed the surrender order (on April 4, 2012); and just over two years more before the Ontario Court of Appeal released its decision upholding both the extradition committal and the Minister's surrender order (on May 15, 2014). The final part of the process involved an application by Dr. Diab's lawyers for leave to appeal to the Supreme Court of Canada. Relevant documents were submitted on August 11 and on September 22, 2014. As noted, it was on November 13, 2014, that the Supreme Court's decision not to grant leave was announced, so terminating the extradition process. As is customary, the Canadian Supreme Court did not provide any reasons for its decision not to hear the case.

A. Mainstream Media Coverage of the Hassan Diab Extradition Case

In addition to the notable length of the extradition proceedings concerning Dr. Hassan Diab, his case is also unusual for the amount of public attention that it garnered. In part this was due to ongoing, and often in-depth, media reporting on the case, notably by journalist Chris Cobb of the *Ottawa Citizen*. In late 2014 Cobb observed that, since the passage of the *Extradition Act* in 1999, there had been about 100 cases per year, for a total of about 1,500 cases between 1999 and 2014. About 90% of these cases involved requests from the United States of America to Canada.⁷

⁶ *Diab*, *supra* note 2 at paras 14-15.

⁷ Chris Cobb, "Canada's extradition law: A legal conundrum", *Ottawa Citizen* (15 November 2014), online: <ottawacitizen.com/news/local-news/canadas-extradition-law-a-legal-conundrum> [perma.cc/5WPN-654X] (citing extradition lawyer Gary Botting as stating that only 5 of the approximately 1,500 extradition requests during the period 1999 to 2014 had been rejected. Data provided by the Department of Justice in the spring of 2018 suggested that about 90% of extradition requests received between 2007 and 2017 that led to an arrest resulted in extradition); see Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform", *Ottawa Citizen* (30 May 2018), online: <www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289> [perma.cc/86MK-K7FR]; see also Sean Fine, "The overlap of law and politics: Meng Wanzhou's extradition explained", *Globe and Mail* (27 January 2019), online: <www.theglobeandmail.com/canada/article-the-overlap-of-law-and-politics-meng-wanzhou-extradition-explained/> [perma.cc/NEM6-CFRM]. In general, there is limited statistical information concerning requests, arrests, and extraditions in connection with the *Extradition Act*. Hopefully more data will become available given

While the media do provide some information (especially in high profile cases such as that involving pro marijuana activist Marc Emery and, more recently and currently, concerning that of Huawei executive Meng Wanzhou) it has been rare for extradition cases to get such prolonged and detailed media attention as has been seen in relation to Hassan Diab.

Following Hassan Diab's extradition, the media in Canada continued to report on the progress (and often lack thereof) of his case in France. Notable in the ongoing reporting has been the observation that it was unclear as to whether the case would actually proceed to trial. In a particularly informative article,⁸ as of November 2016, Chris Cobb reported that on three separate occasions in 2016, the French *juge d'instruction* Jean-Marc Herbaut had filed release orders to free Hassan Diab on bail, and that one other judge had also ordered his release. However, on each occasion, these were challenged by prosecutors and overturned by a three-member panel of appellate court judges; the grounding for this included Diab's purported flight risk, and that his release could "disrupt public order."

The first two orders for Hassan Diab's release came in May of 2016. On May 11, the lead investigating judge signed an order in favour of releasing Hassan Diab on bail. In Herbaut's opinion, Dr. Diab did not pose a flight risk. The prosecution requested an emergency appeal. With that appeal granted, the first release order was overturned on May 13. However, on that same day, another judge who reviews pre-trial detention also ordered release. Pursuant to this, on Saturday, May 14, 2016, Hassan Diab was released in Paris under a form of house arrest with bail conditions. These conditions included electronic monitoring. Yet in contrast to the approximately five and a half years of electronic monitoring that Hassan Diab had endured in Canada prior to extradition, where he had been obliged to pay approximately \$2,000 per month to the company involved, in France he was not obliged to pay. Another contrast to Hassan's previous house arrest in Canada was that, in Paris, he was permitted to walk outside

growing calls for transparency in this domain.

⁸ See Chris Cobb, "'Consistent evidence' suggests Ottawa academic did not commit 1980 terrorist bombing, French judge says", *Ottawa Citizen* (13 November 2016), online: <ottawacitizen.com/news/local-news/consistent-evidence-suggests-ottawa-academic-did-not-commit-1980-terrorist-bombing-french-judge-says> [perma.cc/WB47-NB2F]. Throughout the extradition process in Canada, and during the early stages of Hassan Diab's incarceration in France, the lead *juge d'instruction* had been Marc Trevidic. In the fall of 2015, Trevidic had been obliged to step down owing to a ten-year limit on anti-terrorist judges' eligibility to hold the position and Herbaut then assumed the lead role.

unaccompanied for three hours every day. In Canada, Dr. Diab had only been permitted to leave his home in the company of a surety.

The second release order appears to have taken French prosecutors by surprise; this is how Hassan Diab's release was able to occur. Even still, on Friday, May 20, 2016, in communicating with his supporters in Ottawa from Paris via Skype, Diab cautioned them that re-incarceration was imminent, as prosecutors were once again opposing his release and were likely to be successful.

This proved to be the case and on Tuesday, May 24, 2016, he returned to Fleury-Mérogis Prison. Notably, despite prosecutors' again opposing his release on grounds including an alleged flight risk, and that his release could pose a threat to "public order," Hassan Diab's release had been entirely without incident.⁹

Chris Cobb further observed in a November 2016 article that Herbaut's calls for release were becoming more pointed. The *juge d'instruction*'s two release orders issued on October 27 were partly based on information he had gathered during a recent trip to Lebanon, and his interviews with contemporaries of Hassan Diab at the time of the bombing. These, plus other pieces of evidence gathered by Justice Herbaut, indicated that Hassan Diab had been in Lebanon studying at a university in Beirut and taking examinations during the period that French authorities claimed that he had been in France. An important component of the evidence gathered by Justice Herbaut was that, as of September 28, 1980, Hassan Diab had accompanied his then girlfriend – Nawal Coptý – to the airport in Beirut (as she was going to England for academic reasons). This information was corroborated by Ms. Coptý's passport, as well as her father's testimony and passport. This finding was significant, because, according to French

⁹ Relevant events were documented by Chris Cobb, "French judge orders terror accused Diab's release", *Ottawa Citizen* (17 May 2016), online: <ottawacitizen.com/news/national/french-judge-orders-terror-accused-diabs-release> [perma.cc/Z6GZ-8NZ2]; see also Chris Cobb, "French appeal court orders Diab back to jail pending trial", *Ottawa Citizen* (24 May 2016), online: <ottawacitizen.com/news/local-news/french-appeal-court-orders-diab-back-to-jail-pending-trial> [perma.cc/7Y4S-HMQ4]. See generally Donald Bayne, "Donald Bayne, Hassan Diab's lawyer, May 20, 2016" (20 May 2016) at 00h:00m:00s, online (video): *YouTube* <www.youtube.com/watch?v=Wt70pRMOGi8> [perma.cc/L2SD-7MJN] (which documents remarks made by Donald Bayne, Hassan's Diab's lawyer in Ottawa, at a support event at the Unitarian Congregation in Ottawa, coinciding with Hassan Diab's temporary release).

prosecutors, their suspect had been present in France from September 20, 1980, through to October 7, 1980.

In light of the evidence contradicting the case against Hassan Diab, the judge ruled that the situation “demand[ed]” his release, and underscored that word in making his point. As quoted by Chris Cobb, the judge stated:

[T]he fact that there is some doubt about his involvement demands that he should be released without waiting for the outcome of the ongoing investigation...There is no evidence to indicate, or even imply, that these investigations will enable to gather [sic] further incriminating evidence against him.¹⁰

In short, Herbaut – as the lead investigating judge – had not only repeatedly called for Diab’s release, but, as of late fall 2016, was publicly indicating that there may not have been sufficient evidence to proceed to trial. He conceded, however, that there were still outstanding questions about Hassan Diab’s passport at the time of the bombing. The passport had been lost or stolen and would turn up in the possession of a militant with links to a terrorist group about one year after the Copernic bombing.

In his *Ottawa Citizen* article of November 13, 2016, Chris Cobb also reported on, and quoted, scathing observations about the ongoing legal saga by members of Hassan Diab’s legal defence teams in France and Canada. In Paris, defence lawyer William Bourdon described Hassan Diab’s situation as “unprecedented.” In his observation:

After 36 years and since no one else was indicted, the court of appeal is clinging to Hassan Diab. He is detained because of the judges’ fear to be accused for laxity in the context of today’s fight against terrorism in France. Such a situation would be inconceivable in an ordinary law situation.¹¹

In the same article, Ottawa defence lawyer Donald Bayne was cited as having praised judge Herbaut for his stance, and went on to state:

I never give up hope, but there are divisive right-wing forces in France and an atmosphere of terrorism paranoia...We have put a Canadian in this terrible position and every Canadian citizen at risk. Our courts have failed Hassan Diab at every level through an extradition system that is a shambles of injustice.¹²

As noted, despite *juge d’instruction* Jean-Marc Herbaut’s expressed concerns about the weakness of evidence, as well his highlighting of exonerating evidence provided by at least six witnesses, and by the university where Hassan Diab had been taking exams at the time of the bombing, his

¹⁰ See Cobb, *supra* note 8.

¹¹ *Ibid.*

¹² *Ibid.*

release order was again challenged by prosecutors and overturned by the same three-member panel of judges at the court of appeal.

During the following months, what had become the equivalent of a lengthy legal ping-pong rally continued. There were further calls for release by Justice Herbaut, as well as several other judges (e.g. in December, 2016, and on two occasions in April, 2017). On each occasion, the orders were again challenged by prosecutors and quashed by the court of appeal. By the end of April, 2017, there had been six calls for Hassan Diab's release by judges.¹³ In early May, the sixth release order, which had been supported by two investigating judges, was also quashed by the appellate court.

On July 28, 2017, lead investigating judge Jean-Marc Herbaut issued a notice about ending the investigation. Normal procedure at that stage allows the French defence and prosecution lawyers one month to file their responses. It would then be expected for justice Herbaut to take approximately ten days to render a decision on whether to end the case against Hassan Diab, or alternatively, to commit Dr. Diab to stand for trial. In this instance, however, while the defence made their submissions during the allotted time, the prosecution omitted to do so. Moreover, while a timely submission by the prosecution should have been the norm, there was no legal sanction for the failure to do so.¹⁴

Another factor that further delayed the case was that, in late September of 2017, *juge d'instruction* Jean-Marc Herbaut received a visit from members of what was initially identified as a "foreign nation," and later more specifically as officials of the Israeli secret service. They were offering support in French efforts to bring charges against Hassan Diab. However, the '*note blanche*' that they provided was later described as providing old, recycled, anonymous and contradictory allegations.¹⁵ Arguably, this event looked like an attempt to put political pressure on French judicial authorities.

¹³ Megan Gillis, "Canada must intervene with France on terror accused Diab's behalf, lawyer, wife plead", *Ottawa Citizen* (27 April 2017), online: <ottawacitizen.com/news/local-news/canada-must-intervene-with-france-on-terror-accused-diabs-behalf-lawyer-wife-plead> [perma.cc/CN38-WVSC].

¹⁴ Chris Cobb, "Ottawa academic Hassan Diab still in legal limbo in Paris prison", *Ottawa Citizen* (16 October 2017), online: <ottawacitizen.com/news/local-news/ottawa-academic-hassan-diab-still-in-legal-limbo-in-paris-prison> [perma.cc/58ZX-MBH6].

¹⁵ Chris Cobb, "French court blocks release of Ottawa academic Hassan Diab for eighth time", *Ottawa Citizen* (15 November 2017), online: <ottawacitizen.com/news/local-news/french-court-blocks-release-of-ottawa-academic-hassan-diab-for-eighth-time> [perma.cc/UWT3-XMVB]; see also Michelle Zilio, "Trudeau urged to intervene in case

Despite this pressure, as of November 6, 2017, a fourth judge had ordered Hassan Diab's release. This represented the eighth release order by four different judges in Paris. Once again, the prosecution immediately filed an appeal. On November 14, 2017, three years after Hassan Diab's extradition to France, the court of appeal again denied his release. Speaking with CBC radio host Piya Chattopadhyay (of *The Current*) several days later, Hassan Diab's Ottawa lawyer Donald Bayne observed that, although French investigating judges repeatedly referred to "corroborated and consistent evidence" of his client's innocence, the situation was, as he described:

[No]w beyond legal and logical. It's got into into diplomatic and political. You've got a Canadian who has been declared innocent by the investigators in France, and yet he is being held because of the political situation in France. That's not legal. That's political.¹⁶

In light of this, both Donald Bayne and Hassan Diab's spouse – Rania Tfaily – called upon the Canadian government to assume a more proactive role in seeking Diab's release and return to Canada. During the above segment, a brief clip of an interview with a representative of the French prosecution also re-confirmed that a primary obstacle to their not acceding to Diab's release was their perception that it could pose a threat to "public order."¹⁷

Here it is important to reaffirm that it was not the prosecution's opinion that Hassan Diab represented a threat to public order himself, but that his release could pose a threat.

In December of 2017, the French prosecution provided investigation judges with written submissions. Although they acknowledged the credibility of evidence concerning Hassan Diab's innocence, and the doubts about allegations against him, they were still asking for a trial.¹⁸ In response,

of Ottawa Professor jailed in France", *Globe and Mail* (14 November 2017), online: <www.theglobeandmail.com/news/politics/trudeau-urged-to-act-for-jailed-ottawa-professor-in-france/article36983126/> [perma.cc/SA7D-MH6J].

¹⁶ Piya Chattopadhyay, "Canadian Hassan Diab remains in prison after French court blocks release for 8th time", *CBC Radio, The Current* (17 November 2017), online: <www.cbc.ca/listen/shows/the-current/segment/14839865> [perma.cc/T9M2-XFAB] (with interviews of Donald Bayne, Rania Tfaily – Dr. Diab's spouse – and a spokesperson for the French prosecution).

¹⁷ *Ibid.*

¹⁸ Justice for Hassan Diab, Press Release, "French Prosecutor Concedes Credible Evidence Points to Diab's Innocence, but Asks for Trial" (14 December 2017), online: <www.justiceforhassandiab.org/press-release-2017-12-14> [perma.cc/WML6-XTKX] [Justice for Diab].

the investigating judge reissued a notice concerning his intent to close the investigation soon with a decision involving an ending of the case, or alternatively, a referral to trial.

As noted earlier, this decision, by lead *juge d'instruction* Jean-Marc Herbaut and his deputy Richard Foltzer, came on Friday, January 12, 2018. They ruled that there was insufficient evidence to proceed to trial. Hassan Diab was released from Fleury-Mérogis Prison that day. Prosecutors immediately worked towards an appeal, as did lawyers representing some of the victims and their families.

The same day, in a radio interview by Giacomo Panico with Donald Bayne on CBC's *All in a Day*, Bayne explained that the previous release orders had been interim release orders, pending the investigation. However, the release order earlier that day put an end to the investigation. It was a conclusive final judgement that said there was no reliable evidence against Hassan Diab, and that he is innocent. Under the previous release orders, the mere filing of an appeal by the prosecution sufficed to rescind the release order. However, the final order could only be rescinded after an appeal had actually been heard by the court, and if the court came to a different conclusion.

Donald Bayne also reported that Diab's French defence lawyers had observed that such a strong statement of innocence had never been made before by terrorism investigating judges. The Hassan Diab case was unprecedented in France. The program also broadcast Prime Minister Justin Trudeau's quote that "we will be reflecting on possible lessons learned in the coming days and months."¹⁹

Facilitated by Canadian consular officials in Paris, Hassan Diab arrived back in Ottawa early on Monday, January 15, 2018. His release and return, and the press conference that took place on January 17, received widespread coverage in the media.²⁰

¹⁹ Giacomo Panico, Interview with Donald Bayne, "Hassan Diab's charges dropped" CBC, *All in a Day* (12 January 2018), online: <www.cbc.ca/listen/shows/all-in-a-day/segment/15459709> [perma.cc/L3H9-CYZ2].

²⁰ See e.g. the following: "Justice, finally, for Hassan Diab", *Ottawa Citizen* (12 January 2018), online: <ottawacitizen.com/opinion/editorials/editorial-justice-finally-for-hassan-diab> [perma.cc/86N9-FBDK]; Terry Milewski, Interview of Rania Tfaily, CBC TV, *Power and Politics* (12 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/power-and-politics/episode/15460857> [perma.cc/RZG2-97YB]; Carol Off, Interview of Rania Tfaily, CBC Radio, *As it Happens*, (12 January 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/episode/15460565>

While the coverage in the mainstream media of the Hassan Diab extradition case was relatively limited during the extradition proceedings in Canada, dating from the time of his arrest in November 2008 to the Supreme Court's declining the leave application in November of 2014 (except, as noted, by the work of Chris Cobb of the *Ottawa Citizen*, with his work sometimes being picked up by other media outlets), from the spring of 2017 there was growing attention from the CBC, including in their national radio and television outlets. Journalists raised and discussed questions about how an extradition from Canada could have taken place in the face of such flimsy and unreliable evidence. In turn, questions were raised about the content of the 1999 Canadian extradition legislation itself.

Following Dr. Diab's release from the Fleury-Mérogis Prison in Paris and his return to Canada, widespread national coverage continued. As of the spring and summer of 2018, the reporting reflected three major themes. Firstly, there was a focus on the *Extradition Act* and its perceived flaws. Secondly, questions were raised about the potential over-zealousness of some officials in the Canadian Department of Justice in facilitating and supporting French prosecutors in their efforts to gather more incriminating evidence at a point in the proceedings where the case against Hassan Diab

[perma.cc/ZCT7-V7UQ]; Michael Enright, "We're all at risk – Hassan Diab's lawyer on what's wrong with Canada's extradition system", Interview of Donald Bayne, *CBC Radio, The Sunday Edition* (14 January 2018), Toronto, online: <www.cbc.ca/listen/shows/sunday-edition/episode/15549781> [perma.cc/LTH7-ZD46]; Robyn Bresnahan, Interview of Rania Tfaily, *CBC Radio, Ottawa Morning* (15 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/ottawa-morning/segment/15487870> [perma.cc/6T62-K5H6]; Chris Cobb, "Ottawa academic Hassan Diab is back home, free for first time in a decade", *Ottawa Citizen* (16 January 2018), online: <ottawacitizen.com/news/local-news/ottawa-academic-hassan-diab-is-back-home-free-for-the-first-time-in-a-decade> [perma.cc/MLE4-QEYS]; Terry Milewski & Rosemary Barton, Interview of Donald Bayne and Hassan Diab, *CBC TV, Power and Politics* (17 January 2018), Ottawa, online: <www.cbc.ca/listen/shows/power-and-politics/episode/15494674> [perma.cc/QUH3-9LUH]; Carol Off, Interview of Hassan Diab *CBC Radio, As it Happens* (17 January 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/segment/15494669> [perma.cc/W239-7DUW]; Catharine Tunney, "After years in French prison, Diab is fighting to fix 'lousy' extradition laws", *CBC News* (17 January 2018), online: <www.cbc.ca/news/politics/hassab-diab-talks-terrorism-charges-1.4490927> [perma.cc/4N4N-HKPP]; Chris Cobb, "Exclusive: 'I feel so wonderful,' Diab discusses reuniting with family, release from French prison", *Ottawa Citizen* (17 January 2018), online: <ottawacitizen.com/news/local-news/exclusive-i-feel-so-wonderful-diab-discusses-reuniting-with-family-release-from-french-prison> [perma.cc/54K8-9EU3].

appeared to be in danger of falling apart. Questions were also raised about Canadian prosecutors not providing exonerating evidence to the Canadian extradition judge, Robert Maranger.²¹ Thirdly, the coverage post-release focused on calls by Hassan Diab, his lawyers, and his supporters to have a full public inquiry into the case, including an examination of the extradition legislation and processes more generally.

The call for a public inquiry was in contrast to the more modest proposals by Justice Minister Jody Wilson-Raybould who, as of May 29, 2018, informed the British Columbia Civil Liberties Association and Amnesty International that her officials had undertaken a “lessons learned” review of the case. She additionally reported that: “I have also asked for an independent external review of the matter.” Hassan Diab and his supporters were strongly of the opinion that an internal review lacked credibility given Justice officials’ ties to the existing legislation. It was further thought that an independent external review was insufficient. Their consensus again was that a full-fledged public inquiry with all the powers that would embody (e.g. concerning the attendance of witnesses, and the full disclosure of relevant documents) was what was needed.²²

²¹ One issue is that, on November 21, 2009, following the defence team’s discrediting of the original handwriting evidence against Hassan Diab (given that French handwriting experts had used some handwriting samples not even written by Diab), Canadian senior counsel with the International Assistance Group, Claude LeFrançois, sent an urgent memo to France seeking additional handwriting evidence – especially as the handwriting evidence had been a key part of the case. Another issue was that the Canadian prosecution also sought fingerprint evidence from France. This was provided, and as of January 11, 2010, a comparison by the Royal Canadian Mounted Police could not match the prints to those of Hassan Diab. This information was not provided to the Canadian court or defence team. Meanwhile, prosecutor LeFrançois had successfully argued for an adjournment on December 18, 2009, and would do so again on February 8, 2010. With the extradition hearing then set to start on June 14, 2010, prosecutor LeFrançois withdrew the original tainted handwriting evidence and submitted the new version. See David Cochrane & Lisa Laventure, “Canada helped France dig up evidence to extradite Ottawa man later freed on terror charges” *CBC News* (1 May 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-france-terrorism-investigation-1.4614855> [perma.cc/MK3L-QAYS].

²² See e.g. Carol Off, Interview of Donald Bayne, *CBC Radio, As it Happens* (1 May 2018), Toronto, online: <www.cbc.ca/listen/shows/as-it-happens/episode/15541492> [perma.cc/5URZ-827E]; David Cochrane & Lisa Laventure, “What more can you lose?”, *CBC News* (1 May 2018), online: <newsinteractives.cbc.ca/longform/hassan-diab-extradition-french-prison> [perma.cc/8NAJ-XLCZ]; Anna Maria Tremonti & David Cochrane, “Extradition could happen to anyone, says professor fighting for change in law” (Interviews of Hassan Diab, Donald Bayne & Professor Robert Currie),

On July 5, 2018 Justice Minister Wilson-Raybould announced that Murray Segal, prosecutor and former deputy attorney general of Ontario, had been appointed to conduct the external review. Segal was asked to consider whether Department of Justice officials had followed the law and departmental procedures during the extradition process. What was absent however was any request to examine the extradition legislation itself. Given the limited terms of reference, Hassan Diab declined to participate in what his lawyer Donald Bayne described (on his behalf) as appearing to be “little more than a concerted damage control effort.”²³ Once again, Hassan Diab and his supporters demanded a full public inquiry.

B. Social Media and Advocacy Coverage of the Hassan Diab Extradition Case

In addition to substantial coverage in the mainstream media, Hassan Diab’s case also presented an unusual groundswell of public support, received over the years during the proceedings in Canada and his imprisonment in France, as well as following his release and return to Canada. Indeed, Hassan Diab’s case has arguably been unprecedented in the extradition context in terms of civic expressions of concern, both about his case in particular, and about the broader characteristics of the 1999 legislation.

A factor in bringing public attention to the case has been a highly active campaign to support Hassan Diab conducted through social media. A

CBC Radio, *The Current* (2 May 2018), Toronto, online: <www.cbc.ca/listen/shows/the-current/segment/15541636 [perma.cc/U2FY-CFUP]; Chris Hall, Interview of Donald Bayne, CBC Radio, *The House* (5 May 2018), Ottawa, online: <www.cbc.ca/listen/shows/the-house/segment/15542356 [perma.cc/5EQF-TCLV]; Lisa Laventure & David Cochrane, “Canada’s high extradition rate spurs calls for reform. Extradited Ottawa professor Hassan Diab to call for a public inquiry”, *CBC News* (30 May 2018), Ottawa, online: <www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289 [perma.cc/WH53-7ZDH]; Alan Neal, Interview of Donald Bayne, CBC Radio, *All in a Day* (30 May 2018), Ottawa, online: <www.cbc.ca/listen/shows/all-in-a-day/segment/15547848 [perma.cc/E7YS-8GRL].

²³ See David Cochrane & Lisa Laventure, “Murray Segal to lead review of Hassan Diab’s extradition”, *CBC News* (5 July 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-extradition-france-external-review-1.4736033 [perma.cc/2W75-VPT3]; David Cochrane & Lisa Laventure, “Hassan Diab to boycott external review of 2014 extradition to France”, *CBC News* (24 July 2018), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france-extradition-1.4758418 [perma.cc/J6K9-AMKT].

primary source in this has been the work of the “Justice for Hassan Diab” support group, and their website: www.justiceforhassandiab.org. Prominent also has been the Facebook page – “Justice for Hassan Diab.” Numerous individuals and organizations have offered support. Relevant organizations include Amnesty International, Canada; the International Civil Liberties Monitoring Group; the British Columbia Civil Liberties Association; the Canadian Association of University Teachers; the Canadian Labour Congress; the Canadian Union of Postal Workers; Canadian Unitarians for Social Justice; Comité Justice Sociales des Soeurs Auxiliatrices; the Civil Liberties Association, National Capital Region; the European Group for the Study of Deviance and Social Control; Independent Jewish Voices/Voix Juives Indépendantes – Canada; Ligue des Droits et Libertés; the National Union of Public and General Employees; Union Syndicale Solidaires, France; and the United Jewish People’s Order/L’Ordre Uni du Peuple Juif – Toronto.

Early in 2017, an additional social media step was taken with the release of a short documentary – *Rubber Stamped: The Hassan Diab Story*. Copies of the documentary were made available through the Justice for Hassan Diab website and were posted on YouTube.²⁴

In light of the onerous extradition process experienced by Hassan Diab in the context of excellent legal support, as well as extensive media and public attention, one of the questions that arises is: what is the nature of the extradition process in Canada, in cases that are beyond the media or public spotlight? As legal scholar Robert Currie has observed, although there can occasionally be media attention to extradition cases both in Canada and internationally, “the extradition process itself is unfamiliar to most practitioners and members of the public.”²⁵ Hassan Diab’s extradition lawyer – Donald Bayne – has similarly observed: “[Extradition law] is one of the dark corners of the criminal justice system.”²⁶

²⁴ *Rubber Stamped: The Hassan Diab Story*, Documentary (13 minutes), directed by Amar Wala, edited by Andrea Conte, online (video): *YouTube* <www.youtube.com/watch?v=WVv_J7s78Bc> [perma.cc/6S5V-RW5D].

²⁵ Robert J Currie, “Extradition”, Joel E. Pink & David C. Perrier, eds, *From Crime to Punishment: An Introduction to the Criminal Law System*, 8th ed (Toronto: Carswell, 2014) at 669. Cases alluded to by Currie include Luka Magnotta in the context of extradition to Canada, and Edward Snowden and Julian Assange in relation to other countries.

²⁶ Chris Cobb, “Extradition being attempted ‘under the cover of darkness.’ Process worse than that used against Maher Arar: lawyer”, *Ottawa Citizen* (3 November 2010), online: <www.meforum.org/campus-watch/18094/extradition-being-attempted-under-the>

In an effort to shed some light on this relatively unknown part of the legal and justice system, I provide below a retrospective analysis of the emergence and implementation of the 1999 *Extradition Act* in Canada. A key issue is how justice officials' emphasis on international cooperation and diplomacy as political considerations arguably went hand-in-hand with the displacement of human rights considerations on behalf of persons being sought for extradition from Canada. In particular, the lowering of the evidentiary threshold in the new legislation carried the potential for excessive intrusions into the liberty rights of persons sought. The failure to adhere to basic principles of fundamental justice would later become apparent in the case of Hassan Diab.

III. CANADA'S *EXTRADITION ACT*, 1999 – RATIONALES PRESENTED BY JUSTICE OFFICIALS

Indeed, other than as a matter of form, it is difficult to understand why the judicial role has been retained in the new Act, as the extradition judge has little, if anything, to do.²⁷

- Anne Warner La Forest, 2002

Under Canada's extradition law, the duty of a Canadian court and the minister of justice is, first and foremost, to the government seeking an individual. That individual no longer enjoys the rights that are supposed to be accorded everyone else facing the deprivation of their liberty. Canadian standards of evidence disappear, and the case is presumed to be reliable, regardless of how many inaccuracies, errors and contradictions are contained within it. One cannot present evidence to show one's innocence, and the requesting state need not present any evidence of that innocence.²⁸

- Matthew Behrens, 2013

Extradition usually²⁹ involves "the formal rendition of a criminal fugitive from a state [i.e. country] that has custody (the requested state) to a

cover> [perma.cc/V6AX-D54E] [Cobb, "Extradition being attempted"].

²⁷ Anne Warner La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 at 172.

²⁸ Matthew Behrens, "The Extradition Case of Dr. Hassan Diab", *Canadian Dimension* 47:5 (15 October 2013), online: <canadiandimension.com/articles/view/the-extradition-case-of-dr.-hassan-diab> [perma.cc/5TTM-49Z9].

²⁹ The word "usually" here is deliberately chosen because, in the case of Hassan Diab, the exact circumstances under which he was sought by the French authorities, including the actual likelihood of him being put on trial (as opposed to only being wanted for questioning), would become a major issue in the period subsequent to Justice

state that wishes either to prosecute or, if the fugitive has already been convicted of an offence, to impose a penal sentence (the requesting state).”³⁰ As Robert J. Currie further observes, “[i]t is important to note that extradition is geared towards the apprehension and transfer of individuals to face criminal proceedings,”³¹ and that it should be distinguished from other forms of involuntary transfers including, for example, deportation, security certificates in Canada, as well as what Currie describes as the “regrettable practices of abduction and ‘extraordinary rendition’.”³² Anne W. La Forest similarly observes:

Extradition is firmly entrenched in the concept of territorial sovereignty. It is an act, usually pursuant to a treaty, under which the executive of one state, the requested state, surrenders a person within its territory to another state, the requesting state, in order to face criminal proceedings in the latter state.³³

The phenomenon of extradition can be traced back to antiquity.³⁴ However, it is generally recognized that the ‘modern’ origins of extradition can be located in Europe, and notably France during the late 1700s and subsequent century. As La Forest observes, major developments of extradition treaties internationally during the mid-19th century overlapped with a growing emphasis on the importance of protecting individual liberties.³⁵ In Canada, legislation governing extradition from 1877 until the end of the twentieth century was influenced by the British *Extradition Act 1870*.³⁶ Influences on the British legislation included the “increased movement of persons brought on by colonization and technology.”³⁷ From the outset in Canada, the extradition process had two components, namely:

Maranger’s extradition decision (June 2011) and prior to Justice Minister Rob Nicholson’s decision to agree to the surrender (April 2012).

³⁰ Robert J. Currie, *International and Transnational Criminal Law*, 1st ed (Toronto: Irwin Law, 2010) at 447.

³¹ Currie, *supra* note 25 at 669-670.

³² *Ibid* at 670.

³³ La Forest, *supra* note 27 at 96.

³⁴ See e.g. Christopher L. Blakesley, “The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History” (1981) 4:1 BC Int’l & Comp L Rev 39 (For scholarly debates about the precise origins of ‘modern’ legal notions of extradition).

³⁵ La Forest, *supra* note 27 at 97.

³⁶ *Extradition Act 1870* (UK), 33 & 34 Vict, c 52.

³⁷ La Forest, *supra* note 27 at 97.

executive and judicial. Moreover, and as observed by La Forest, the process has been “primarily an executive act.”³⁸

A watershed in extradition law in Canada arose in 1999 with the passage of a new *Extradition Act*. A variety of concerns and motives were identified as precipitating the new legislation. As described by Eleni Bakopanos, then Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, in presenting the legislation to the House of Commons in 1998,³⁹ these included the increasing need to be able to respond to transnational forms of crime and criminals. Ms. Bakopanos additionally observed that because of the growing ease of international travel, and with the evolution of technology, transnational crime and criminals rather than being an exception, had now become “the norm.”

Another important rationale lay in Canada’s international law obligations. According to Ms. Bakopanos there had been calls from international bodies including the United Nations for countries “to put in place a comprehensive, effective and modern process for extradition.”⁴⁰ By contrast, the then existing legislation as provided in the *Extradition Act* and the *Fugitive Offenders Act* was described by Ms. Bakopanos as “antiquated.” She also highlighted the need for Canada to respond to the requirements of international criminal tribunals, especially those concerning Rwanda, and the former Yugoslavia.⁴¹ An objective of the act was to “ensure that Canada is not a safe haven for criminals seeking to avoid justice.”⁴²

In presenting the legislation an issue that was given prominence was the perception of a need to be better able to respond to, and facilitate, extradition requests from states that involved civil (as opposed to common) law jurisdictions. For Canadian officials there was a strong perception that such were the barriers for civil law jurisdictions in fulfilling the evidentiary

³⁸ *Ibid.*

³⁹ “Bill C-40, an Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act*, and the *Mutual Legal Assistance in Criminal Matters Act*, and to amend and repeal other acts in consequence”, 2nd reading, *House of Commons Debates*, 36-1, No 135 (8 October 1998) at 1605 (Ms Eleni Bakopanos) [Bill C-40 debate].

⁴⁰ *Ibid* at 1610.

⁴¹ *Ibid* at 1605-1630 (where references are made to future “entities,” including the then imminent International Criminal Court. In July of 1998, the Rome Statute of the International Criminal Court was adopted by 120 countries and entered into force in July, 2002. The inaugural session of the court took place in July 2003).

⁴² *Ibid* at 1605.

requirements of Canadian extradition law that requests that might otherwise have proceeded were not being submitted in the first place.⁴³ As reported by Eleni Bakopanos:

In the case of a number of requests from countries other than the United States extradition proceedings cannot be instituted. In other instances states are so discouraged by the different hurdles imposed by our current extradition law that they do not even initiate an extradition request. The primary problem is that the current legislation mandates that the foreign states submit evidence in support of their request in a form which meets the complicated requirements of Canadian evidentiary rules.⁴⁴

Within what might be described as this ‘comity conundrum’ the main impediment perceived as experienced by civil law states were the limits on ‘hearsay’ evidence being admissible in the context of Canadian extradition hearings. Reportedly, states that were not common law found it “difficult to comply with the requirement of sworn affidavits based upon first-hand knowledge of the events.”⁴⁵ Further, while difficulties with the evidentiary requirements of sworn statements and the lack of admissibility of hearsay were considered most extreme for civilian states even countries with a closer legal tradition to Canada’s were presented as experiencing challenges. In the words of Ms. Bakopanos:

For countries that do not have a common law system, and for which concepts such as hearsay are unknown, this requirement makes the preparation of a request for extradition a tremendously difficult task, and in some instances an impossible one. Even with countries with a similar legal tradition such as the United States, we have heard on numerous occasions how difficult it is to obtain extradition from Canada. In the context of our other common law jurisdictions such as Great Britain and Australia, Canada’s system is viewed as one fraught with difficulties due to the antiquity of our legislation.⁴⁶

A goal of the new legislation was to enhance Canada’s ability to comply with its international obligations, and to reaffirm the country’s commitment

⁴³ See e.g. La Forest, *supra* note 27 at 133-134 (where this concern was later described as “amorphous.” In presenting the act, no examples were given by Bakopanos. Evidence subsequently provided by experts could only find two decisions where reference was made to extradition requests which failed because of evidentiary considerations, and in one of those cases the information referred to was described as anecdotal.).

⁴⁴ Bill C40 debate, *supra* note 39 at 1610.

⁴⁵ *United States of America v Yang*, 56 OR (3d) 52, [2001] OJ No 3577 at para 24 (citing evidence adduced by the Attorney General in explaining the historical rationales for changes in the 1999 legislation).

⁴⁶ Bill C40 debate, *supra* note 39 at 1610.

to ‘comity’ regarding the legal systems of foreign states. Here, comity refers to the requirement that there should be “respect for the criminal proceedings of the requesting state.”⁴⁷ The concept also includes a “recognition of differences between the preliminary proceedings in the requesting state and in Canada, and that the extradition procedure in Canada should not have the effect of preventing or hindering the removal of persons in proper cases.”⁴⁸

While previous legislation was likewise reliant on the principle of comity the stumbling block lay in the boundaries set upon the admissibility of evidence. Under the prior legislation the process could be compared in some respects to a preliminary hearing whereby the purpose was to determine if an individual for whom extradition was being requested would have faced charges if the alleged offence had occurred in Canada. This purpose can be contrasted with that of a trial process itself. While the latter is concerned with weighing the evidence and determining if it is sufficient to convict the accused, the purpose of the extradition hearing was to decide if a *prima facie* case existed such that it would be appropriate to proceed to trial. It was not up to the extradition judge to investigate the evidence, but rather to decide, with the assumption that if the admissible evidence was correct, if it would suffice for proceeding to the next legal step.

Given the limited role of the extradition judge under the former legislation deference to treaty partners included that witnesses did not have to be produced or cross-examined. However case law provided guidelines concerning the need for evidence to be sworn. Hearsay was not admissible. In this way an effort was made to balance the liberty rights of the accused versus the diplomatic commitment to comity. Or, as La Forest observed, concerning the legislation prior to 1999:

This approach, which survived scrutiny under the *Canadian Charter of Rights and Freedoms*, and particularly under section 7,⁴⁹ represented a careful balance between

⁴⁷ La Forest, *supra* note 27 at 98.

⁴⁸ *Ibid* at 98-99

⁴⁹ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. (section 7 affirms that: “Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice”). Cases cited by La Forest supporting this observation include: *Canada v Schmidt*, [1987] 1 SCR 500; *Re Federal Republic of Germany and Rauca*, 1983 CanLII 1774 (ON CA), 41 OR (2d) 225; *United States of America v Cotroni*, [1989] 1 SCR 1469 [Cotroni].

the fugitive's right to a hearing in accordance with fundamental justice and the need of the state to cooperate in international criminal matters.⁵⁰

Arguably, some changes involved in the 1999 legislation shifted this delicate balance in a way favouring the interests of requesting states over the rights of the person sought. At first glance however, this might not have been apparent to those less familiar with the intricacies of extradition law in Canada. But, as will be described below, the 1999 legislation embodied profound changes in the content of extradition law in Canada. In the eyes of critics these changes involved a huge shift away from principles of fundamental justice. The adverse impact of these changes on persons sought for extradition from Canada would clearly be brought to light in the case of Hassan Diab.

Some of the reasons that the extent of changes involved in the 1999 legislation might not have been readily apparent to those less familiar with extradition law is because of the laudatory discourses adopted by officials in their presentations. One aspect of this was the repeated emphasis on how 'antiquated' legislation and processes were being replaced with 'modern' ones. There was also general agreement that the new legislation would greatly facilitate Canada's obligations to international bodies concerned with criminal law including, as previously noted, tribunals concerning atrocities in Rwanda, and the former Yugoslavia, as well as the impending International Criminal Court. Further, and as noted earlier, another dominant theme was to preclude Canada from becoming a 'safe haven' for criminals, and especially those involved in war crimes.⁵¹ Taken at face value each of these reasons for amending the legislation indeed appeared commendable.

Another reason that a profound shift in Canada's extradition legislation might not have been easily obvious is because officials emphasized positive aspects of the continuity between the new and previous legislation. In both the existing and upcoming proceedings there were executive and judicial aspects. Moreover, as Ms. Bakopanos elaborated, under the new legislation:

[T]he legal standard for extradition would be retained. That is, a Canadian judge will still have to be satisfied that there is sufficient evidence before her or him of the conduct underlying the request for extradition which, if it occurred in Canada,

⁵⁰ La Forest, *supra* note 27 at 99.

⁵¹ Bill C-40 debate, *supra* note 39 at 1610.

would justify a trial for a criminal offence. Lawyers like to refer to this as the *prima facie* test.⁵²

However, when examined more closely, it can be seen that the new legislation involved a seismic shift in what could be considered as evidence. Such was the extent of this shift that legal scholar Anne La Forest would question why the judicial role had been maintained at all under the new legislation when it allowed judges such a minimal ability to actually do anything.⁵³ The slackening of the rules around admissible evidence in extradition proceedings would likewise later lead activist critics such as Matthew Behrens to bemoan the lack of rights afforded to individuals such as Hassan Diab in facing extradition proceedings.⁵⁴

IV. GENERAL EXPRESSIONS OF CONCERN ABOUT THE LOWERING OF EVIDENTIARY STANDARDS IN THE *EXTRADITION ACT*, 1999

To a certain extent within the criminal defence bar, the prospects of winning at an extradition hearing or in submissions to the minister are largely laughable...Amongst the criminal bar, the chance of winning extradition cases is largely considered a joke.⁵⁵

- Paul Slansky, 17 March 1999

The notion of surrendering to a foreign state using evidence that is not admissible in a Canadian court is very troubling. The existing process has been accepted by the Supreme Court of Canada as being consistent with principles of fundamental justice.⁵⁶

- Anne Warner La Forest, 17 March 1999

⁵² *Ibid* at 1615.

⁵³ La Forest, *supra* note 27 at 172.

⁵⁴ Behrens, *supra* note 28; see also Matthew Behrens, "No evidence? No Problem. What Hassan Diab's extradition and imprisonment in France tells us about Canada's casual relationship with the rule of law", *Canadian Centre for Policy Alternatives* (1 March 2017), online: <www.policyalternatives.ca/publications/monitor/no-evidence-no-problem> [perma.cc/6X5V-PBHJ].

⁵⁵ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 62 (17 March 1999), "Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act* and the *Mutual Legal Assistance in Criminal Matters Act* and to amend and repeal other Acts in consequence" (Witness Testimony: Criminal Lawyers' Association of Ontario).

⁵⁶ *Ibid* (Witness Testimony: Anne W. La Forest, Dean of the Faculty of Law, University of New Brunswick).

Prior to the passage of the *Extradition Act* 1999 officials from the Department of Justice made presentations to members of the House of Commons and its Standing Committee on Justice and Human Rights, as well as to the Senate Standing Committee on Legal and Constitutional Affairs. During these presentations the impending law was praised for significantly updating the extradition legislation, for facilitating Canada in fulfilling its international law and comity obligations, and for preventing Canada from becoming a safe haven for fugitives from international justice. As summed up by Jacques Lemire,⁵⁷ senior counsel with the Department of Justice, while making a presentation to the Standing Senate Committee, the legislation “intends to bring Canada into the 21st century by remedying and eliminating cumbersome deficiencies in the current extradition regime.”

Mr. Lemire highlighted the difficulties for many states, especially those with civil law systems, in meeting the requirements of Canadian extradition law, and specifically with respect to the provision of sworn affidavits devoid of hearsay. He reiterated that the impending legislation contained a new process for meeting the *prima facie* requirement. In short, what would now be considered adequate in presenting the alleged case against the person sought was a “record of the case.”

As had earlier been explained by Parliamentary Secretary Eleni Bakopanos, in speaking to the House of Commons on October 8, 1998, while the legal standard of a *prima facie* case would be continued, what would now be different was the format in which evidence could be presented:

What would be modified is the form of evidence that could be presented to the extradition judge. This approach addresses the current difficult evidentiary requirement for first person affidavits devoid of hearsay, which is the main problem encountered by states requesting extradition from Canada.

...

Under the new legislation the judge would admit into evidence documentation contained in a record of the case. The record would contain evidence gathered according to the rules and procedures followed in the requesting state. It may contain a summary of the evidence available prepared by the appropriate foreign

⁵⁷ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 60 (10 March 1999), “Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act* and the *Mutual Legal Assistance in Criminal Matters Act* and to amend and repeal other Acts in consequence” (Mr. Jacques Lemire, Legal Counsel, International Assistance Group, Department of Justice Canada).

judge or official. The evidence may not be in the form of an affidavit and may be unsworn. The objective is to accept the evidence in the form used by the foreign state, provided it is sufficient according to a Canadian extradition judge to demonstrate criminal conduct under Canadian law and to require a trial in the requesting state.⁵⁸

Ms. Bakopanos went on to contend that this record of the case would provide the person sought with a “clearer picture in our opinion” than previously existed where there were “just affidavits on particular elements.”⁵⁹

While discussion of the problems with sworn affidavits devoid of hearsay had primarily focused on the difficulties posed for civil law countries, drafters of the new legislation took the opportunity to provide sweeping jurisdiction with respect to records of the case. To again quote Ms. Eleni Bakopanos:

Following a careful consideration of other options, we concluded that the record of the case should be available to all foreign states irrespective of their legal system.⁶⁰

In short, while the language of “careful consideration” implied caution on the part of justice officials, in practice the new legislation involved a major relaxing of the standards of evidence that needed to be adhered to by all requesting states.

One of the first sources of critique of the new legislation came during the deliberations of the House of Commons Standing Committee on Justice and Human Rights. On November 17, 1998, Michael Lomer and Paul Slansky of the Ontario Criminal Lawyers’ Association provided a submission and discussed the planned changes. Among their concerns was that the evidentiary bar in extradition proceedings was being substantially lowered. As expressed by Mr. Lomer: “You’ve taken the [evidentiary] bar and dropped it on the ground.”⁶¹ In his view the proposed legislation could in part be seen as a “wish list” for the government lawyers that had drafted it. In turn, both of the lawyers were concerned that the legislation did even less to ensure accountability of the case against the person sought than the then existing legislation. They also raised the dangers of unsworn evidence,

⁵⁸ Bill C-40 debate, *supra* note 39 at 1615 [emphasis added].

⁵⁹ *Ibid* at 1620.

⁶⁰ *Ibid* at 1615 [emphasis added].

⁶¹ House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 36-1, No 98 (17 November 1998) at 1100 (Mr. Michael Lomer).

and the possibility that this could put the accountability, reliability and responsibility of evidence in jeopardy.

Within this context, Michael Lomer highlighted the possibility that a person sought might be vulnerable to an allegation from an “unnamed person.” In summing up his concerns he stated: “You need to have evidence as opposed to rumour...what you have presently is a virtual guarantee of non-reliability.”⁶²

In retrospect Mr. Lomer’s concerns could be seen as prophetic in relation to the case of Hassan Diab. Much of the evidence against Diab was derived from ‘intelligence’ sources that were not fully known, not only to the defence, but also to the investigating authorities in France themselves. Moreover, there was no guarantee that at least some of the ‘evidence’ had not been acquired through torture. In connection with this Professor Kent Roach of the University of Toronto’s Faculty of Law, and an expert on anti-terrorism law and national security, was called upon as an expert by Hassan Diab and the defence. Professor Roach testified on November 24, 2010.

As reported by Andrew Seymour of the *Ottawa Citizen*⁶³ Professor Roach testified about the dangers of “unsourced and uncircumstanced” intelligence particularly where it could have been derived from torture. He further raised concerns about the French authorities “cherry picking” pieces of intelligence that supported their case while ignoring others that did not support it. Thus, the worries expressed by Michael Lomer in face of the impending legislation in 1998 found expression in the case of Hassan Diab that would commence in Canada about a decade later.

On March 17, 1999, lawyer Paul Slansky reiterated these points to the Senate Standing Committee on Legal and Constitutional Affairs. He strongly questioned whether there was any need for the new legislation. It was the view of the Criminal Lawyers’ Association of Ontario that the existing legislation was “working fine” and had withstood a variety of constitutional challenges. Moreover, he highlighted that requests for extradition had a very high success rate to the point that extradition laws as then applied could be considered as “practically a rubber stamp – not fully

⁶² *Ibid* at 1110.

⁶³ Andrew Seymour, “Terrorism evidence against former Ottawa professor ‘unreliable,’ court hears”, *Ottawa Citizen* (25 November 2010), online (pdf): <www.justiceforhassandiab.org/wp-content/uploads/2010/12/ottawa_citizen_2010_1124b.pdf> [perma.cc/C8FS-XLMS].

a rubber stamp, but close to it.”⁶⁴ Indeed Mr. Slansky identified extradition law as being somewhat of a laughing matter among the criminal defence bar, because the prospects of successfully resisting an extradition proceeding were so slim.

When questioned about an apparent discrepancy in his portrayal of existing law as almost a “rubber stamp” yet also being “constitutionally valid” Mr. Slansky repeated that current law was “[p]artially a rubber stamp, yes.” With respect to constitutional validity he elaborated on his perspective:

That is true. It has been upheld as constitutionally valid. I do not necessarily agree with the Supreme Court of Canada’s decision that these minimal protections that amount largely to a rubber stamp provide any real protection, however, the Supreme Court of Canada, nevertheless, has said they do. Personally, and as a lawyer, I would like there to be better protection of those rights. However, the Supreme Court has said that you do not need better protection of the rights. Now what little rights there are, are being eliminated, therefore, it is becoming a real rubber stamp.⁶⁵

In arguing that many aspects of the new legislation were unnecessary Paul Slansky observed that:

There is no evidence of any need in existence and none has been presented in any fashion during the course of these proceedings except bold assertions that there is a need.

In his view there was no evidence that civil law jurisdictions could not meet existing evidentiary requirements of Canadian law, and that, should there be any difficulty, officials from the Department of Justice were available to provide assistance. In Mr. Slansky’s opinion the “purported justification...relating to civil law jurisdictions is a creation...of the Department of Justice...to make their job easier.”⁶⁶

Overall Mr. Slansky strongly articulated that the provisions of the new legislation represented a severe blow to the rights of the person sought. He considered that any claims concerning their protection were “purely illusory.” He contended that such rights that had existed were being diluted.

⁶⁴ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 62 (17 March 1999), “Bill C-40, An Act respecting extradition, to amend the *Canada Evidence Act*, the *Criminal Code*, the *Immigration Act* and the *Mutual Legal Assistance in Criminal Matters Act* and to amend and repeal other Acts in consequence” (Mr. Paul Slansky).

⁶⁵ *Ibid* (The apparent discrepancy between some of his statements was noted by the Chair of the Committee, the Hon. Lorna Milne).

⁶⁶ *Ibid*.

In his observation, where the threshold of evidence was concerned, all “indicia of reliability have been removed by this bill.”⁶⁷

Another witness before the Senate Committee on the same day, immediately following Paul Slansky’s testimony was Anne W. La Forest, then Dean at the Faculty of Law at the University of New Brunswick. On several occasions Dean La Forest indicated her agreement with some of the points made by Mr. Slansky.⁶⁸ In particular this concerned his observations and concerns about the reducing of requirements concerning evidence. La Forest pointed out that the existing process had been “accepted by the Supreme Court of Canada as being consistent with principles of fundamental justice.” By contrast, she was concerned about the proposed changes and warned that they could result in *Charter* challenges. In her observation one could reasonably argue that once evidence not usually admissible in Canadian legal proceedings was to be admitted under extradition law this involved a change to what had been “recognized and accepted by the Supreme Court of Canada.”⁶⁹ In expressing these concerns La Forest summed up her position by stating: “An expedited process that is inconsistent with our own *Charter* provisions is problematic for me.”⁷⁰

Despite these strong expressions of reservations when Justice Minister the Honourable Anne McLellan appeared before the Senate Standing Committee the next day,⁷¹ she extolled the virtues of the new act. The critics’ concerns did not seem to be seen as meriting much attention by her

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* However, while La Forest agreed with many of Mr. Slansky’s concerns about lowering the evidentiary bar, her own wording was less strident. In particular, La Forest stated that she did not fully agree with the “rubber stamp” terminology. The reader should also note that La Forest’s testimony was far broader than the focus taken here as it also included discussion about extraditions to the USA and related concerns about exposing some of those extradited there to the possibility of the death penalty. Additionally discussed (and this also applies to Mr. Slansky’s testimony) was the possible need for a two-tier extradition process, with one set of rules for extraditions between individual states, and another set applying to extraditions to war crimes tribunals and other bodies concerned with international criminal law. In this article however, the focus is primarily on discussions concerning evidence in extradition proceedings involving individual states as this is the issue that would most sharply be thrown into relief in the case of Hassan Diab.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 63 (18 March 1999), at 11:35 (Minister of Justice and Attorney General of Canada, Hon. Anne McLellan).

and her officials. Rather, the Minister warned that, under the current system, “there is a real danger...that Canada will become the country of choice for criminals seeking to shield themselves from arrest and prosecution.”⁷²

Minister McLellan further strengthened her point by observing that “American authorities have noted that, in the case of telemarketing fraud and other forms of complex fraud...our cumbersome extradition law is being used as a shield by those who choose to do that kind of business in Canada.” She continued with a provocative observation and question:

[W]e are seen as a place from which to organize and carry out these kinds of crimes because the extradition process is so cumbersome that foreign states do not even bother to seek extradition. Is that the reputation Canada wants in the new global world?⁷³

She then proceeded to provide a very strong narrative about the difficulties being experienced by other countries in securing individuals’ extradition from Canada. In her words:

My officials can provide you with examples of cases in which we have been unable to extradite because of the complexity of these rules...We have heard again and again from those many countries in the world with different legal traditions, where the concept of affidavits and hearsay are unknown yet with legal systems we respect, how enormously difficult and in some instances impossible this task can be.⁷⁴

Unfortunately, the Minister did not identify any specific cases or countries where her observations applied. Instead she continued with her narrative about the allegedly drastic state of affairs:

Practice demonstrates the problem. Generally, fewer than 10 per cent of requests from countries other than the United States result in surrender following extradition proceedings. That does not even take into account the states that are discouraged by the onerous hurdles imposed by our current extradition law and do not even initiate an extradition request.⁷⁵

Again, and despite the ardent delivery of her point, no examples of the purportedly problematic practice of the extradition law were given by Minister McLellan on this occasion.⁷⁶ Given her contention that over 90

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* However in previously speaking with the House of Commons Standing Committee on Justice and Human Rights, on 4 November 1998, the Justice Minister did mention in passing that Japan was one country which “probably” encountered difficulties. In

per cent of requests from countries other than the United States did not succeed it is unfortunate that further information was not provided. Further this claim appeared to have been taken at face value by committee members and no questions were raised about it.

Minister McLellan went on to bolster her point by criticizing the perspective of the Criminal Lawyers' Association of Ontario, and alleging that its members were uninformed. She stated that:

While the Criminal Lawyers' Association may be of the view that the current system is functioning effectively, their assessment is based solely on those cases that actually come before the courts and not on those that never reach the public domain because a state cannot or, by choice, will not meet Canada's evidentiary requirements.⁷⁷

In fact, Paul Slansky had himself previously worked at the Department of Justice and been involved in the preparation of extradition cases. As of 17 November, 1998, he had testified to the House of Commons Standing Committee on Justice and Human Rights that:

When I was counsel at the Department of Justice... I was involved in that process and did provide assistance to foreign states in preparing extradition materials. I think Justice officials, in proposing this legislation, have effectively set up a straw man or a complaint that this is not working when in fact it is.⁷⁸

Overall the presentation of the new legislation by the Parliamentary Secretary, the Minister and Department of Justice officials made a compelling case in its favour. The increasing complexity of international, and indeed global crime, the need to update 'antiquated' laws, and the desire to be better able to cooperate with recent and emergent international criminal justice bodies were all strong rationales in its support. Further the alleged limits of pre-existing legislation and its purported barriers to

presenting to the Committee on the previous day, Justice official Don Piragoff also referenced difficulties with Japan not permitting affidavits being sworn in its jurisdiction concerning the Narita airport bombing in 1985. He recounted that, in that case, witnesses in Japan were brought to Hong Kong where the affidavits were prepared for use in the Canadian case. On November 3, Mr. Piragoff also mentioned that in the case of Charles Chitat Ng, the Department had sent one of their own lawyers to California to assist with the preparation of affidavits. See *Reference Re Ng Extradition* (Can.), [1991] 2 SCR 858; *House of Commons Standing Committee on Justice and Human Rights*, 36-1, Meetings 95 (3 November 1998) at 0920 (Mr. Don Piragoff); *House of Commons Standing Committee on Justice and Human Rights*, 36-1, Meeting 96 (4 November 1998) at 1700 (Ms. Anne McLellan).

⁷⁷ *Ibid.*

⁷⁸ Michael Lomer, *supra* note 61 at 1100.

successful extraditions could be seen as detrimental to Canada's diplomatic commitments to comity. Minister McLellan and her colleagues also took pains to point to problems being experienced not just by civil law jurisdictions, but also by common law ones such as the United States. Here, once again the spectre of Canada as a potential haven for transnational criminals was emphasized.

In the initial presentation of the bill to the Senate on December 8, 1998, the Honourable Joan Fraser, as its sponsor, had been similarly persuasive and enthusiastic. She touched on the major themes that would be elaborated on by justice officials. In addition, she emphasized benefits that the new law embodied for persons sought. In the words of Senator Fraser:

The bill strengthens the guarantees accorded fugitives...The person sought for extradition will have a better view of the case, as they will see a summary of evidence as opposed to just affidavits on particular elements...Bill C-40 is well balanced, because it establishes procedural guarantees and human rights for the fugitive, while making the extradition process more accessible to countries with legal systems and evidence rules that are different from ours....Under no circumstance shall the minister make a surrender order if she or he is satisfied that the surrender would be unjust or oppressive...The safeguards referred to in the legislation are, of course, in addition to the protection provided by the *Canadian Charter of Rights and Freedoms*.⁷⁹

With the presentations of the new legislation being overwhelmingly laudatory, and with such discussions that did take place in both Houses of Parliament tending to focus on issues concerning war criminals, and on matters concerning the possibility of extradited individuals facing the death penalty, the significance of changes being introduced to lower the threshold of evidence were largely overlooked. Meanwhile, such concerns that were raised about the evidentiary threshold being proposed, were, for the most part, given short shrift.

Extradition scholar and practitioner Gary Botting, in his 2004 doctoral thesis – *Executive and Judicial Discretion in Extradition between Canada and the United States* – made important observations about the legislative process

⁷⁹ *Senate Debates*, 36-1, Vol 137, Issue 102 (8 December 1998) at 1530 (Hon. Joan Fraser, whose journalism background included three years (1993-1996) as Editor-in-Chief for the *Montreal Gazette*, joined the Senate on September 17, 1998. She commenced with the Standing Committee on Legal and Constitutional Affairs on October 12. Her speech, as sponsor of Bill C-40, was her maiden speech).

underlying the 1999 *Extradition Act*.⁸⁰ He notes that the Act was passed by the House of Commons “without much fanfare.” Meanwhile it had been before the Senate Committee on Legal and Constitutional Affairs that the impending legislation had been subject to “intensive hearings.” Most significantly, Botting observes what was omitted in the official summary of Bill C-40 as passed on December 1, 1998 that would subsequently be included in Senate considerations:

What was not said in the official summary was that the considerations for the extradition judge were much reduced, and that the issues for the Minister of Justice to consider were much expanded by the legislation. With the passage of the *Extradition Act*, executive discretion in extradition matters obtained preeminence over judicial discretion even in areas formerly (and traditionally) the domain of the extradition judge, such as receiving evidence of an offence of a political nature, or of situations faced by the accused which breached human rights.⁸¹

In the Senate Committee’s concluding session about Bill C-40,⁸² Senator Fraser made a motion to dispense with clause-by-clause consideration of the legislation. Some concerns expressed by two legal members, Senators Grafstein and Joyal, were overridden by the Committee Chair, Senator Lorna Milne. The concerned Senators expressed their dissatisfaction by abstaining from the final vote on the legislation – a matter which will be further discussed after first documenting the expression of concerns about the lowered threshold of evidence in extradition proceedings that emerged more clearly in the years after the implementation of the *Extradition Act*. Bill C-40 received Royal Assent on 17 June 1999. The *Extradition Act* came into force on 1 September 1999.

A. Expressions of Concern about the *Extradition Act*, 1999, Subsequent to its Implementation

The reality is that Canada has gone further than virtually any other country in facilitating extradition.⁸³

- Anne Warner La Forest, 2002

⁸⁰ Gary Botting, *Executive and Judicial Discretion in Extradition between Canada and the United States* (Ph.D. Thesis, Faculty of Law, University of British Columbia, 2004) [unpublished] at 197 [Botting, “Thesis”].

⁸¹ *Ibid* at 198.

⁸² *Senate Standing Committee on Legal and Constitutional Affairs*, 36-1, Issue 64 (24 March 1999).

⁸³ La Forest, *supra* note 27 at 140.

The year 2002 also saw the beginning of shots across the bow of Justice Canada by commentators who were concerned that much of the 'protective' aspect of extradition law and practice had been stripped away by the new legislation, in favour of Canada being seen as a 'leader' in the fight against international and transnational crime.⁸⁴

- Robert J. Currie

In 2002, Anne W. La Forest published an article in the *Queen's Law Journal* aptly titled "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings." Professor La Forest elaborated on her points previously made in the course of Senate Committee discussions preceding the 1999 Act. She meticulously provides an historical overview of the practices underlying the admissibility of evidence prior to the 1999 legislation. She also examines the content of the new legislation and the reasoning behind it.

In the opinion of La Forest, in extradition proceedings "[s]tripped of detail, the question is really one of mediating between the competing values of liberty and comity."⁸⁵ Drawing attention to historical similarities between extradition hearings and preliminary inquiries La Forest argues that "[r]ather than being antiquated," the earlier process in extradition hearings "was one more accurately described as creating a practical, workable balance."⁸⁶ By contrast, the recent legislation with its 'record of the case' approach would allow for second and even third hand hearsay evidence to be introduced. Here, La Forest's concern centred on issues of reliability. Pointing to the more "onerous"⁸⁷ consequences for the person sought in extradition hearings compared to preliminary hearings given that the individual can be surrendered to a foreign jurisdiction (and so beyond the protection of *Charter* provisions), La Forest highlighted the adverse implications for liberty rights of persons sought. This was especially the case given that Canada, unlike civil law states, extradites its own citizens. In La Forest's words:

[U]nless an exception is shown to be necessary, an extradition hearing to assess whether there is sufficient evidence to establish a *prima facie* case should not be any less rigorous than the process for assessing whether an individual should be prosecuted in this country except as shown to be necessary. Would anyone claim

⁸⁴ Robert J Currie, Book Review of *Canadian Extradition Law Practice* by Gary Botting (2005-2006) 37:1 Ottawa L Rev 163 at 165.

⁸⁵ La Forest, *supra* note 27 at 172.

⁸⁶ *Ibid* at 173.

⁸⁷ *Ibid* at 172.

that fundamental justice does not mandate any particular evidentiary standards in the context of a preliminary proceeding? How then can that claim be so readily made in the context of extradition, merely because extradition raises considerations of accommodation, reciprocity and comity? These represent important values but their mere invocation should not trump liberty.⁸⁸

As argued by La Forest an individual's liberty should not be removed "without some evidence that is at base reliable."⁸⁹ However the provisions of the new legislation were detrimental to this. In her opinion, under the previous legislation, the balance was a "fair" one. While not questioning officials' assertions about the need to facilitate civil law countries and international tribunals, it was her opinion that "there has been an overstatement of the needs of comity and a consequent undervaluing of the liberty interest."⁹⁰ Reiterating her earlier observation that "there is little evidence that the earlier approach hindered the extradition process in Canada in any significant way,"⁹¹ La Forest stated:

I submit that the provisions applicable to admissibility and sufficiency in the new *Extradition Act* are contrary to fundamental justice unless the courts interpret the evidentiary provisions of the new Act so as to re-establish an appropriate balance that allows the extradition judge to protect the liberty of the fugitive by assessing the weight and reliability of the evidence either at the stage of admissibility or in deciding whether there is sufficient evidence to commit the fugitive. Such an approach would accommodate Canada's extradition partners to submit evidence in accordance with their own procedures while ensuring the liberty interest of the fugitive in a manner consistent with Canadian preliminary proceedings.⁹²

Another scholar expressing concern about the extradition legislation early in the new millennium was Dianne L. Martin, then an Associate Professor of Law at Osgoode Hall Law School and Director of the Innocence Project at that institution. In her article, "Extradition, the Charter, and Due Process: Is Procedural Fairness Enough?"⁹³ while much of Martin's focus was on the intersection of flaws in the extradition process with those reflected in cases of wrongful conviction in Canada and internationally (especially concerning problems with jail informant evidence) she also repeatedly raised issues about rule of law guarantees and

⁸⁸ *Ibid* at 173.

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 174.

⁹¹ *Ibid* at 176.

⁹² *Ibid.*

⁹³ Diane L Martin, "Extradition, the Charter, and Due Process: Is Procedural Fairness Enough?" (2002) 16 SCLR (2d) 161.

sometimes the lack thereof.⁹⁴ Describing extradition as “a procedure on the margins of the criminal justice system,” she goes on to observe that the extradition process:

[E]njoys few formally protected due process safeguards, and often concerns cases that challenge any claim to fairness at all. The requesting state needs only to produce, in documentary form, a *prima facie* case. The process relies on the ‘good faith of nations’ to ensure that the fugitive is not in effect being hijacked with false evidence to face an unfair trial. The fugitive, whose probable guilt is assumed for the purposes of the process, has no right of confrontation, no right to challenge the facts or the witnesses brought against him. These limits render illusory the affirmation by the Supreme Court that extradition proceedings must comply with due process safeguards and will attract constitutional protection, in particular that of section 7.⁹⁵

Martin further observes that only in “extreme circumstances” would the Supreme Court consider whether the extradition process violates rights under the Canadian constitution, as it is assumed that the requesting country will provide a fair trial.⁹⁶ Overall, in her view, the extradition process in Canada reflects a condition of “frailty.”⁹⁷ Martin concludes that the process, and criminal processes more generally, need more attention to substance (notably the reliability of evidence) and to move beyond procedural matters: “Due process must mean more than an appearance of fairness.”⁹⁸

Generally in the new millennium with respect to extradition law in Canada there has been what Professor Robert J. Currie of the Faculty of Law, Dalhousie University, in 2006 described as a “lack of serious scholarly inquiry on the issue.”⁹⁹ A notable exception had been the work of scholar

⁹⁴ *Ibid* (Martin focuses in particular on the intersection of issues of due process, extradition and wrongful conviction in the case of Leonard Peltier, extradited from Canada to the USA in 1976 in alleged connection with the murder of two FBI agents the previous year. She also discusses the impact of growing awareness of the possibility of wrongful convictions in the 2001 Canadian Supreme Court decision concerning the extradition of Glen Sebastian Burns and Atiif Ahmad Rafay to the USA where the two had been eighteen years old at the time of the murders and potentially faced the death penalty); see *United States v Burns*, 2001 SCC 7.

⁹⁵ *Ibid* at 166.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at 179.

⁹⁸ *Ibid* at 181.

⁹⁹ Robert J Currie, Book Review of *Extradition Between Canada and the United States* by Gary Botting, 2005, (2006) 19:1 RQDI 349 at 351 [Currie, Book Review of Botting]. Prior to the new millennium scholarly attention was also limited. The major text was

and practitioner Gary Botting. Active in defence proceedings for persons being sought since the early 1990s, in 2005 Dr. Botting published the first edition of his book *Canadian Extradition Law Practice*.¹⁰⁰ Drawing from his previous academic¹⁰¹ and practical expertise, Botting provides a detailed account of Canadian extradition law both past and present. The book has been described by Currie as a “thorough and useful manual for lawyers practicing in the extradition area.”¹⁰² Botting also provides a trenchant critique of the 1999 legislation. Further, while his presentation is thoroughly scholarly and well researched Dr. Botting does not constrain himself to some of the usual tenets of scholarly legal discourse. In short, he does not mince words in pointing to shortcomings of extradition law as viewed from the perspective of a defence lawyer. Nor does he defer to politesse in highlighting some of what might be described as ‘doublespeak’ in the narratives sometimes reflected in the legislation itself and in the allied discourses of its proponents. As Robert J. Currie describes the book, as much as it is a “standard ‘practice manual,’” it is additionally “a detailed, section-by-section critique of the Act – the tone of which can be described as harsh, if not vitriolic.”¹⁰³

As Currie points out, among Botting’s key points, and echoing Anne W. La Forest,¹⁰⁴ is that Canada’s interest in respecting comity has come to greatly outweigh the emphasis on the rights of the person sought. However,

G rard Vincent La Forest’s *Extradition to and from Canada* (New Orleans: Hauser Press, 1961). The second edition was published in 1977 by Toronto: Canada Law Book. In 1991 the third edition was authored by La Forest’s daughter Anne La Forest – *La Forest’s Extradition to and from Canada* (Aurora, Ontario: Canada Law Book). In 2002 Elaine F. Krivel, Thomas Beveridge and John Hayward published *A Practical Guide to Canadian Extradition* (Toronto: Carswell). The first two authors were currently Department of Justice officials, and the third was a former prosecutor with the Department of Justice.

¹⁰⁰ Gary Botting, *Canadian Extradition Law Practice* (Markham, Ontario: LexisNexis Canada, 2005). As of 2015, the fifth edition of the book had been published; see also Gary Botting, *Extradition between Canada and the United States* (Ardsey, New York: Transnational Publishers, 2005).

¹⁰¹ Dr. Botting’s prior scholarly contributions included his LLM Thesis of 1999: Gary Botting, *Competing Imperatives: Individual Rights and International Obligations in Extradition from Canada to the USA* (LL.M. Thesis, Faculty of Law, University of British Columbia) [unpublished]; for Gary Botting’s Ph.D. Thesis of 2004, see generally Botting, “Thesis”, *supra* note 80.

¹⁰² Currie, *supra* note 84 at 166.

¹⁰³ *Ibid* at 167.

¹⁰⁴ See generally La Forest, *supra* note 27.

Botting expresses his concerns in far stronger language than La Forest, as he describes the Canadian extradition procedure as having become “little short of repressive.” In tandem, Currie quotes Botting’s contention that:

Canadian courts from the top down have used the new provisions, in combination with precedents predating the Act, to perpetuate judicial fictions and conceits which constitute dangerous incursions on the liberty interests of anyone caught up in the extradition web.¹⁰⁵

As of 2007, some of Gary Botting’s concerns about the relaxed evidentiary requirements under the 1999 Act appear to have been somewhat allayed pursuant to several important Supreme Court decisions that addressed the matter. In his article “The Supreme Court ‘Decodes’ the Extradition Act: Reading Down the Law in *Ferras* and *Ortega*.”¹⁰⁶ Botting reviews the severely constraining impact of the ‘*Shephard Test*,’ the problems with the reduction of the judicial role since 1999, and the potential of then recent decisions for reclaiming some judicial autonomy in considering evidence. Among his concerns was that the legislation as reconstituted under the 1999 Act might open the door for the wrongful conviction of a person sought. In Botting’s words:

The excessive discretionary power of the Minister under the new legislative scheme, combined with new rules of evidence that require judges to commit persons for surrender for extradition wherever the requesting state has formally certified that the evidence summarized in the record of the case is available and sufficient to justify going to trial, may lead to the unjust extradition of persons wrongfully accused of crime in foreign countries. The legislation renders the extradition court’s role insignificant: it must rule on the superficial question of whether the commission of a parallel Canadian crime, already identified by specialists in extradition law within the International Assistance Group (IAG) of the Department of Justice, is in fact supported by the summary of evidence.¹⁰⁷

Looking back historically, Botting identifies the case of the *United States of America v Shephard*¹⁰⁸ as a particular source of “grief” for persons sought and their lawyers “due to its narrowness of vision and its rigid interpretation by extradition judges and courts of appeal.”¹⁰⁹ The case involved an

¹⁰⁵ Currie, *supra* note 84 at 167.

¹⁰⁶ Gary Botting, “The Supreme Court ‘Decodes’ the Extradition Act: Reading Down the Law in *Ferras* and *Ortega*” (2007) 32:2 Queen’s LJ at 446 [Botting, “Supreme Court Decodes”].

¹⁰⁷ *Ibid* at 449-450 [emphasis added].

¹⁰⁸ *United States of America v Shephard*, [1977] 2 SCR 1067, 30 CCC (2d) 424 [*Shephard*].

¹⁰⁹ Botting, “Supreme Court Decodes”, *supra* note 106 at 452.

extradition application concerning allegations of “conspiracy to import and distribute narcotics” where “the only substantive evidence was an affidavit by the defendant’s co-accused.”¹¹⁰ Further, the affidavit had been provided only after the co-accused had been promised by the United States Attorney’s office that charges against him would be dropped in return for testimony.¹¹¹

At the initial hearing at the Quebec Superior Court then Acting Chief Justice Hugessen denied the extradition. The Justice stated: “I do not have before me evidence which would justify the commitment of the defendant for trial if the alleged crime had been committed in Canada.”¹¹² The U.S. application to have this decision set aside was dismissed by the Federal Court of Appeal with Jockett, C.J. stating:

I agree with the extradition judge that one type of case where an extradition judge should refuse to grant such a warrant is where a trial judge would feel obliged to direct a jury to bring in a verdict of acquittal and I agree, also, that ‘where the Crown’s evidence is so manifestly unreliable or of so doubtful or tainted a nature as to make it dangerous or unjust to put the accused to his defence on the basis thereof’ is such a case.¹¹³

However, in its turn a majority in the Supreme Court overturned these decisions, and Ritchie J. made what was to become a crucial statement in subsequent extradition proceedings:

[T]he weighing of evidence...forms no part of the function of...an extradition judge in exercising his powers under *The Extradition Act*.¹¹⁴

As Botting documented, his point was affirmed by Anne W. La Forest in her discussion of the case in her 1991 text. As stated by La Forest:

That case makes it clear that committal must follow if there is any evidence upon which a jury could convict. A judge is not entitled to withdraw a case from the jury merely because the evidence is manifestly unreliable or so doubtful or tainted in nature as to make it dangerous to put to the jury. When presented with such evidence, therefore, the duty of an extradition judge is to commit.¹¹⁵

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* (citing *Shephard*, *supra* note 108 at 1070).

¹¹² *United States of America v Shephard*, 1974 CarswellQue 261 (1974), 19 CCC (2d) 35 at 40 [*Shephard*, Qc Sup Ct] (cited in Botting, “Supreme Court Decodes”, *supra*, note 106 at 452).

¹¹³ *United States of America v Shephard*, [1974] 2 FC 210, 20 CCC (2d) 575 at 576 (FCA) [*Shephard*, FCA].

¹¹⁴ *Shephard*, *supra* note 108 at 1088 (cited in Botting, “Supreme Court Decodes”, *supra* note 106 at 453).

¹¹⁵ Anne Warner La Forest, *La Forest’s Extradition to and from Canada*, 3rd ed (Aurora:

The Supreme Court's decision in *Shephard* has been pivotal in subsequent extradition proceedings and their outcomes. As observed by Anne La Forest in 1991, and again, in 2002,¹¹⁶ *Charter* challenges to due process matters in extradition proceedings have been "generally unsuccessful." In this context it is important to note that decisions embodied in *Shephard* were by no means clear cut. At the Supreme Court the decision in favour of the accused's extradition was five to four. When the evolution of the case is examined the picture becomes murky. Botting aptly describes the case as a "judicial cliff-hanger."¹¹⁷ As he elaborates:

The five to four decision reversed two decisions in the courts below, one of which was a unanimous decision of a three-person panel of the Federal Court of Appeal. In *Shephard*, Marland, de Grandpré, Judson and Pigeon JJ. supported the majority decision written by Ritchie J.; however, the jurisprudential heavyweights of the day, Laskin C.J.C. and Dickson J. (who was soon to become Chief Justice), along with Beetz J., adopted the minority decision written by Spence J. This minority supported the unanimous judgement of the Federal Court of Appeal written by Jackett C.J., with Pratte J. and Hyde D.J. approving. Furthermore, the initial decision of the Quebec Superior Court denying extradition was that of Acting Chief Justice Hugessen. Thus, eight distinguished judges, three of whom were acting in the capacity of chief justices of their respective courts at the time, ruled that *Shephard* should not be extradited on the evidence before the extradition judge, and only five (albeit the majority of the Supreme Court of Canada) ruled in favour of extradition.¹¹⁸

As observed by Botting, the *Shephard* case resulted in "the diminution of the discretionary power of extradition judges."¹¹⁹ This was reflected in subsequent Supreme Court judgements including the case of *Argentina (Republic) v Mellino*,¹²⁰ where Justice La Forest stated:

[T]he role of the extradition judge is a modest one; absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that

Canada Law Book, 1991) at 149 (cited in Botting, "Supreme Court Decodes", *supra* note 106 at 453). In a footnote in the article, at 453-454, Botting describes the text as a "classic exposition of extradition in Canada, expanding as it does on the first and second editions of *Extradition to and from Canada* written by Anne La Forest's father, Gerard Vincent La Forest, a justice of the Supreme Court of Canada long regarded as the *doyen* of Canadian extradition law."

¹¹⁶ La Forest, *ibid* at 28; La Forest, *supra* note 27 at 117.

¹¹⁷ Botting, "Supreme Court Decodes", *supra* note 106 at 454.

¹¹⁸ *Ibid* at 454-455.

¹¹⁹ *Ibid* at 455.

¹²⁰ *Argentina (Republic) v Mellino*, [1987] 1 SCR 536, [1987] 4 WWR 289.

the evidence establishes a *prima facie* case that the extradition crime has been committed.¹²¹

In Gary Botting's opinion the extradition process in Canada reached its "true nadir" in the *Wagner* case of 1995 and the decision of the British Columbia Court of Appeal.¹²² In this case, observes Botting, the court drew on *Shephard* in "its narrowest possible sense."¹²³ La Forest's observation pursuant to *Shephard* (i.e. if there is any evidence a jury could use to convict, then a committal must follow) was cited by the court.¹²⁴ As Botting recounts, despite the accused (his client) being able to produce a strong alibi, and thereby exculpatory evidence, he was still extradited. Botting's irritation in the case is understandable in light of the revelation that, after his extradition, "Wagner was incarcerated in Washington for three years until he was finally acquitted of all charges."¹²⁵

As Botting's analysis reveals the 1999 Act did nothing to alleviate onerous circumstances faced by persons sought. Further he deconstructs the apparently benevolent discourse accompanying, and embodied in, the legislation. Of the Act itself he provocatively observes:

[T]he statute is carefully drafted to appear innocuous, often using multiple qualifiers and double negatives so that it may seem to suggest one thing while actually stating another. For example, a superficial reading of sections 16 to 39, governing the function of extradition judges, would leave the impression that the role and powers of extradition judges have been enhanced compared to what they were under the former Act, where in fact their discretionary powers have been significantly reduced. Similarly sections 44, 46 and 47, which govern the powers of the Minister of Justice to refuse extradition might appear to enhance the rights of persons facing extradition by listing protections traditionally accorded to them (such as the political offence exception, the option to prosecute rather than extradite, and protections against double jeopardy). However, these protections are so qualified in the Act as to be meaningless in all but the rarest of cases. While the Minister is cast as the guardian of these largely illusory rights and protections,

¹²¹ *Ibid* at para 29 (cited in Botting, "Supreme Court Decodes", *supra* note 106 at 455).

¹²² *United States of America v Wagner*, 1995 CanLII 1815 (BC CA), 104 CCC (3d) 66 (leave to appeal to the SCC was refused) [*Wagner*]. Gary Botting was himself counsel for the accused in this case.

¹²³ Botting, "Supreme Court Decodes", *supra* note 106 at 456.

¹²⁴ *Wagner*, *supra* note 122 at paras 26-27 (citing Anne La Forest, *supra* note 115 at 149-150).

¹²⁵ Botting, "Supreme Court Decodes", *supra* note 106 at 457 (citing *State v Wagner*, 92 Wn App 1030 (Wash Ct App 1998), (21 September 1998).

the Act expands the discretionary role of the Minister of Justice to initiate, approve and finalize all extraditions at the beginning, middle and end of the process.¹²⁶

According to Botting it was “[o]nly when the Act came into effect and was being interpreted and applied in the courts did it become clear that although extradition judges by definition are drawn from the ranks of superior court judges, they no longer had a meaningful judicial function.”¹²⁷ Here, Botting concurred with Anne W. La Forest’s earlier speculation,¹²⁸ concerning why the role of the judiciary had actually been retained in the new Act, given that they effectively had so little to do. In the context where prior to the 1999 Act evidence had to be provided in the form of affidavits that were not subject to cross-examination Botting describes the “solution” of disposing of the need for affidavits in favour of a record of the case to be “draconian.”¹²⁹

In the years immediately following the passage of the 1999 Act, with respect to the admissibility of evidence, both judges and defence lawyers proceeded with caution, and basic tenets of the legislation remained unchallenged. As Botting records, with officials at the Department of Justice having already examined the contents of each record of the case prior to going to court, extradition judges frequently agreed to extradition requests giving only “a cursory look at the charges.”¹³⁰ Any effort by the person sought to bring in evidence challenging evidence contained in the record of the case was “typically rebuffed by the judge, on the basis of *Shephard*.”¹³¹ As Botting summarizes:

This combination of factors arising from both the Act and the common law led judges to endorse extradition decisions as if they were performing administrative tasks for the Minister. Extradition judges had effectively become an arm of the administration.¹³²

Put simply, judges in extradition cases seemed to be paralysed in the early years of the millennium. Although Ministers of Justice had the power to deny extradition in cases where under Section 44 of the Act the Minister is satisfied that “the surrender would be unjust or oppressive having regard

¹²⁶ *Ibid* at 458-459.

¹²⁷ *Ibid* at 461-462.

¹²⁸ La Forest, *supra* note 27 at 172.

¹²⁹ Botting, “Supreme Court Decodes”, *supra* note 106 at 463.

¹³⁰ *Ibid* at 469.

¹³¹ *Ibid*.

¹³² *Ibid*.

to all the relevant circumstances,” as observed by Botting, Ministers were “rarely” so satisfied.¹³³ Instead, the emphasis was put on comity and the assumption that the request being made was fair. Overall, in the years immediately following the implementation of the 1999 *Extradition Act* in Botting’s observation Ministers seemed to feel “increasingly obliged to honour Canada’s international commitments, even where that would undoubtedly have an ‘unjust or oppressive’ effect.”¹³⁴

B. *Ferras* and *Ortega* as a Watershed Concerning Evidence in Extradition Hearings

Thanks to *Ferras*, extradition judges must henceforth exercise the reasoned discretion expected of them as superior court judges charged with conducting fair, judicial extradition hearings in which, for the first time in thirty years, every person facing extradition truly has the opportunity to be ‘heard.’¹³⁵

- Gary Botting, 2007

[T]o deny an extradition’s judge’s discretion to refuse committal for reasons of insufficient evidence would violate a person’s right to a judicial hearing by an independent and impartial magistrate – a right implicit in s. 7 of the *Charter* where liberty is at stake. It would deprive the judge of the power to conduct an independent and impartial judicial review of the facts in relation to the law, destroy the judicial nature of the hearing, and turn the extradition judge into an administrative arm of the executive.¹³⁶

- Chief Justice McLachlin in *Ferras*, 2006

As of 2007 Gary Botting’s concerns about the lack human rights of persons sought in extradition cases had been moderated by a new tone of optimism. Fundamental to his shift of perspective were the “new principles”¹³⁷ reflected in the *Ferras* and *Ortega*¹³⁸ decisions. Through these the role of the extradition judge was upgraded to having a significant part in the actual assessment of evidence. Where comity had taken precedence for decades, and while this would continue, *Ferras* and *Ortega* nevertheless opened the door for the extradition judge to engage in at least a limited

¹³³ *Ibid.*

¹³⁴ *Ibid* at 470.

¹³⁵ *Ibid* at 486 [emphasis in original].

¹³⁶ *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33 at para 49 [*Ferras*].

¹³⁷ Botting, “Supreme Court Decodes”, *supra* note 106 at 470.

¹³⁸ *United Mexican States v Ortega*; *United States of America v Fiessel*, 2006 SCC 34 [*Ortega*].

weighing of the evidence. Significantly, in rendering its decision in *Ferras* the Supreme Court cited texts¹³⁹ by both Anne W. La Forest¹⁴⁰ and Gary Botting.¹⁴¹

In rendering the decision in *Ferras*, Chief Justice Beverley McLachlin offered various rationales.¹⁴² Noting that in *Shephard* the conclusion was that the judge had “no discretion” to refuse to extradite when there was “any evidence, however scant or suspect, supporting each of the elements of the offence alleged,” McLachlin was of the opinion that “[t]his narrow approach to judicial discretion should not be applied in extradition matters.”¹⁴³ In sharp distinction to the decision in *Shephard* the Chief Justice stated there should be “at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law,” and that “[b]oth facts and law must be considered for a true adjudication.” Correspondingly, it was her opinion that the extradition judge “must judicially consider the facts and the law and be satisfied they justify committal before ordering extradition.”¹⁴⁴

Chief Justice McLachlin repeatedly affirmed that the process in extradition hearings should be in accordance with principles of fundamental justice, including matters concerning the sufficiency of evidence. In her words:

What fundamental justice does require is that the person sought for extradition be accorded an independent and impartial judicial determination on the facts and the evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition. This basic requirement must always be respected; a person cannot be extradited on demand, suspicion or surmise: *Glucksman*. If the combined provisions of the Act reduce the judicial function to ‘rubber stamping’ the submission of the foreign state and forwarding it to the Minister for committal, then s. 7 is violated.¹⁴⁵

In short, it was McLachlin’s view that judicial consideration of the evidence should be a core component of the extradition hearing. As she stated, for the person sought to have a “fair” hearing the extradition judge

¹³⁹ *Ferras*, *supra* note 136 at para 41.

¹⁴⁰ See La Forest, *supra* note 27.

¹⁴¹ Gary Botting, *Extradition Between Canada and the United States* (Ardley, NY: Transnational Publishers, 2005) at 8.

¹⁴² See Botting, *supra* note 106 (for a more detailed and nuanced account and analysis of the decision).

¹⁴³ *Ferras*, *supra* note 136 at para 47.

¹⁴⁴ *Ibid* at para 25.

¹⁴⁵ *Ibid* at para 34.

“must be able to evaluate the evidence, including its reliability, to determine whether the evidence establishes a sufficient case to commit.” Further, in interpreting section 29(1) of the *Extradition Act*, the Chief Justice noted that the extradition judge is required to make an assessment of “whether admissible evidence *shows the justice or rightness* in committing a person for trial.”¹⁴⁶ She continued:

It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot ‘justify committal.’ The evidence need not convince an extradition judge that the person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that *could go to trial* in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial.¹⁴⁷

At several points Chief Justice McLachlin elaborates on circumstances where the extradition judge can refuse an extradition request. These include where the evidence is “insufficient,” for example “where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial.”¹⁴⁸ Extradition could also be refused in cases where the evidence “is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.”¹⁴⁹ Further, and again in marked contrast to *Shephard*, she stated:

I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge in an extradition hearing concluded that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1). Yet under the current state of the law in *Shephard*, it appears that the judge is denied this possibility.¹⁵⁰

Chief Justice McLachlin also voiced concern about limits on judges arising from *Shephard* because “the committal becomes the final judicial

¹⁴⁶ *Ibid* at para 46 [emphasis in original].

¹⁴⁷ *Ibid* [emphasis in original].

¹⁴⁸ *Ibid* at para 50.

¹⁴⁹ *Ibid* at para 54.

¹⁵⁰ *Ibid* at para 40.

determination that sends the subject out of the country.”¹⁵¹ By definition, once extradited the person sought is beyond the purview and protection of the Canadian *Charter of Rights and Freedoms*. The seriousness of this consideration would later become painfully evident in the case of Hassan Diab. In Canada he was released on bail in the spring of 2009 to the equivalent of house arrest for over five and a half years, and without incident despite onerous conditions. However, when extradited to France in November 2014, he was immediately incarcerated and repeatedly denied bail with, as discussed earlier, one brief exception.¹⁵²

Another important component of *Ferras* concerning evidence was its effort to clarify the ability of the person sought to adduce evidence challenging evidence presented by the requesting state. Section 32(1)(c) of the *Extradition Act* specifies that admissible evidence includes “evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.” As Botting observes, the phrase “if the judge considers it reliable” had previously been a subject of judicial debate.¹⁵³

Noting that “[u]nless challenged, certification establishes reliability,”¹⁵⁴ McLachlin sought to clarify the ability of the person sought to challenge the “sufficiency of the case” including “the reliability of certified evidence.” She elaborated:

This does not require an actual determination that the evidence presented by the person sought is in fact reliable. The issue is threshold reliability. In other words, the question is whether the evidence tendered possesses sufficient indicia of reliability to make it worth consideration by the judge at the hearing. Once it is admitted, its reliability for the purposes of extradition is determined in light of all of the evidence presented at the hearing.¹⁵⁵

In short, the *Ferras* decision strongly affirmed the ability of the extradition judge to engage in a limited weighing of the evidence, and the ability of the person sought to challenge the evidence against them, and to adduce evidence on their behalf. As approvingly observed by Botting, this was “precisely the opposite of the view taken by Ritchie J. in *United States v*

¹⁵¹ *Ibid.*

¹⁵² See generally miscellaneous sources, *supra* note 9.

¹⁵³ Botting, “Supreme Court Decodes”, *supra* note 106 at 480.

¹⁵⁴ *Ferras*, *supra* note 136 at para 52.

¹⁵⁵ *Ibid* at para 53.

Shephard thirty years earlier.¹⁵⁶ As Botting also observes an important component of the *Ferras* decision was to make a distinction between the role of provincial court judges in preliminary inquiries and that of judges in extradition hearings.¹⁵⁷ With regard to the former as of the late 1970s provincial court judges in preliminary inquiries often relied upon *Shephard* to support the contention that their role did not involve weighing evidence but rather was simply “to determine whether there was evidence against the accused on every element of an alleged crime sufficient to put before a jury.”¹⁵⁸ By contrast, Chief Justice McLachlin was of the opinion that such a limited role of the judge should not apply in extradition cases, especially in light of the fact that extradition cases, by definition, could result in the person sought losing their constitutional rights if removed from Canadian jurisdiction. Recognizing the limited role for the extradition judge suggested by *Shephard*, she offered a contrary opinion:

The effect of applying this [*Shephard*] test in extradition proceedings... is to deprive the subject of any review of the reliability or sufficiency of the evidence. Put another way, the limited judicial discretion to keep evidence from a Canadian jury does not have the same negative constitutional implications as the removal of an extradition judge’s discretion to decline to commit for extradition. In the latter case, removal of the discretion may deprive the subject of his or her constitutional right to a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty.¹⁵⁹

In making this observation the Supreme Court differentiated between the role of judges in preliminary inquiries, and those in extradition hearings, and in manner that gave more latitude and discretion to extradition judges. Where in the decades prior to *Ferras* the role of the extradition judge had become akin to a “rubber stamp”¹⁶⁰ the Court now directed that “the majority view in the pre-*Charter* case of *Shephard*...should be modified to conform to the requirements of the *Charter*.”¹⁶¹

¹⁵⁶ Botting, “Supreme Court Decodes”, *supra* note 106 at 482.

¹⁵⁷ See generally La Forest, *supra* note 27 (for further discussion of similarities and differences between preliminary inquiries and extradition hearings).

¹⁵⁸ Botting, “Supreme Court Decodes”, *supra* note 106 at 482-483.

¹⁵⁹ *Ferras*, *supra* note 136 at para 47 [emphasis in original].

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* at para 49.

The *Ferras* decision also commented on observations made in the *Ortega* appeals,¹⁶² where the issue was not the reliability of evidence, but rather where “there is no evidence at all.”¹⁶³ McLachlin stated:

A showing that the evidence actually exists and is available for trial is fundamental to extradition. The whole purpose of extradition is to send the person sought to the requesting country for trial. To send the person there to languish in prison without trial is antithetical to the principles upon which extradition and the comity is supports are based.¹⁶⁴

Buoyed by the decisions in *Ferras* and *Ortega*, Gary Botting described the “new authority” of extradition judges as representing “a radical departure by the Supreme Court from standard Canadian extradition law practice.”¹⁶⁵ Both cases involved the Supreme Court considering the first challenges to the constitutionality of provisions of the 1999 *Extradition Act* concerning evidence. While the sections of the Act that were challenged were upheld as constitutional the reading down of the law by the Supreme Court, stated Botting, particularly in the case of *Ferras* “will have a major impact on the way extradition hearings are conducted in the future.”¹⁶⁶ As stated in *Ferras*, a decision to commit “[m]ost fundamentally...depends on a judicial process conducted by a judge who has the discretion to refuse to commit the subject for extradition on insufficient evidence.”¹⁶⁷

As approvingly commented by Gary Botting, the decisions embodied in *Ferras* established a “new standard for extradition proceedings on a number of fronts.” Extradition judges had latitude and discretion in judicially considering the evidence. Within this, as highlighted by Botting, the person sought had an opportunity to challenge the evidence against them and to adduce their own evidence, and so, finally have a true opportunity to have their voice “heard.”¹⁶⁸ Certainly, and in stark contrast to the limits implied for judges after *Shephard*¹⁶⁹ thirty years earlier, it seemed to have been clarified that extradition judges had the ability to take action judicially, as opposed to being some kind of rubber stamp for decisions of the executive.

¹⁶² *Ortega*, *supra* note 138.

¹⁶³ *Ferras*, *supra* note 136 at para 55.

¹⁶⁴ *Ibid* [emphasis added].

¹⁶⁵ Botting, “Supreme Court Decodes”, *supra* note 106 at 484.

¹⁶⁶ *Ibid* at 485.

¹⁶⁷ *Ferras*, *supra* note 136 at para 55.

¹⁶⁸ Botting, “Supreme Court Decodes”, *supra* note 106 at 486.

¹⁶⁹ See generally *Shephard*, *supra* note 108.

V. POST-*FERRAS*: A REVIVAL OF CAUTIOUS PERSPECTIVES ON EVIDENTIARY THRESHOLDS FOR EXTRADITION

Canada's *Extradition Act* (S.C. 1999 c. 18) is perhaps the least fair statute ever to be passed into Canadian law.¹⁷⁰

- Gary Botting, 2011

The Supreme Court's attempt to reverse the conversion of the extradition judge to a 'rubber stamp' in the *Ferras* case was ultimately unsuccessful, and the Court appears to have doubled down on this in its recent judgements by making it virtually impossible for the individual sought to challenge the reliability of the requesting state's evidence.¹⁷¹

- Robert J. Currie, 2019

Gary Botting's enthusiasm about the prospects of the *Ferras* decision opening up a new era in the extradition process, and one where it would be possible to put more emphasis on protecting the human rights of persons sought, would soon be replaced by a distinctly sombre perspective. Around the time of the appearance of Botting's 2007 article,¹⁷² several cases in Ontario – *Thomlison*¹⁷³ and *Anderson*¹⁷⁴ – provided cautious interpretations of *Ferras*. Their approach was to focus on the term 'manifestly unreliable' as imposing a strict test, with *Shephard* otherwise applying. While the case of *Graham*¹⁷⁵ that same year involved the British Columbia Court of Appeal extradition judges being able to take a more holistic approach in considering the evidence, overall nothing like the impact of *Ferras* that Botting had envisaged materialized. The continuing restrictive perspective on the part of extradition judges would have a major impact in Hassan Diab's case. While extradition judge Robert Maranger had serious concerns about the case and key handwriting evidence on which it turned¹⁷⁶ he ordered the extradition.

¹⁷⁰ Gary Botting, "Canada's Extradition Law: The Least Fair Act on Earth", *Prism Magazine* (17 June 2011), online (pdf): <justiceforhassandiab.org/wp-content/uploads/2013/10/extrad_botting_prism_magazine_2011617.pdf> [perma.cc/JU8M-YQXV] [Botting, "Least Fair Act"].

¹⁷¹ Robert J. Currie, "Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform" (2019) (unpublished report on the colloquium, held on 21 September 2018) [manuscript received from the author] at 2.

¹⁷² See Botting, "Supreme Court Decodes", *supra* note 106.

¹⁷³ *United States of America v Thomlison* (2007), 216 CCC (3d) 97 (ONCA) [*Thomlison*].

¹⁷⁴ *United States of America v Anderson* (2007), 218 CCC (3d) 225 (ONCA.) [*Anderson*].

¹⁷⁵ *United States of America v Graham* (2007), 222 CCC (3d) 1 (BCCA) [*Graham*].

¹⁷⁶ *Diab*, *supra* note 2 at para 21.

Indeed, it was Maranger's ruling in Diab's case that prompted Botting's scathing description of the 1999 *Extradition Act* as the least fair act in Canada, and even on earth.¹⁷⁷

In Hassan Diab's case Justice Maranger's favouring of the *Thomlison* and *Anderson* interpretations over those reflected in *Graham* would prove the equivalent of a legal death knell for a potential end to the case. Efforts by Hassan Diab's legal team to highlight discrepancies between *Thomlison* and *Anderson* on one hand, and *Graham* on the other, as well as their ripple effects across the country over the next seven years, was a key component in their leave to appeal to the Supreme Court. Their basic question was:

Does *United States of America v Ferras* require an extradition judge to refuse committal when, on a review of the sufficiency of the whole of the evidence she concludes that there is not a plausible case upon which a reasonable jury, properly instructed, could safely convict – as held by the British Columbia Court of Appeal – or is her function restricted to determining whether there is any evidence on each essential element of the offence that is not 'manifestly unreliable' – as held by the Ontario Court of Appeal?¹⁷⁸

With leave to appeal being denied, the question remained unanswered.

VI. CONCLUSION: THE NEED TO REVISIT AND REFORM CANADA'S *EXTRADITION ACT*

You hang around here [the Senate] long enough and you get to see an amazing number of bills where the lawyers in the Justice Department have assured us six ways from Sunday that a bill was *Charter*-compliant, and then it gets to the courts and, whoops, it's not.

The first and most, to me, embarrassing example of this that I recall was a bill presented by the Chrétien government on extradition, which Senator Joyal will recall, and I was chagrined by it because I was its sponsor and I believed the lawyers in the Department of Justice. Senator Joyal and then Senator Grafstein explained to me that I was wrong. I thought, "No, no, the Justice people, they know."

Senator Joyal and Senator Grafstein were right, and the Justice Department was not.

...

¹⁷⁷ Botting, "Least Fair Act", *supra* note 170.

¹⁷⁸ Marlys A Edwardh, Daniel Sheppard & Donald B Bayne, Factum of the Appellant (Diab), submitted to the Supreme Court of Canada (11 August 2014), at para 26(a), online (pdf): <www.justiceforhassandiab.org/wp-content/uploads/2015/06/Diab-SCC-Leave-Application-2014-08-11.pdf> [perma.cc/X85J-98DH].

I'm not attacking the integrity of the Justice Department, but I am saying there is a demonstrated history here of their, on occasion, being wrong.¹⁷⁹

- Senator Joan Fraser, 8 June 2016

Returning to discussions of Bill C-40 prior to its implementation in 1999 there are several points that are important to remember. Most of the attention was given to firstly, issues involving war criminals, and secondly, issues concerning the possibility of individuals being extradited to a possibility of facing the death penalty and what Canada's stance on this (including the Minister of Justice's ability to seek assurances to the contrary) should be.

Given these two preoccupations issues of the threshold of evidence in extradition cases more generally tended to be overlooked. Moreover when some witnesses before the Committee (including lawyers from the Ontario Criminal Lawyers' Association, and Dean Anne Warner La Forest) did raise concerns, they did not receive much attention. Further the concerns of the two Ontario lawyers (Paul Slansky and Michael Lomer) were dismissed in a rather disparaging tone by the then Minister of Justice, Anne McLellan.

That said, there were several members of the Senate Committee who expressed reservations about the impending legislation.¹⁸⁰ Again, while their focus was primarily directed at issues concerning war criminals, and extradition in the context of potential death penalty issues, they did also touch on matters concerning the quality and reliability of evidence being proposed.

One Senator that expressed reservations about the bill was Jerry Grafstein. He wanted the Committee to take "another few days" to examine material provided by Amnesty International, and to sit down and discuss with them. He also raised the possibility of further discussion with the Criminal Lawyers' Association. Senator Grafstein recommended that more input be received from extradition law practitioners. He stated:

In addition, we should hear from some practitioners. There was one outstanding practitioner, Eddie Greenspan, who was unavailable because he was otherwise engaged in court matters, but he has undertaken to appear three weeks today, if in fact that was open to the committee. I would be very interested in hearing what he has to say. I spoke to him on the telephone, and one of his concerns, I believe, is

¹⁷⁹ *Senate Debates*, 42-1, No 150 (8 June 2016) at 2010 (Hon. Joan Fraser).

¹⁸⁰ Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 64 (24 March 1999).

substantive. I want the committee to have the opportunity to share those views, as well.¹⁸¹

Unfortunately, no information was provided about the substance of Eddie Greenspan's concerns. It is disappointing that the Committee did not make time to receive his input as, in light of his extensive legal experience, including extradition matters, Greenspan's contribution would surely have been invaluable.

In the event Senator Graftsein abstained from voting on the clause by clause and on agreeing that the Bill be reported to the Senate. Senator Serge Joyal also abstained from voting. While his focus was on war criminals he also expressed a preference to have heard from more expert witnesses.

Given the consensus of other members of the Committee that there was nothing sufficiently problematic to prevent the matter from concluding,¹⁸² the Bill's sponsor, Senator Joan Fraser, moved that:¹⁸³ "the committee dispense with clause by clause consideration of Bill C-40, the extradition act, and Bill C-40 be reported to the Senate without amendment."

One wonder what improvements to the legislation could have ensued if the concerns raised the by witnesses Slansky, Lomer and La Forest has been given more attention, if Eddie Greenspan had been given an opportunity to testify, and if the issues mentioned by three legal members of the Standing Committee had been taken more seriously.

The objective of this paper has been to provide a retrospective on the legislative emergence of Canada's 1999 *Extradition Act*. Stimulated by related and disconcerting aspects of the lengthy proceedings endured by Dr. Hassan Diab the focus has been on issues of the troublesomely low threshold of evidence embodied in the law.

Another objective has been to provide support for efforts at seeking a meaningful review of the Act and the implementation of needed reforms. In this context Hassan Diab, his lead lawyer Donald Bayne, and their

¹⁸¹ *Ibid.*

¹⁸² However, Senator John Bryden, while stating he did not wish to delay the proceedings or abstain from voting, did offer the cautionary observation: "This bill relies on the extradition process, albeit an expedited process. Some of my colleagues and myself are concerned about the evidentiary rules and the issues of jurisdiction. Our concern is whether the summary of the proceedings received, upon which the decision will be based, and the exercise of discretion may not be even too expeditious." Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 36-1, No 64 (24 March 1999) [emphasis added].

¹⁸³ *Ibid.*

supporters, especially since Diab's release and return to Canada in January 2018, have been calling on the government to convene a public inquiry, and one that would involve a re-consideration of the legislation.¹⁸⁴ While there are debates about whether public inquiries are the most effective means in facilitating legislative and related reforms,¹⁸⁵ there seems to be a broad and growing consensus that reforms of the *Extradition Act*, and associated policies and procedures, are needed. In concluding this paper, a preliminary effort will be made to facilitate identification of some relevant issues.

In recent efforts to constructively contribute to the reform process itself extradition scholar Robert J. Currie, Professor of Law at the Schulich School of Law, Dalhousie University, has emerged as a leader. While Professor Currie had followed Hassan Diab's case from the outset, and had engaged with related issues in the course of his academic activities, it was on July 27, 2017, that he felt compelled to more publicly express his observations on the case and the law. He did this through an op-ed published in the *Ottawa Citizen* entitled "Repatriate Hassan Diab and reform our unbalanced extradition law."¹⁸⁶ Since that time Currie has worked with others knowledgeable about extradition (as practitioners, scholars, and human rights activists) in identifying specific issues and areas for reform as illustrated in the case of Hassan Diab, as well as in extradition cases more generally. Events facilitated by Currie included a colloquium at Dalhousie University in September 2018,¹⁸⁷ and a one-day workshop at the Human Rights Research and Education Centre, University of Ottawa, in February of 2019.

Toward reforming extradition legislation and practices in Canada the overarching issue that should arguably be considered is the need to bring all stages of the process more into conformity with principles of fundamental

¹⁸⁴ See e.g. *supra* notes 22 & 23.

¹⁸⁵ For examples see Gerard J Kennedy, "Public Inquiries' Terms of Reference: Lessons from the Past - And for the Future" (2018) 41:1 Man LJ 317; see also Justice John H Gomery, "The Pros and Cons of Commissions of Inquiry" (2006) 51:4 McGill LJ 783.

¹⁸⁶ Robert J Currie, "Currie: Repatriate Hassan Diab and reform our unbalanced extradition law", *Ottawa Citizen* (27 July 2017), online: <ottawacitizen.com/opinion/columnists/currie-repatriate-hassan-diab-and-reform-our-unbalanced-extradition-law> [perma.cc/6YGC-VA4X].

¹⁸⁷ See Currie, *supra* note 171. Access to Professor Currie's report, as well as attendance at the University of Ottawa workshop in February, 2019, greatly facilitated the author's understanding of the need for extradition law reform in Canada.

justice as reflected in Section 7 of the *Charter of Rights and Freedoms*.¹⁸⁸ In turn this means that attention needs to be given to the balance between the requirements of comity and the need to protect the human rights of persons sought. As matters stand the latter have been displaced in favour of the former. Related to this the presumption embodied in the Act that evidence presented in the record of the case (including unsworn allegations and unsourced intelligence) is 'reliable' effectively discards the presumption of the innocence of the accused which is more generally a feature of the Canadian criminal law system. Detrimental consequences for persons sought in extradition cases are further exacerbated by the lack of meaningful disclosure (including exculpatory evidence) available to the defence, by the inability to cross-examine witnesses, and by limits on the accused's ability to present evidence in their defence.

Also, as matters stand the *Extradition Act* is overwhelmingly framed in favour of facilitating the Crown's interests in efficient and expeditious proceedings, and against the individual's interest in a fair process. It is arguably unacceptable that summary and expeditious proceedings are accomplished at the expense of due process, basic fairness, and transparency. More safeguards are needed to facilitate persons sought in fighting extradition cases, especially when the case against them is weak. In particular, the defence's ability to demonstrate evidence as 'manifestly unreliable' has proven to be an almost unattainable goal.

In advancing reform a key area for consideration is that of the role of the judiciary. It should not be reduced to the role of a 'rubber stamp.' The efforts reflected in *Ferras* to counter this tendency need to be reconsidered, and judges should have a more meaningful ability to *judge* if extradition is legally sustainable.

It will not be sufficient to only reform the law. Attention also needs to be paid to the mandate and roles of the International Assistance Group within the Department of Justice. Advocates and critics have remarked on instances of apparent over-zealousness on the part of justice officials. As observed by Currie:

Years of concern about extradition has gone unheard, and at times been actively combatted, by the federal crown and in particular Justice Canada's International Assistance Group (IAG), which is charged with overseeing all extraditions. All of this came to a head with the case of Dr. Hassan Diab, extradited to France on the basis of dubious evidence....Diab was imprisoned for over three years in solitary

¹⁸⁸ See the *Charter*, s 7, *supra* note 49.

confinement in a maximum-security prison – only to be released without having being formally committed for trial when it became clear to the French courts that there was no case.¹⁸⁹

Arguably the policies and practices of the International Assistance Group need to be clarified, monitored, and made accountable. More information, including statistics, should be made available on extradition cases in Canada. Similarly, Ministerial decisions regarding surrender should be publicly reported and accessible.

Finally, at all stages of the process a primary consideration is that the process should not continue unless it is abundantly clear that surrender is being sought for trial purposes, and not merely for the purposes of investigation, as occurred in the case of Hassan Diab. When Diab's legal team sought to bring this up with the Ontario Court of Appeal the court's response was to baldly state:

The record in this case clearly demonstrates that the appellant, if extradited, will not simply languish in prison.¹⁹⁰

As Hassan Diab would learn to his great personal and emotional cost, this legal pronouncement was incorrect. It is understandable that as of the summer of 2019 Dr. Hassan Diab and his supporters' efforts to seek a public inquiry, and to influence reform of the Canadian *Extradition Act* were ongoing.

VII. POSTSCRIPT

I think for Hassan Diab we have to recognize, first of all, that what happened to him should never have happened. This is something that obviously was an extremely difficult situation to get through for himself and his family, and that's why we've asked for an independent, external review to look into exactly how this happened and make sure this never happens again.¹⁹¹

¹⁸⁹ Currie, *supra* note 171 at 3. Currie also refers to the recent *Badesha* case, *India v Badesha*, 2018 BCCA 470 at para 77 ("where the British Columbia Court of Appeal characterized the IAG's conduct as 'subterfuge' and stated that it had 'a very serious adverse impact on the integrity of the justice system.'") [emphasis added]; Concerning International Assistance Group zealotry in Hassan Diab's case see *supra* note 21.

¹⁹⁰ *France v Diab*, 2014 ONCA 374 at para 176.

¹⁹¹ Prime Minister Justin Trudeau (in response to a question submitted by David Cochrane of the CBC), "Reporters focus on Trump, tariffs, pot, immigration & climate at Trudeau Session-end news conference" (20 June 2018) at 00h:04m:50s, online (video): YouTube <www.youtube.com/watch?v=gs1nV1f0nR0> [perma.cc/NYZ2-RJ5R].

-Prime Minister Justin Trudeau, 20 June 2018

Instead of [what the Prime Minister promised] the government retained a career prosecutor to conduct a behind closed doors review with no transparency in the process... with the result that this is a report that excuses all of the conduct of the Department of Justice IAG [International Assistance Group] lawyers who did this case. It defends the lack of disclosure of evidence of innocence. It endorses all of the troublesome aspects of the current extradition law and system in Canada...There's no answers here....[T]his is a recipe for continuing disaster and wrongful extradition.¹⁹²

-Donald Bayne, 26 July 2019

In late July 2019 Hassan Diab's, his lawyer Donald Bayne's, and their supporters' calls for a public inquiry into the case, including a meaningful reform of the 1999 *Extradition Act*, received added momentum. This momentum was prompted by the release of prosecutor and former deputy attorney general of Ontario Murray Segal's report – *Independent Review of the Extradition of Dr. Hassan Diab*.¹⁹³ The report had been submitted to the Department of Justice in late May, but was not publicly released until July 26 2019.

As mentioned earlier¹⁹⁴ the announcement of an 'independent external review' by the Minister of Justice had been met with scepticism by Hassan Diab and his lawyer Donald Bayne. Of particular concern was that Segal's 'Terms of Reference'¹⁹⁵ were far too narrow, focusing primarily on whether justice officials had followed legal and departmental procedures during the process, and without a clear mandate to address the need for reform of the extradition law itself, or the desirability of a public inquiry with greater investigative powers. Unfortunately, while expectations were low, the

¹⁹² CBC Politics, "Hassan Diab and lawyer discuss report on his extradition" (26 July 2019) at 00h:05m:51s, 00h:07m:01s, online (video): CBC News <www.cbc.ca/news/politics/hassan-diab-extradition-france-1.5226033> [perma.cc/6QHA-6TZ5] [Bayne, "Press Conference"]. Additional speakers at the Press conference were Hassan Diab, and Justin Mohammed, Human Rights Law and Policy Campaigner with Amnesty International, Canada.

¹⁹³ Murray D Segal, *Independent Review of the Extradition of Dr. Hassan Diab*, (Ottawa: Department of Justice, May 2019), online (pdf): <assets.documentcloud.org/documents/6217872/Segal-Report-Final.pdf> [perma.cc/4PN9-8DKZ]].

¹⁹⁴ *Supra* notes 22 & 23.

¹⁹⁵ Canada, Department of Justice, "Independent Review of the Extradition of Dr. Hassan Diab: Appendix A – Terms of Reference" (last modified 26 July 2019), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/p6.html> [perma.cc/D4KJ-XQ5N].

content of the Murray Segal's report was even more dismaying for critics than originally anticipated. In his opening statement¹⁹⁶ at the press conference on the day of the report's release Donald Bayne stated: "I regret to say that this is indeed a profoundly disappointing report." He later¹⁹⁷ commented that when he and Hassan Diab first viewed the report the previous day they had been "shocked."

The main source of Hassan Diab's and Donald Bayne's consternation was that the Segal report read more as a mouthpiece for the perspectives of justice officials rather than an objective or neutral inquiry into the process of Hassan Diab's extradition. As expressed in Dr. Diab's opening remarks at the press conference:

To say that the Segal report is a disappointment is a gross understatement. It's a one-sided report. Its purpose is not to provide transparency or accountability, or to prevent future miscarriages of justice. Rather its purpose is to absolve the Department of Justice from any accountability and to shield senior officials at the Department from further scrutiny.

From the outset we asked for an independent and transparent public inquiry into my wrongful extradition. We boycotted the external review because we believed that it would amount to a whitewash exercise. It is profoundly upsetting to see our concerns and fears materializing.¹⁹⁸

At the core of Donald Bayne's and Hassan Diab's concerns was Murray Segal's acceptance of the Department of Justice International Assistance Group lawyers' omission to disclose fingerprint evidence pointing to Diab's innocence to the original extradition judge Robert Maranger, and to the defence team.¹⁹⁹ As observed by Donald Bayne,²⁰⁰ the discretion held by Canadian prosecutors to disclose this information could have had a significant impact on the initial extradition decision. In his view if Justice Maranger had been provided with the lack of any evidence whatsoever connecting prints taken from Hassan Diab with those gathered from the suspect by French police, it would have been "relevant" in the Canadian judge's perspective on the handwriting evidence that had tipped the judicial balance in favour of extradition.

¹⁹⁶ Bayne, "Press Conference", *supra* note 192 at 00h:03m:25s.

¹⁹⁷ *Ibid* at 00h:21m:20s.

¹⁹⁸ *Ibid* at 00h:00m:30s.

¹⁹⁹ Cochrane & Laventure, *supra* note 21.

²⁰⁰ Bayne, "Press Conference", *supra* note 192 at 00h:39m:22s – 00h:40m:40s.

In examining Murray Segal's report one area where he provides some useful insights concerns the lack of information available from the Department of Justice with respect to basic questions about extradition processes in Canada. The difficulties in accessing information about many aspects of extradition in Canada have been remarked upon earlier,²⁰¹ and some of Murray Segal's comments and questions on related matters are highly pertinent. As he observes:

Currently, the public has very little access to information about the Minister's surrender decisions in individual cases, like Dr. Diab's, or even more generally. There is a dearth of statistical information about the extradition requests Canada receives. How many requests are made each year? From which countries? In how many of these cases is an authority to proceed issued? What factors does the Minister consider in deciding whether to issue an Authority to Proceed? Of the cases in which an Authority to Proceed is issued, how many pass the judicial phase? In what percentage of cases where the person sought is ordered committed for extradition does the Minister order surrender? What are the most common reasons the Minister refuses to surrender someone for extradition? How frequently does the Minister seek assurances when ordering surrender? What types of assurances are sought?²⁰²

Mr. Segal continued:

The absence of any publicly available information about these matters may fuel public ignorance and, potentially, suspicion of the Canadian extradition system. The Department of Justice should consider providing public access to statistics about extradition cases, the policies and procedures that guide decision-making by counsel within the IAG, and summaries of the Minister's decisions.²⁰³

Overall Murray Segal's report appears to be guided by two principal preoccupations that have already been alluded to. The first of these is to demonstrate support for the work on the Hassan Diab case undertaken by justice officials, while discrediting any views (notably those of Hassan Diab, his lawyer Donald Bayne, and their supporters) to the contrary. His second preoccupation involves emphasizing the need for more education about the extradition process itself. While this theme initially appears benign, a closer look (as will be undertaken later below) reveals that the target of Mr. Segal's aspirations for education are far from in harmony with those of human rights activists and reformers who are concerned about Canada's extradition law and processes.

²⁰¹ *Supra* note 7.

²⁰² Segal, *supra* note 193 at 107.

²⁰³ *Ibid.*

In Mr. Segal's unwavering approval for the work and conduct of justice officials he emphasizes what he characterizes as their "ethical" approach in Hassan Diab's case. The Department of Justice counsel, he says, "acted in a manner that was ethical and consistent – both with the law and IAG practices and policies." He further states that his "conclusion" in this regard is based on a "firm factual foundation."²⁰⁴ Related statements by Mr. Segal include that the Assistance Group counsel "advanced the case ethically and with skill and considerable drive,"²⁰⁵ and that "[o]f course in advancing a case for extradition, counsel for the Attorney General must act ethically and fairly – as they did in Hassan Diab's case."²⁰⁶

By contrast, while Mr. Segal recognizes that Hassan Diab's defence counsel were "talented and dedicated,"²⁰⁷ as well as "knowledgeable,"²⁰⁸ their concerns about certain aspects of the case are given short shrift by him. As Mr. Segal states: "I have concluded that none of the criticisms lodged against the Department of Justice counsel have any merit."²⁰⁹ With the defence's central concern focusing on the Canadian prosecutors' omission to disclose fingerprint evidence pointing to the exoneration of Hassan Diab (with numerous samples linked to the alleged bomber failing to provide any match) Mr. Segal takes pains to emphasize that, unlike the requirement that full disclosure be provided in Canadian criminal trials,²¹⁰ this obligation does not apply in extradition cases.²¹¹ Dismissing the concerns of the defence Mr. Segal reiterated:

[N]either the requesting state, nor counsel for the Attorney General acting on the requesting state's behalf, are required to disclose all relevant evidence. They need only disclose that evidence on which they rely in seeking extradition.²¹²

However Mr. Segal appears to concede that defence concerns about the matter are worth at least some consideration as his recommendations include that:

²⁰⁴ *Ibid* at 8.

²⁰⁵ *Ibid* at 14.

²⁰⁶ *Ibid* at 82.

²⁰⁷ *Ibid* at 5.

²⁰⁸ *Ibid* at 13.

²⁰⁹ *Ibid* at 8.

²¹⁰ *R v Stinchcombe*, [1991] 3 SCR 326.

²¹¹ Segal, *supra* note 3 at 28. Cases cited by Mr. Segal in support of this are *United States v Dynar*, [1997] 2 SCR 462 and *United States of America v Kwok*, 2001 SCC 18.

²¹² *Ibid*.

Counsel for the Attorney General in advancing a case for extradition should consider sharing evidence – particularly relevant and exculpatory or potentially exculpatory evidence – even when they are not required or obligated to do so.²¹³

For his part, defence lawyer Donald Bayne found this to be “a surprising recommendation.” This was because, in his view, “[t]hey already have that discretion. It’s called ethics. It’s called doing the right thing.”²¹⁴

With respect to Murray Segal’s second preoccupation with the need for more education about extradition in the Canadian context he elaborates by stating:

Chief among the lessons I learned conducting this review is that the world of extradition is poorly understood and information about how Canada’s extradition system works is difficult to access. Significant and sustained efforts should be made to illuminate Canada’s extradition process and increase its transparency. I believe these efforts could contribute to greater respect for and confidence in our extradition system.²¹⁵

Mr. Segal correctly observes that there has been a dearth of information about, and understanding of, extradition law and processes in Canada. Segal is further correct in his observation that this also applies in legal communities as “many lawyers in Canada are not familiar with the extradition process.”²¹⁶ As previously noted Professor Robert J. Currie - a long-standing expert on extradition law in Canada - has also commented on the lack of familiarity both among practicing lawyers and the public,²¹⁷ and lawyer Donald Bayne has described related law as one of the “dark corners”²¹⁸ of Canada’s legal system.

Murray Segal’s encouragement of greater transparency as it might contribute to the system being held in higher public regard gives rise to important issues. At a minimum his call for more education acknowledges that, as matters currently stand, at least in relation to Hassan Diab’s case, the work of officials at the Department of Justice is perceived as vulnerable to criticism and some remedial action seems to be needed. One of the complicating factors here is that while observers of extradition law and processes in Canada across a spectrum (ranging from unquestioning

²¹³ *Ibid* at 124.

²¹⁴ Bayne, “Press Conference”, *supra* note 192 at 00h:34m:12s.

²¹⁵ Segal, *supra* note 193 at 9.

²¹⁶ *Ibid* at 75.

²¹⁷ Currie, *supra* note 25.

²¹⁸ Cobb, “Extradition being attempted”, *supra* note 26.

approval²¹⁹ to relentless questioning including about the content of the law itself²²⁰) are united in agreeing that education is needed, a deep schism is evident concerning what the content of it should be.

In seeking to advance understanding of the current legislation and system Murray Segal's commentary reflects an unswerving support for the extradition world as is. While he acknowledges that Hassan Diab's extradition and subsequent imprisonment in France were "troubling,"²²¹ this does not prompt Segal to engage in any meaningful examination of how the human rights of persons sought could potentially be better protected in the extradition context.

To the contrary an effort to get the message out that matters of innocence or guilt are not a consideration in the current extradition world appears to be at the heart of Murray Segal's mission. In seeking to "dispel misconceptions"²²² about extradition Mr. Segal repeatedly reminds the reader that the process is not a trial. All that is needed is that the requesting country, with the assistance of Canadian prosecutors, establish that a *prima facie* case exists against the person sought. As described by Mr. Segal prosecutors have a more limited role in extradition cases than in domestic criminal trials,²²³ and considerations of culpability are extraneous. In highlighting his key point about the irrelevance of innocence or guilt Mr. Segal's remarks include the following:

²¹⁹ Prominent here are justice officials. As reported by Murray Segal: "[C]ounsel representing the Attorney General at the extradition hearing and those representing the Minister take the view that the current Canadian extradition system is fair and working well." The only caveat to this identified by Segal is the view of officials that the system "could benefit from improvements to increase efficiency." *Supra* note 193 at 74.

²²⁰ As Murray Segal observes Hassan Diab and his supporters had questions not only about International Assistance Group lawyers having possibly "overstepped" their role, but they also "have criticized the current state of the law and argue strenuously that the rights and interests of individuals sought for extradition have been sacrificed at the altar of expediency and comity." Segal, *supra* note 193 at 11 & 76.

²²¹ *Ibid* at 14.

²²² *Ibid* at 17.

²²³ In Murray Segal's words: "[B]efore a trial in Canada, Crowns must consider whether there is a reasonable prospect of conviction. They also have an obligation to evaluate the strength of their case at all stages of the proceedings. These types of considerations are not relevant to counsel for the Attorney General in extradition proceedings." (*supra* note 193 at 82).

In deciding whether to extradite someone, the guilt or innocence of the person sought is not a concern.²²⁴

...

It is not the Minister's role to review the findings of the committal judge, to consider whether there is sufficient evidence for extradition, or determine the guilt or innocence of the person sought for extradition.²²⁵

...

At the extradition stage, guilt or innocence is not a relevant issue.²²⁶

...

[T]he core purpose of extradition is not to decide a person's guilt or innocence.²²⁷

...

The extradition judge's role is 'not to determine guilt or innocence'. Nor is that the role of the Minister in deciding the issue of surrender. The ultimate guilt or innocence of the fugitive is not the concern of the Canadian executive or judiciary.²²⁸

...

[T]he Minister does not consider the issue of guilt or innocence in making the surrender decision.²²⁹

On one occasion when repeating this point Murray Segal refers to the perspective of a person sought who declares their innocence. He states:

[T]he guilt or innocence of the person sought for extradition is not a live issue at any of the three stages of the extradition proceedings. For an individual facing extradition who wishes to proclaim their innocence, this is a difficult concept to accept.²³⁰

This statement by Mr. Segal is arguably very difficult to fathom. He seems to be chagrined that a person who is potentially (or even actually) innocent has trouble with the reality that – as Canadian extradition law currently stands – this is simply not a consideration. While the irrelevance of guilt or innocence in Canada's extradition context may be factually correct in the strictly legal context, it is hard to see how this can be justified

²²⁴ *Ibid* at 17-18.

²²⁵ *Ibid* at 20.

²²⁶ *Ibid* at 28.

²²⁷ *Ibid* at 79.

²²⁸ *Ibid*, citing *United States of America v MM*, 2015 SCC 62 at para 62; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779 at 844; and *Philippines (Republic) v Pacificador*, (1993), 83 CCC (3d) 210 (Ont CA) at 222 (leave to appeal to SCC refused [1993] SCCA No 415 (SCC)).

²²⁹ *Ibid* at 111.

²³⁰ *Ibid* at 75 [emphasis added].

from any perspective that values human rights, and indeed ethics, in dealing with suspects.

In his report Murray Segal accurately observes that “[f]or many, Dr. Diab’s case is disconcerting...because the law was applied faithfully and nevertheless produced a troubling result.”²³¹ Unfortunately his report does not remedy the situation. According to David Cochrane of the CBC in a phone conversation on the day of the report’s release Murray Segal “acknowledged that none of his recommendations would have been likely to prevent Diab’s extradition in the first place.”²³²

In light of this Hassan Diab’s wry comment that the report “came just to justify all the actions of the people at the Department of Justice as if I did not exist”²³³ is understandable. For his part Donald Bayne questioned the standard and reliability of evidence considered acceptable in the extradition context, and opined that “the standard is too low. Anything goes in an extradition. And you can’t defend yourself.”²³⁴ Bayne further lamented “by and large the recommendations are cosmetic, and serve to further streamline the expedition of the system rather than the protection of Canadians.”²³⁵

While Hassan Diab and Donald Bayne had questions and concerns about how the case was handled by justice officials, they both (as did their supporters) remained adamant that the fundamental issue was the underlying legislation. As emphasized by Hassan Diab: “*The Extradition Act* itself is the problem.”²³⁶

It is hoped that this article can contribute to future discussions and resolutions, especially with respect to the unsatisfactorily low threshold of evidence that currently applies in Canadian extradition proceedings.

²³¹ *Ibid* at 77.

²³² David Cochrane, “‘Whitewash’: Hassan Diab attacks report concluding government acted properly in his extradition case”, *CBC News* (26 July 2019), Ottawa, online: <www.cbc.ca/news/politics/hassan-diab-extradition-france-1.5226033> [perma.cc/L66Y-85Z2].

²³³ Bayne, “Press Conference”, *supra* note 192 at 00h:27m:42s.

²³⁴ *Ibid* at 00h:09m:41s.

²³⁵ *Ibid* at 00h:33m:25s. However Mr. Bayne did continue by identifying one “useful” recommendation by Mr. Segal, namely that when expert reports are involved they should be provided in their entirety to the defence, rather than just a summary of conclusions.

²³⁶ *Ibid* at 00h:29m:25s.

A Bargain with Justice? A Perspective on Canada's New Remediation Agreements

P A E T R I C K S A K O W S K I *

ABSTRACT

Remediation agreements, in other jurisdictions known as deferred prosecution agreements, have recently been implemented in the Canadian *Criminal Code* as a new tool for curbing corporate crime. The availability of such agreements serves as an incentive for corporations to self-report offences, the prosecution of which is traditionally difficult and resource intensive. In exchange for their cooperation in the investigation of such economic offences, corporations may receive significant discounts on fines and avoid the risks, costs and damaged reputation that lengthy trials entail. As with any system that involves incentives and deterrence, in other words the carrot and stick approach, finding the right balance is crucial for achieving results that are effective as well as legitimate. This article considers how Canada may draw upon the experiences gained with deferred prosecution agreements in both the United States and the United Kingdom, as a broad and robust foundation for the new Canadian provisions in favor of deferred prosecution agreements, and reductions lowering incurred fines and penalties. Such an approach would encourage self-reporting and mitigate the negative impacts of criminal prosecution on innocent corporate stakeholders, whilst achieving a balance that does not undermine the legitimacy of non-prosecution.

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I. INTRODUCTION

Traditionally, the criminal justice system's approach has been to have justice realized by means of unilateral acts of the state, using its monopoly on force to issue judgments, and thereby impose fair punishments. Several jurisdictions¹ have recently supplemented their approaches to corporate crimes by introducing deferred prosecution agreements ("DPAs") as a new instrument for dealing with harm resulting thereof. Instead of a unilateral investigation followed by a trial, corporations and prosecutors enter into negotiations, leading to an agreement on a statement of facts and appropriate remedies.

On 19 September 2018, without much attention from legal scholars,² the Canadian *Criminal Code*³ was amended to make provision for DPAs, or remediation agreements ("RAs") the preferred terminology by Canadian legislators.⁴

The recent scandal surrounding the bribing of Libyan officials by SNC-Lavalin Group Inc. ("SNC-Lavalin") brought this new instrument quickly to the attention of the broader Canadian public. Allegedly, then Minister

¹ Among them the United Kingdom, France, and Australia. The Law Reform Commission of Ireland has recommended the introduction of DPAs, *Report on Regulatory Powers and Corporate Offences*, vol 2 (Ireland: Law Reform Commission, 2018) at 755, online (pdf): <www.lawreform.ie/fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pdf> [perma.cc/9CLS-56NM].

² The exception being: Todd Archibald & Kenneth Jull, "Coming in From the Cold: Deferred Prosecution (Remediation) Agreements in Canada" (July 2018) Toronto LJ 1, online (pdf): <www.tlaonline.ca/document/107/deferred_prosecution-archiba.pdf> [perma.cc/3NQC-ZLBG].

³ *Criminal Code*, RSC 1985, c C-46 as amended by the *Budget Implementation Act, 2018*, No 1, SC 2018, c 12, Division 20 [*Criminal Code*]. The argument was made that the implementation of the new rules through the budget bill was to pass them "quietly", see Andy Blatchford "Bill quietly introduced in federal budget proposes tool to ease corporate crime penalties", *Global News* (15 May 2018) online: <globalnews.ca/news/4208910/federal-budget-proposes-ease-corporate-crime-penalties> [perma.cc/TE4V-JHLP].

⁴ The Canadian terminology is supposedly meant to shift the focus from avoiding penalties to the implementation of remedial measures, Cf Institute for Research and Public Policy, *Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement*, (Round Table Report) (Montreal: IRPP, 2016) at 12-13, online (pdf): <irpp.org/wp-content/uploads/2016/03/roundtable-report-2016-03-10.pdf> [perma.cc/8HP3-PYFD].

of Justice and Attorney General Jody Wilson-Raybould was pressured by the Prime Minister's Office to prevent prosecution against SNC-Lavalin by offering a RA to the corporation.⁵ The heated debate that started over this particular case—which may likely also have been an important motive to amend the *Criminal Code* in the first place⁶—must not deter prosecutors in making use of RAs in future cases. As this article will show, RAs have the potential not only to adequately compensate the harm caused by corporate offenses to individuals and society as a whole, but also to avoid inefficiencies and additional detriments the traditional sanction system is often burdened with.

Two of the main policy goals to compensate for these inefficiencies and detriments underlying RAs are encouraging self-reporting of corporate offences and preventing bankruptcies due to the effects of criminal prosecution, incurred by defendant corporations, as a consequence of the particularly high costs of trials, fines, and additional reputational damages in such cases.⁷ In both respects, perhaps in contrast to the notions of traditional prosecution, exercising broader use of discretion that the law confers upon prosecutors and judges by means of more modest penalties, promises to yield significant public benefits. Informed by experiences with DPAs in the two jurisdictions which provided the blueprint for the Canadian legislation,⁸ the United States and the United Kingdom, this article will demonstrate that the Canadian rules for RAs provide for sufficient safeguards to support such a broad use of discretion without undermining the legitimacy of criminal prosecution.

After a brief introduction to the newly enacted Canadian rules for RAs in Part 2, Part 3 will discuss their rationale as it has been described in the

⁵ "Jody Wilson-Raybould: Ex-minister increases pressure on Trudeau", *BBC News* (28 February 2019), online: <www.bbc.com/news/world-us-canada-47362652> [perma.cc/6G78-JP4S].

⁶ "SNC-Lavalin CEO urged Ottawa to change anti-corruption rules", *CBC News* (5 March 2019), online: <www.cbc.ca/news/business/snc-lavalin-ceo-letter-1.5044395> [perma.cc/CCS8-63NK].

⁷ Public Services and Procurement Canada, *Integrity Regime: Annual Report: April 1, 2017 to March 31, 2018*, (Ottawa: PSPC, 2018), online (pdf): <www.tpsgc-pwgsc.gc.ca/ci-if/documents/rpri-irr-2017-2018-eng.pdf> [perma.cc/99VA-9TG5]; *Criminal Code*, *supra* note 3, s 715.31.

⁸ Library of Parliament, *Legislative Summary Bill C-74*, Publication No 42-1-C74-E at 44-45, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c74-e.pdf> [perma.cc/G2YX-6XNE].

legislative enactment process and as outlined in the law itself. Part 4 analyses the implementation of DPAs in the US, where, despite considerable criticism, they have been used quite extensively, and in the UK, where DPAs are subject to strict court scrutiny and are less frequent. Part 5 will draw upon the experiences of both jurisdictions and will show that in order to maximize the public benefit, careful consideration must be given to the conditions under which RAs may be entered into.

II. REMEDIATION AGREEMENTS - AN OVERVIEW

After a one-year legislative process, including a public hearing with many contributions from the business and the justice sector,⁹ RAs were introduced to the *Canadian Criminal Code* via Budget Bill C-74.¹⁰ As defined in the *Criminal Code*, an RA is “an agreement between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.”¹¹ RAs are therefore exclusively open to “organizations” which include (a) societies, companies, firms, partnerships or (b) where the following conditions are met: (i) an association of persons; (ii) created for a common purpose, (iii) with an operational structure; and (iv) holds itself out to the public as an association of persons.¹² RAs are available for a limited number of corporate offences, including fraud, forgery, bribery (of domestic or foreign officials), gaming in stocks, or laundering proceeds of crime.¹³ For remedying these offences, the agreement may impose different obligations of preventive and/or punitive character on the organization, in particular, the provision

⁹ Out of 45 submissions, 47% were provided by business, 26% by individuals, 20% by the justice sector (including law enforcement) and 7% by NGOs. In addition, there were over 40 meetings held by government officials with approximately 370 participants; the results and participants thereof are unknown. Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing in Canada: What We Heard*, (Ottawa: GOC, 2018) at 7, online (pdf): <www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/rapport-report-eng.pdf> [perma.cc/4SHU-GZYL] [Canada, “What We Heard”].

¹⁰ The bill was granted Royal Assent on June 21, 2018. See Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018 (assented 21 June 2018), SC 2018, c 12.

¹¹ *Criminal Code*, *supra* note 3, s 715.3 (1).

¹² See *ibid*, s 2; *Ibid*, s 715.3 (1) excludes from this definition every public body, trade union, or municipality.

¹³ *Ibid*, Schedule to Part XXII.1.

of additional information, continuous cooperation, monetary penalties and costs reimbursement, disgorgement of profits, reparations to victims, compliance measures, and the appointment of an independent monitor.¹⁴

The commencement of negotiations by the prosecutor needs the assent of the Attorney General.¹⁵ The draft agreement upon also has to be approved by a superior court.¹⁶ The court must take into consideration the impact of the proposed RA on any victim and the community, and the suggested reparations, statements and additional measures the organization agrees to.¹⁷ The court must approve the RA if three factors are met: (i) the court is satisfied the organization is charged with an offence to which the agreement applies; (ii) the agreement is in the public interest; (iii) and the terms of the agreement are fair, reasonable and proportionate to the gravity of the offence.¹⁸

Once in effect, an RA leads to a stay of proceedings against the organization.¹⁹ Proceedings may only be reinstituted if the RA is terminated due to a breach by the organization.²⁰ If the organization fulfills all its obligations under the RA, "proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence."²¹

The RA and the court's order have to be published except for cases in which the non-publication is necessary for the proper administration of justice.²²

III. CANADIAN POLICY OBJECTIVES

RAs are an atypical instrument in the context of criminal prosecution. Instead of a thorough investigation by the prosecutor followed by a public trial and a unilateral act of judgment, RAs are results of bilateral

¹⁴ *Ibid*, ss 715.34 (1), 715.34(3).

¹⁵ *Ibid*, s 715.32(1)(d).

¹⁶ *Ibid*, s 715.37(2).

¹⁷ *Ibid*, s 715.37(3).

¹⁸ *Ibid*, s 715.37(6).

¹⁹ *Ibid*, s 715.37(7).

²⁰ *Ibid*, ss 715.39(1)-(2).

²¹ *Ibid*, s 715.4(2).

²² *Ibid*, ss 715.42(1)-(2). Whether the proper administration of justice requires non-publication is to be determined by taking into consideration a variety of factors which are non-exclusively listed in s 715.42(3).

negotiations. This very special nature of RAs puts pressure on the justice system to justify their legitimacy in general, and their scope in particular cases, because their use may give the impression of reducing justice to a bargain, particularly in cases of economically powerful defendants.²³ The Canadian Parliament has articulated five objectives of RAs in s. 715.31:

- Denouncement of an organization's wrongdoing and the harm it has caused;
- Accountability through penalties;
- Contribution of respect for the law by imposing corrective measures and promoting a compliance culture;
- Encouragement of voluntary disclosure;
- Compensation of victims; and
- reducing the negative consequences of wrongdoings for the organization's stakeholders (among them employees, pensioners, customers).

Further objectives that can be taken from the new provisions are:

- Transparency by publishing RAs and judicial decisions thereon²⁴; and
- Enabling or facilitating prosecution against individuals such as employees whose conduct cannot be a subject to an RA.²⁵

One of the objectives not expressly mentioned as a policy consideration is the prevention of the unnecessary use and spending of prosecutorial and court resources, through prevention of costly and timely investigations and trials. While there is good reason not to overemphasize this objective and thereby give the impression that a lack of resources could lead to organizations buying themselves out of prosecution, this objective has been brought up in the public hearings,²⁶ and may provide a strong incentive for the prosecution to make effective use of RAs.

²³ The danger such impression could arise is very present in the warning of judge Sir Brian Leveson in *Serious Fraud Office v Rolls-Royce PLC*, [2017] Lloyd's Rep FC 249 at para 59 [Rolls-Royce]:

"...nothing must ever be done to encourage the view that those with money can 'buy' themselves out of prosecution..."

²⁴ *Criminal Code*, *supra* note 3, s 715.42(1).

²⁵ *Ibid*, ss 715.32(2)(c), 715.32(2)(f).

²⁶ Government of Canada, *Expanding Canada's Toolkit to Address Corporate Wrongdoing*: Discussion paper for public consultation, (Ottawa: GOC, 2018) at 4 [Canada,

The express objectives are listed in no particular order and may not necessarily be of equal importance in every single case. This is obvious for compliance measures which are not an obligatory part of RAs.²⁷ The compensation of victims may be problematic in cases where there are no individual victims, for example when public goods are affected, or victims are not identifiable, notably in cases of foreign bribery.²⁸ Some of the policy objectives are even contradictory. For the organization's stakeholders, at least for those who are not at the same time its victims, the most favorable outcome would be the absence of any penalty. On the other hand, optimal corrective measures including reporting, monitoring, and the implementation of a tightly construed compliance structure might impose disproportionate costs on the organization, particularly in cases of small and medium enterprises. Moreover, preventive measures have no inherent boundaries as even the most sophisticated compliance system may still be improved to reduce peripheral risks. Accordingly, prosecutors and courts deciding on RAs and their terms, must take into account which policy considerations apply, and how their opposed objectives can be brought into a fair and equal balance.

"Discussion paper"]; Canada, "What We Heard", *supra* note 9 at 14; the argument was openly accepted in the UK as parameter for the court's decision whether to approve a DPA, *Rolls-Royce*, *supra* note 23 at para 58:

"Although the SFO is ready and able to prosecute large corporates like Rolls-Royce, where necessary, its resources (both financial and in terms of manpower) are not unlimited so that when an agreement such as this can be negotiated, the public interest requires consideration to be given to the cases that will not be investigated if very substantial resources (sufficient to prepare the case for a hearing) are diverted to it."

²⁷ See *Criminal Code*, *supra* note 3, s 715.34(3)(a).

²⁸ Cf *Rolls-Royce*, *supra* note 23 at para 83; *Serious Fraud Office v XYZ* [2016] Lloyd's Rep FC 509 at 20 [XYZ]; *Criminal Code*, *supra* note 3, s 715.3(1) makes it clear though that foreign persons can be victims of foreign corruption. Thus, the *Corruption of Foreign Public Officials Act* not only protects a public good (for example the integrity of foreign administrations). Nevertheless, the problem for prosecution in such cases to identify individual victims remains.

IV. DEFERRED PROSECUTION AGREEMENTS IN THE UNITED STATES AND THE UNITED KINGDOM

A. United States

In the United States, DPAs have been concluded in considerable numbers since their introduction to address corporate white-collar crimes by the Department of Justice (“DOJ”) in 1994,²⁹ and their adoption by the Securities and Exchange Commission (“SEC”) in 2013.³⁰ In contrast to Canada and the UK, no statutory framework on DPAs exists, but only DOJ and SEC policies.³¹ These policies make DPAs available to organizations as well as to individuals for a wide variety of offences without limitation to white-collar crimes.³² In practice, particularly in the area of foreign corruption, the clear focus of DPAs has been corporate crimes, while individuals such as corporate employees are rarely prosecuted.³³

The extensive use of DPAs is often attributed by legal commentators to a particular case: The conviction of accounting firm Arthur Andersen LLP.³⁴ The partnership was the auditor for Enron Corporation, which conducted fraudulent accounting practices to an unprecedented extent. As investigations were initiated, employees of Arthur Anderson destroyed significant evidence leading to the firm’s conviction for obstruction of justice. As a consequence of this conviction, which was later overturned, Arthur Anderson went bankrupt. Based on the experience from this case, the DOJ shifted its policy from prosecuting corporate crime to negotiating

²⁹ Wulf Kaal & Timothy Lacine, “Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013” (2014) 70:1 Bus Lawyer 61 at 72.

³⁰ *Ibid* at 63.

³¹ The DOJ policies were shaped by a series of memoranda, namely the Thompson, Holder, McCallum, Mc Nulty, and the Filip Memorandum, each revising US, Department of Justice, *Justice Manual*, s 9-28.000 - Principles of Federal Prosecution Of Business Organizations [Justice Manual] (previously known as U.S. Attorneys’ Manual). For a detailed history of these policy revisions see Kaal & Lacine, *supra* note 29 at 64-77.

³² DPAs were traditionally used in non-corporate crimes, see Peter Spivack & Sujit Raman, “Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements” (2008) 45 Am Crim L Rev 159 at 163.

³³ Mike Koehler, “Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement” (2015) 49:2 UC Davis L Rev 497 at 530.

³⁴ *Ibid* at 501; Kaal & Lacine, *supra* note 29 at 69.

DPA's. The conclusion was to avoid what became known as the "Arthur Anderson effect" or the "death sentence for corporations," by initiating criminal investigations and thereby burdening the corporation with costs and disrepute. Although empiric research suggests that Arthur Anderson was an extraordinary case, and there is no evidence that criminal conviction or even mere investigations by default impose a severe risk of bankruptcy,³⁵ the adoption of the negotiation-based approach has developed a dynamic on its own. A private study³⁶ revealed that between 2000-2017, 483 DPAs were concluded;³⁷ the vast majority of which were initiated by the DOJ. The OECD has subtly insinuated the increase of DPAs as "dramatic."³⁸ On the other hand, it keeps emphasizing the leading role of the US in combating foreign corruption,³⁹ which seemingly has been enabled by DPAs.⁴⁰

Scholars have not been able to establish clear causation for the increasing numbers of DPAs. Thus, it remains unclear whether it was due to a rise in corporate crimes, more effective investigations, or a more significant focus of corporations in compliance and self-reporting.⁴¹ Nevertheless, there are two factors unique to the US legal system that arguably have played a decisive role in this development. Firstly, the near absence of judicial oversight suggests that prosecutors are inclined to use DPAs as an instrument to avoid the risk of losing cases and shaping enforcement policies without judicial interference.⁴² Although this absence has been criticized by scholars and judges,⁴³ and a Congress bill was

³⁵ Koehler, *supra* note 33 at 511.

³⁶ Gibson Dunn, "2017 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)" (4 January 2018), online (pdf): <www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf> [perma.cc/7Z8V-TXZ5].

³⁷ This number includes non-prosecution agreements.

³⁸ OECD, Working Group on Bribery in International Business Transactions, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States*, (OECD, 2010) at 112, online (pdf): <www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf> [perma.cc/PJ79-DN5X] [OECD].

³⁹ *Ibid* at 13.

⁴⁰ *Ibid* at 20: "It seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S."

⁴¹ Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement, IRPP Round Table Report March 2016, 8.

⁴² Koehler, *supra* note 33 at 521.

⁴³ Gordon Bourjaily "DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions"

introduced to establish further judicial oversight,⁴⁴ this has not yet led to any change. On the contrary, the U.S. Court of Appeals for the District of Columbia Circuit has recently emphasized that the decision to conclude a DPA and the terms of such an agreement fall within the scope of a prosecutor's discretion.⁴⁵ Secondly, the extensive application of criminal law by prosecutors without judicial oversight and review. Further, corporations cannot invoke a compliance defense, and the attribution of their employees' misconduct is not limited, such as under the "controlling minds" doctrine in the UK and Canada.⁴⁶

Despite the fact that negative anecdotal evidence of single corporations which repeatedly conducted relevant offenses and underwent consecutive DPAs suggests that such agreements may sometimes result in insufficient deterrence,⁴⁷ their broad use seems to have uncovered a considerable number of corporate crimes through self-reporting, particularly in the field of foreign corruption.⁴⁸ Further, there is wide belief that DPAs, by imposing compliance measures, have a severe impact on the change in corporate culture in the US.⁴⁹

B. United Kingdom

Based on the US model,⁵⁰ but with noteworthy deviations, DPAs were introduced in the UK by the *Crime and Courts Act 2013* on 24 February

(2015) 52 Harv J on Legis 543 at 547-549, 562-564; Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements" (2016) J Leg Analysis 191 at 231-232.

⁴⁴ US, Bill S 2544, *Ending Too Big to Jail Act*, 115 Cong. 2018, online: <www.congress.gov/bill/115th-congress/senate-bill/2544/text> [perma.cc/M6BP-G8NX].

⁴⁵ *United States v Fokker Services BV*, 818 F (3d) 733 at 744 (DC Cir 2016). In Canada, on the other hand, only the decision whether to offer a RA is not subject to judicial review except for abuse of process, see *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282 at para 180.

⁴⁶ Koehler, *supra* note 33 at 512.

⁴⁷ Notoriously in the case of Pfizer H.C.P. Corporation which subsequently entered three DPAs on similar offences, see Patrick Radden Keefe "Why Corrupt Bankers avoid Jail", *The New Yorker* (31 July 2012), online: <www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail> [perma.cc/9M6U-3TXT].

⁴⁸ OECD, *supra* note 38.

⁴⁹ Jake A Nasar, "In Defense of Deferred Prosecution Agreements" (2017) 11 NYU JL & Liberty 838 at 849-856; Koehler, *supra* note 33 at 512.; Kaal & Lacine, *supra* note 29 at 82.

⁵⁰ Serious Fraud Office, "Alun Milford on Deferred Prosecution Agreements" (5 September 2017), online: <www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred>

2014.⁵¹ The UK provisions in turn served as a model for the Canadian RAs,⁵² and are therefore more similar to the Canadian legislation. In particular,

- no individuals may enter a DPA;⁵³
- DPAs are reserved for a restricted list of white-collar crimes⁵⁴;
- the DPA needs the assent by the Crown Court, which has to review whether the DPA is in the public interest, and assess if its terms are fair, reasonable and proportionate;⁵⁵ and
- the court's decision, together with the DPA itself, is generally to be published.⁵⁶

So far, only five DPAs have been concluded in the UK under the auspices of the Serious Fraud Office ("SFO"),⁵⁷ all involving bribery of foreign officials or false accounting, and all approved by the same judge, Sir Brian Leveson who accordingly had considerable influence in shaping the terms under which a proposed DPA may be approved by the Crown Court. The court has taken its role in overseeing proposed DPAs very seriously, and attempted to balance the policy issues at stake. In two decisions, the court has given important guidance on the problems of self-reporting and the determination of fines.

The first being the case of the *Rolls-Royce*, where the court made an exception to the UK's general rule that self-reporting is a condition for entering a DPA.⁵⁸ This exception has attracted much attention among commentators,⁵⁹ but is less significant if the details of the case are reviewed more carefully. *Rolls-Royce* was, for a considerable time, involved in the bribery of foreign officials in various jurisdictions to obtain government

prosecution-agreements> [perma.cc/893J-7KV9] [SFO, "Alun Milford"].

⁵¹ Koehler, *supra* note 33 at 561.

⁵² Archibald & Jull, *supra* note 2 at 7.

⁵³ *Crime and Courts Act 2013* (UK), Schedule 17, s 4(1);

⁵⁴ See *Ibid*, Schedule 17, Part 2.

⁵⁵ *Ibid*, Schedule 17, ss 8(1), 8(3).

⁵⁶ *Ibid*, Schedule 17, s 8(7).

⁵⁷ Serious Fraud Office, "Deferred Prosecution Agreements" (last visited 2 August 2019), online: <www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> [perma.cc/X6QK-BUR2].

⁵⁸ *Rolls-Royce*, *supra* note 23.

⁵⁹ SFO "Alun Milford", *supra* note 50: "some commentators have dwelt on this aspect of the case".

orders. The SFO got first indications of these activities through the observation of public online forums.⁶⁰ Shortly after, Rolls-Royce cooperated over the course of the next several years, providing considerable detailed information, naming individual wrongdoers, and waiving legal privilege on many documents. Further, the company implemented considerable compliance measures to prevent similar offences in the future. As the SFO became aware of many other offences solely on the basis of the information provided by Rolls-Royce, the case came close to self-reporting.⁶¹ The exception created by the court for “extraordinary cooperation”⁶² thus remains rather narrow and is limited to such cases of almost complete self-reporting.⁶³

As to the reduction of fines, the court has shown that it is willing to grant leniency through means of substantial reductions in specific circumstances. While reductions for self-reporting and cooperation in the UK usually result in a discount of one third,⁶⁴ the court made several important exemptions from this rather stringent rule. In the *Rolls-Royce* case, the court took the firm’s “extraordinary cooperation” and its substantial role in the British (defense) industry into consideration, thereby reducing the fine more appropriately by 50%.⁶⁵ In the case of XYZ,⁶⁶ the court had to deal with a potential case of the “Anderson effect.” Since XYZ did not have the financial means to pay such a considerable fine, the imposition thereof would likely have had the decimating effect of permanently shutting down the business. Thence, the court not only granted a discount of 50% for the company’s cooperation but further reduced this amount to about 2%.⁶⁷ This enabled the company to continue its business operations for the sake of its stakeholders (the cooperative parent company, employees, pensioners,

⁶⁰ *Rolls-Royce*, *supra* note 23 at para 16.

⁶¹ A fact, often ignored by critics, Cf Rita Cheung, “Deferred Prosecution Agreements: Cooperation and Confession” (2018) 77:1 Cambridge LJ 12 at 13; OECD, Working Group on Bribery in International Business Transactions, *Implementing the OECD Anti-Bribery Convention Phase 4 Report*: United Kingdom, para 22, online (pdf): <www.oecd.org/corruption/anti-bribery/UK-Phase4-Report-ENG.pdf> [perma.cc/M84S-HUK7].

⁶² *Rolls-Royce*, *supra* note 23 at para 121.

⁶³ SFO, “Alun Milford”, *supra* note 50.

⁶⁴ *Rolls-Royce*, *supra* note 23 at para 119.

⁶⁵ *Ibid* at para 123.

⁶⁶ XYZ, *supra* note 28. The defendant’s name remains anonymous until related criminal proceedings are concluded.

⁶⁷ £352,000 of £16.4 million, *ibid* at 22, 24.

suppliers, and customers),⁶⁸ and to additionally acknowledge the positive decisions to comply made by XYZ and its parent company. In this context, the judge emphasized the importance of encouraging self-reporting and cooperation with prosecutors.⁶⁹

V. THE CANADIAN RA – A CHANCE FOR CHANGE

The examples from the US and the UK indicate that different legislative frameworks and practices on DPAs have a decisive effect on their significance in the system of criminal prosecution. Although Canada has already, in part, set the course by modeling the framework of its rules on RAs as a derivative of the rules established in the UK, the interpretation and weighing of different factors to be taken into consideration by prosecutors and judges still leaves significant room for policy considerations. As RAs can only constitute a meaningful prosecutorial instrument if they have both, a merit for the public and an incentive for the offending organization, there has to be a reasonable balance between both.

In the following, ways to achieve this balance with regard to the requirement of self-reporting and the determination of penalties are discussed.

A. No Requirement of Prior Self-Reporting in the *Criminal Code*

Given the nature of corporate crime, it is often difficult to uncover.⁷⁰ Encouraging self-reporting is therefore of significant importance and a common objective of any set of rules on DPAs. Although it has been argued in the Canadian context that for the benefits the organization may receive by concluding an RA, self-reporting should be made a strict condition thereof,⁷¹ this is not supported by the law. On the contrary, policy considerations suggest a broad use of RAs.

The *Criminal Code* clearly states that while enhancing self-reporting is an objective of RAs, it is not a strict condition thereof.⁷² Moreover, the

⁶⁸ *Ibid* at 24: “These [considerations] include the conclusion that the interests of justice did not require XYZ to be pursued into insolvency”.

⁶⁹ *Ibid* at 16, 18.

⁷⁰ Miriam Hechler Baer, “Insuring Corporate Crime” (2008) 83 Ind LJ 1035 at 1038.

⁷¹ Archibald & Jull, *supra* note 2 at 6.

⁷² *Criminal Code*, *supra* note 3, s 715.32(1).

circumstances under which the wrongdoing came to the prosecution's attention are just one factor the prosecutor has to consider when determining whether an RA is in the public interest and appropriate in the circumstances.⁷³ This reading of the *Code* as being in the public interest becomes evident from the British *Rolls-Royce* case with its narrow yet remarkable exception. Had the court strictly enforced the requirement of self-reporting, the significant cooperation that Rolls-Royce had undertaken would not have been encouraged by the prospect for a DPA. A broad reading of the provisions is even further encouraged by the opening clause in s. 715.32(2)(i) which allows prosecutors to take any analogous factor into consideration when deciding on whether to offer an RA. The rigid restriction of RAs to a "zero discovery zone"⁷⁴ on the other hand, would discourage any self-reporting where even minimal parts of an offence series become public, or at least known to prosecutors. This would drastically limit the benefits of RAs by excluding the possibility to self-report on the facts that have not yet been discovered, and in particular on the individuals responsible for offences—not to mention all the other terms of an RA with beneficial potential for the public, particularly, specific compliance measures.⁷⁵ A restrictive interpretation would go even further than the very modest exemption made by the Crown Court on the rules upon which the Canadian RA framework is primarily based. This approach would, contrary to Archibald and Jull,⁷⁶ not be compatible with US policies, but on the contrary, follow the successful, and in this regard, well-balanced US approach. In the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, what the authors refer to does not address DPAs but rather only deviations and modifications from standard fine rates. While it grants up to 50% discounts for voluntary disclosure, it still grants up to 25% for involuntary disclosure.⁷⁷ Other US policies explicitly or implicitly leave open the possibility for concluding a DPA in cases of involuntary self-disclosure.⁷⁸

⁷³ *Ibid*, s 715.32(2)(a).

⁷⁴ Archibald & Jull, *supra* note 2 at 6.

⁷⁵ Kaal & Lacine, *supra* note 29 at 71.

⁷⁶ Archibald & Jull, *supra* note 2 at 4-6.

⁷⁷ Justice Manual, *supra* note 31, s 9-47.120 - FCPA Corporate Enforcement Policy at 2; reducing such insecurity is one objective of the Canadian regime, see *Debates of the Senate*, 41-1, No 218 (11 June 2018) at 5981 (Hon Grant Mitchell).

⁷⁸ For example: According to Justice Manual, *supra* note 31, ss 9-28.300, 9-28.900, self-disclosure is merely one factor to be considered; likewise, the SEC considers "[w]hether

Presuming one of the main factors discouraging organizations from self-reporting is insecurity regarding the question whether, as a consequence, a RA will be offered to them,⁷⁹ Canadian prosecutors should issue clear statements on whether they intend to accept delayed/non-voluntary self-reporting and if so, under which circumstances. The arguments above and the experiences in the US indicate that a non-restrictive approach even beyond the limited *Rolls-Royce* exception, i.e. an approach that does not make self-reporting a strict condition for the offer of a RA, may incentivize self-reporting in areas where investigations traditionally are of limited impact. The next section will show that different reporting behavior can be dealt with comfortably by adjusting penalties.

B. Penalty Discounts as Incentive

Entering a DPA potentially has considerable benefits for organizations: avoiding procedural costs and risks, loss of reputation, and debarment from public procurement.⁸⁰ Penalty reductions, (as compared to a conviction, can act as an additional and significant incentive for organizations to self-report and submit to compliance measures.

The *Criminal Code* does not set any criteria for determining penalties.⁸¹ Practice in the US and UK use the same criteria for determining penalties as for deciding whether to enter into a DPA. Two important examples are the cooperation of the organization, particularly by self-reporting, and the avoidance of the “Arthur Anderson effect.”

the Investigation was initiated based on information or other cooperation” as only one relevant factor (Enforcement Manual [Nov. 2017] sec. 6.2.2, 6.1.1. a (1) (iii)); US, Department of Justice, *Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations* at 9, online: <www.justice.gov/nsd/file/902491/download> [perma.cc/5F8C-4SVJ], expressly states: “Where an organization does not voluntarily self-disclose, but, after learning of violations from the government’s investigation, cooperates fully and appropriately remediates the practices that led to the violations, the company still may be eligible to receive some credit, to include the possibility of a deferred prosecution agreement.”

⁷⁹ Justice Manual, *supra* note 31, s 9-47.120 - FCPA Corporate Enforcement Policy at 2.

⁸⁰ Canada, “Ineligibility and Suspension Policy” (last modified 14 July 2017), online: <www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html> [perma.cc/KF59-H6YK], s 6, automatically debars organizations convicted for certain offences from public procurement for a period of up to 10 years.

⁸¹ The sole indirect exception of adding a default victim surcharge on penalties of 30% (*Criminal Code*, *supra* note 3, s 715.37(5)).

Both the US and the UK accept that self-reporting should not only be a factor for determining whether to enter a DPA, but also be of decisive significance for any penalty discounts. This applies to voluntary and non-voluntary self-reporting. While in the US involuntary self-disclosing can still lead to substantial penalty discounts of up to 25%,⁸² the Crown Court in *Rolls-Royce* even applied a 50% fine reduction for “extraordinary cooperation.”⁸³ While, as shown above, the *Rolls-Royce* case only constitutes a very limited exception to the general rule that self-reporting is required in the UK, the financial impact it had, in that case, was quite significant. The variance in reduction rates allows addressing a vast scale of self-reporting beyond the mere either/or choice when considering whether to enter an RA. Other areas, like competition law, allow even for complete immunity from prosecution,⁸⁴ for achieving policy objectives considered more prevailing, than the effective sanctioning of each offending organization. Further, such discounts could increase the incentive for managers to initiate early self-reporting as they otherwise may be held liable for lower discounts resulting from undue delays.⁸⁵ A reasonable graduation of penalty discounts is, therefore, a sound approach for outweighing any potential discouragement, and a less restrictive approach on self-reporting may grant the opportunity of concluding RAs even in cases of involuntary self-reporting.

As for the “Arthur Anderson effect,” i.e. the avoidance of an organization’s bankruptcy due to criminal prosecution and the level of fines imposed, the UK case of XYZ gives valuable guidance. The Crown Court, in this case, has shown a considerable determination to avoid the consequence of shutting down XYZ, taking into consideration the degree of cooperation both XYZ and its parent company had displayed, as well as the perceived adverse effects on XYZ’s stakeholders.⁸⁶ The resulting discount amounting to almost 98% of penalties demonstrates that other policy

⁸² Justice Manual, *supra* note 31, s 9.47.120 - FCPA Corporate Enforcement Policy at 2.

⁸³ *Rolls-Royce*, *supra* note 23 at para 123.

⁸⁴ Canada, “Immunity and Leniency Programs under the *Competition Act*” (15 March 2019), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html> [perma.cc/3UDZ-WXTG].

⁸⁵ Cf Larissa Fulop & Jason Wadden “Canada Adopts New ‘Remediation Agreement’ Regime To Address Corporate Crime” (3 October 2018), online: <www.mondaq.com/canada/x/740126/Corporate+Crime/Canada+Adopts+New+Remediation+Agreement+Regime+to+Address+Corporate+Crime> [perma.cc/28D9-CWVR].

⁸⁶ XYZ, *supra* note 28 at paras 23, 24.

objectives can have priority over imposing high penalties. This approach enables the corporation to opt for adopting well-implemented compliance structures, whilst yielding to the public interest instead of opting to bypass what would otherwise prove to be a financial and organizational burden, by filing bankruptcy, in which case, one would neither be able to collect penalties, nor would any deterrence be established for other wrongdoers. Ultimately, what has to be taken into consideration is that, in most cases, innocent parties end up having shoulder the substantial financial burden imposed through fines, whilst only partly, if at all, attributable to the organization's value gains, increased stock prices, and wage raises caused by the advantages resulting from the organization's offences.⁸⁷

VI. CONCLUSION

Whether the introduction of RAs will have a significant impact on how organizations assess litigation, investigations, and enforcement,⁸⁸ strongly depends on how prosecutors and courts will interpret and apply its underlying rules. The Canadian framework gives authorities the means to create strong positive incentives by not making prior self-reporting a condition, and by providing a balanced middle ground between not too severe a penalty and a reasonably deterrent and punitive penalty in appropriate cases.

While there is yet no empirical basis to verify this assumption, the mere numbers of DPAs entered in the UK suggest that the substantial restrictions the Crown Court and the SFO have implemented in their practice and interpretation of the law, may sharply restrict the scenarios in which a DPA can be entered into, and accordingly deter organizations from self-reporting. Through Sir Leveson's admonition to offenders to not only consider the financial burden resulting from a DPA, but to also take into consideration the supposedly much higher costs of criminal proceedings,⁸⁹ an economic rationale suggests that this is exactly what managers do, in particular, if the risk of discovery by investigations is perceived to be low. An obvious

⁸⁷ Canada, "Discussion paper", *supra* note 26 at 6.

⁸⁸ As claimed by Riyaz Dattu, Larry Ritchie & Sonja Pavic, "Deferred prosecution agreements to be introduced in Canada", *Financier Worldwide Magazine* (July 2018), online: <www.financierworldwide.com/deferred-prosecution-agreements-to-be-introduced-in-canada/> [perma.cc/J894-XW7P].

⁸⁹ *Rolls-Royce*, *supra* note 23 at para 143.

example is the area of foreign corruption where in Canada there have only been four convictions in almost two decades.⁹⁰

In the US, on the other hand, the lack of judicial oversight has arguably led to an imbalance between the executive branch and the judiciary, resulting in broad interpretations of the law which are not subject to judiciary review. This detriment, however, is already efficiently contained by giving Canadian courts a critical oversight role in the RA regime. As the discussion in the US suggests, too broad and relaxed use of DPAs may have detrimental effects on deterrence and lead to a perceived loss of legitimacy among the general public.

Based on the newly established rules, Canadian authorities have the chance to avoid the dilemma of being caught between a rock and a hard place, especially when it comes to finding the right balance and preventing what could otherwise easily become a discouragingly restrictive approach of self-reporting, or undermining legitimacy by too broad a use of RAs. As self-reporting in some areas of criminal law remains the most effective, if not the only, possibility to uncover committed offences,⁹¹ prosecutors and judges would be well-advised not to set the bar for concluding RAs too high, so as to render them unyielding. The variety of terms available for RAs, including flexibility for penalty discounts to be imposed, gives ample opportunity to establish customizable solutions for those organizations that are compromised.

The case of SNC-Lavalin, which at the time of the publication of this article is still controversially debated, illustrates not only that the burden on prosecutors to exercise their discretion on whether to offer a RA to the defendant corporation in a manner which does justice to all circumstances of the individual case as being high. It also demonstrates that responsible

⁹⁰ Since the Corruption of Foreign Public Officials Act was introduced in 1998 to August 2017, see Global Affairs Canada, "Fight against Foreign Bribery: Eighteenth Annual Report to Parliament" (last modified 11 October 2017), online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-18.aspx?lang=eng> [perma.cc/AR8A-HF3Z].

⁹¹ The Law Reform Commission of Canada has accurately noted on the immunity provisions in competition law, Law Reform Commission of Canada, *Immunity From Prosecution*, Working Paper 64 (1992) at 9:

"We are prepared, however, to recognize that the consideration flowing from an immunized offender (regardless of motivation) may, in exceptional cases, be sufficient to counterbalance any debt he or she is thought to owe to society as a whole."

democratic institutions, including courts and the press, are capable of curbing any potential abuse of RAs.

Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to ‘Mr. Big’

NATHAN PHELAN *

ABSTRACT

The “Mr. Big Operation” (MBO) is a noncustodial investigative technique wherein covert officers, posing as members of a fictitious criminal organization, seek to lure targeted suspects by offering fulltime membership in the organization in exchange for incriminating information. The deceptive technique is known to enhance the risk of unreliable and prejudicial evidence, two factors which have been stated by the Supreme Court of Canada as being traceable to wrongful convictions. Thus, a comprehensive and robust approach to governing the admissibility of Mr. Big confessions is essential to protect targets against the inherent risks associated with the use of the technique. This article delves into the origins of MBOs in Canada and details its importation to New Zealand and Australia. Further, through a comparative analysis of relevant case law and legislation in Canada, New Zealand and Australia, this article identifies the similarities and distinctions as well as the flaws and strengths of each nation. Proposed solutions are discussed in order to strengthen protection for Mr. Big targets and provide greater consistency in those countries where MBOs are most prevalent.

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Keywords: Mr. Big operations; wrongful convictions; comparative law; evidential rules; regulating Mr. Big confessions; scenario evidence; unreliable confessions; prejudicial effect; abuse of process; police impropriety; presumption of inadmissibility; admissibility of Mr. Big confessions; Canada; New Zealand; Australia; protection against false confessions; probative value; importation of Mr. Big operations; false confessions; unreliability

I. INTRODUCTION

With the creation of “Mr. Big Operations” (“MBOs”),¹ law enforcement officials have increasingly employed deceptive undercover police work that seek to elicit incriminating confessions from targeted suspects. The ‘Mr. Big’ technique is a noncustodial investigative operation, wherein covert police officers, posing as members of a criminal organization, seek to lure targeted suspects by offering full time membership in the organization in exchange for incriminating information. As of 2011, the Royal Canadian Mounted Police (“RCMP”) have noted that in 75% of such operations, the person of interest is either cleared or charged; and of the cases prosecuted, over 95% result in convictions.² Given the conviction rate and potential to solve what are commonly known as ‘cold cases’ – investigations that have gone ‘cold’ due to insufficient evidence to bring the suspect(s) to trial – it is no surprise that the state-sponsored ‘Mr. Big’ technique quickly spread across Canadian provinces and overseas to countries such as Australia, New Zealand, South Africa, and some European jurisdictions.³

Commonly implemented on homicide suspects, the methodology behind most MBOs is nearly uniform from case to case.⁴ MBOs, also referred to as the ‘Crime Scenario Undercover Technique’ in New Zealand

¹ The first reported Mr. Big-like operation occurred in the 1901 case of *The King v Todd* (1901), 4 CCC 514, 13 Man R 364 [Todd]. Despite this initial use, it was not until the late 1980s and early 1990s that an advanced modern version of the technique resurfaced in Canadian law enforcement.

² Royal Canadian Mounted Police, “Undercover Operations – Questions and Answers” (last modified 14 December 2011), online: <bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6943> [perma.cc/48AE-LKU2] [Undercover Operations].

³ *Ibid.*

⁴ *R v Hart*, 2014 SCC 52 at para 108 [Hart].

or the ‘Scenario Technique’ in Australia,⁵ begin with undercover officers luring their suspect into a fictitious criminal organization to which the officers supposedly belong. The covert officers form a social bond with the suspect, and entice them into cooperating with the gang through powerful inducements. The undercover officers posing as organized crime figures flaunt incentives of wealth and power, and allow the suspect to partake in staged criminal activity ostensibly for the benefit of the organization. As a result, suspects often develop a strong desire to permanently join the organization and aspire to see the realization of such inducements. Values of trust, honesty and loyalty are explicitly demanded between members of the fictitious organization, and it becomes known to the suspect that solidified membership within the syndicate hinges on the sole approval of the crime boss, colloquially known as ‘Mr. Big.’ The operation culminates in an interview with the crime boss – who is typically a highly skilled and trained interrogator – wherein the suspect is encouraged to reveal information regarding certain criminal activity of his or her past in order to demonstrate trustworthiness and honesty. The interview is expertly designed to extract inculpatory statements from the target and often use fabricated evidence that leads the suspect to believe that a formal police investigation has been initiated, or reinitiated, for the purpose of convicting them.⁶ As a remedy, the crime boss offers to make the investigation disappear through the influential corrupt power of the seemingly criminal organization. However, such backing is contingent on the suspect confessing to the ‘truth’ of their part in the particular crime in question. It is made clear to the suspect that a confession will lead to permanent membership in the organization and the extinguishment of serious state allegations against them. A denial, of course, would lead to neither.

⁵ *Tofilau v R*; *Marks v R*; *Hill v R*; *Clarke v R*, [2007] HCA 39 at para 117 [*Tofilau*].

⁶ *Hart*, *supra* note 4; see also *R v Mack*, 2014 SCC 58 [*Mack*]; *Tofilau*, *supra* note 5; *R v Wichman*, [2015] NZSC 198 [*Wichman*]; where fabricated or misleading evidence was given by the covert officers to the MBO target in order to allow the target to believe that an official investigation had been initiated against them. A slight variation on the Mr. Big sting is seen where the covert officers tell the target that one of their connections, commonly a ‘terminally ill’ member of their organization, is willing to confess to the homicide. However, in order to make the confession credible, they ask the target to provide a detailed accounting of their participation in the homicide. For a recent example, see *R v Streiling*, 2015 BCSC 597 [*Streiling*].

Correspondingly, denials are often met with resistance from the fictitious crime boss, and confessions ultimately result in the suspect's prompt arrest.⁷

The technique has raised significant concerns in relatively recent times in Canada, Australia and New Zealand. As alluded to by Justice Moldaver in the precedent setting Canadian case of *R v Hart*, the threat of unreliable confessions present a unique danger in MBOs as suspects confess to 'Mr. Big' during interrogations in the face of powerful inducements and sometimes veiled threats.⁸ As a result of such a skilfully orchestrated and deceptive strategy, MBOs concoct a perfect recipe for heightening the danger of false confessions. Consequently, triers of fact have traditionally had difficulty accepting that an innocent person would confess to a crime they did not commit which, in turn, leads to an exponential increase in the risk of wrongful conviction.⁹

This article conducts a comparative analysis on the relevant case law and legislation in Canada, New Zealand, and Australia that has developed with respect to regulating the admissibility of confessions arising from MBOs. Although the Mr. Big technique has been deployed in a number of jurisdictions, this article focuses on those countries where the utilization of MBOs is most prevalent, and issues surrounding their use have been challenged at the highest level of court. While concentrating on three main concerns that are unique to the Mr. Big technique, namely, the potential for unreliable or false confessions, prejudicial effects on the accused, and accompanying police misconduct and/or impropriety, the laws of each selected country will be juxtaposed to examine similarities, differences, and the overall robustness of their legal framework said to be applicable to those who have made an admission during a MBO. Such examination of criminal procedures in other nations can expose flaws and benefits that may be considered as material for legal reform.¹⁰ Ultimately, through comparative methodology, the analysis of laws in each jurisdiction may lead to a more comprehensive approach to guarding against Mr. Big confessions which, if

⁷ *Hart*, *supra* note 4; *Tofilau*, *supra* note 5; *Wichman*, *supra* note 6; where denials of guilt are consistently resisted by Mr. Big during the interviews.

⁸ *Hart*, *supra* note 4 at paras 5-6.

⁹ *Ibid* at para 6.

¹⁰ Erik Luna, "A Place for Comparative Criminal Procedure" (2003-2004) 42 *Brandeis LJ* 277 at 284; see also Amar Khoday, "Uprooting the Cell Plant: Comparing United States and Canadian Constitutional Approaches to Surreptitious Interrogations in the Detention Context" (2009) 31:1 *W New Eng L Rev* 39 at 41.

found to be admissible in court, would otherwise pose a risk of wrongful conviction.

In totality, this article argues that the overall legislative and/or common law approach to the admissibility of Mr. Big confessions in each country remains inadequate to protect targets of such covert investigative techniques against the underlying threat of wrongful conviction. On the surface, Canada's new framework in *Hart* bolstered protection over what it used to be, and has heightened judicial awareness with regard to false confessions, prejudicial impact on the accused, and police misconduct stemming from MBOs. However, post-*Hart* jurisprudence demonstrates that its application in Canadian courts has been soft, resulting in a lower standard of admission than one might have expected. Nonetheless, it is argued that Australia, in particular, holds the weakest regulations for protection in comparison to Canada and New Zealand. Analogously, there are also weaknesses in New Zealand's statutory approach, but the country's policies and common law have evolved to diminish state use of violence, or threats of violence, within MBOs. New Zealand accordingly appears to have stronger regulations to protect against police impropriety within the technique, which should be taken into account for Canadian and Australian reform. In consideration of the following comparative analysis, a reinforced version of the *Hart* presumption of inadmissibility for Mr. Big confessions – with a burden placed on the Crown to prove reliability beyond a reasonable doubt rather than on a balance of probabilities – is suggested as a mechanism for each country to adopt in order to strengthen their frameworks.¹¹ It is also recommended that greater scrutiny be placed on the analysis of prejudicial effects in judicial proceedings of each country in order to fairly combat the seemingly inevitable high probative value given to Mr. Big confessions.¹² Moreover, it is proposed that a proactive and broad approach to eliminating police misconduct in MBOs should be taken in each country by excluding

¹¹ See Chris Hunt & Micah Rankin, “*R v Hart*: A New Common Law Confession Rule for Undercover Operations (2015) 14:2 OUCLJ 321 at 334 for a similar solution. Hunt & Rankin argue that the Crown should carry the burden of proving a Mr. Big confession voluntary beyond a reasonable doubt through an extension of the confessions rule. Here, it is suggested that the standard is raised within the existing *Hart* framework.

¹² For further discussion on this recommendation, see Jeremy Allen Henderson, “Don’t Go Breakin’ My Hart: The Early Evolution of the Reliability Branch of the Common Law Mr. Big Admissibility Test” (16 March 2016) [unpublished, University of Victoria Faculty of Law].

confessional evidence that is obtained as a result of an operation that used direct or indirect violence, or threats thereof.

At the outset of this article, the Canadian origins of MBOs will be briefly discussed before detailing its importation to Australia and New Zealand. The potential benefits of the technique and associated risks will subsequently be analysed. Based on the grounds of three main issues uniquely inherent to MBOs, the applicable legal framework in Canada is then examined and contrasted against approaches found in New Zealand and Australia. Lastly, a short discussion of proposed solutions for strengthening protection around the admissibility of Mr. Big confessions is outlined within the conclusion of main findings. Although solutions are drawn and proposed based on scholarly articles and cross-jurisdictional case analysis, this article mainly focuses on the results of the comparative examination between selected countries.

II. MBOs IN CANADA AND THEIR IMPORTATION TO AUSTRALIA AND NEW ZEALAND

Although the technique has raised significant concerns more recently, the admissibility of confessional evidence stemming from Mr. Big – like operations has been a contentious legal issue throughout its history. Canadian courts have expressed their discomfort with the tactics of the technique since its inception, especially the use of inducements or threats to elicit inculpatory statements.¹³ Indicia of this are found in the 1901 Manitoban case of *R v Todd*,¹⁴ which focused on the first reported investigative technique similar to that of a MBO. In that case, the court found the method of gathering evidence from the accused to be “vile” and “contemptible.”¹⁵ However, well-established common law principles allowed for the admission of the confessional statement because the inducement was not held out by a ‘person in authority,’¹⁶ and it was not made in reference to the particular charge that was subsequently laid against the defendant.¹⁷

¹³ See *Todd*, *supra* note 1, Dubuc J; *Hart*, *supra* note 4, Moldaver J.

¹⁴ *Todd*, *supra* note 1.

¹⁵ *Ibid* at 519-520.

¹⁶ *Ibid* at 527-528.

¹⁷ *Ibid* at 519-520, 523-524.

Until *Hart*, the common law confessions rule – which provided that the Crown prove beyond a reasonable doubt that an accused’s statement to a ‘person in authority’ is voluntary – continued to provide scant protection to those who made inculpatory statements to an undercover officer in Canada, especially individuals targeted by MBOs.¹⁸ It prevailed as the main starting point for judiciaries in considering the admissibility of statements made to undercover officers. This was confirmed in the 2005 case of *R v Grandinetti*, wherein the Supreme Court of Canada (“SCC”) addressed the question of whether undercover officers were to be considered ‘persons in authority’ at law.¹⁹ If the undercover officers were considered to be persons in authority, then inculpatory statements made to them would likely be inadmissible in court for two reasons. First, coercive state power, capable of controlling or influencing the investigation or prosecution of a crime, cannot be used as an inducement to elicit a confession;²⁰ second, because the use of such inducements could render the confession involuntary.²¹ The SCC ultimately held that undercover officers involved in MBOs are not persons in authority because they are not perceived by the accused to be acting on behalf of the state. Therefore, the state’s coercive power is not engaged and, due to a lack of other effective legal defences at the time, the statements were rendered admissible.²² During this era of jurisprudence in Canada, there was little to no judicial consideration as to the admissibility of Mr. Big confessions based on unreliability or probative value, unfair prejudicial effect on the accused, or police impropriety during the process of the undercover investigation.²³

MBOs developed further in the 1990s and early 2000s through the RCMP’s extensive employment of the technique in British Columbia. It is reported that nearly 180 MBOs were conducted in BC between 1997 and 2004.²⁴ Given the lack of stringent laws governing the admissibility of Mr.

¹⁸ *Hart*, *supra* note 4 at para 64.

¹⁹ *R v Grandinetti*, 2005 SCC 5 [*Grandinetti*].

²⁰ *Ibid* at paras 43-44.

²¹ *Ibid* at para 34.

²² *Ibid* at para 44.

²³ In hindsight, the SCC acknowledged in 2014 that this approach provided insufficient protection to accused persons who confess during MBOs. See *Hart*, *supra* note 4 at paras 65-67.

²⁴ Timothy E Moore, Peter Copeland & Regina A Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the “Mr. Big” Strategy” (2009) 55:3 *Crim LQ* at 350.

Big confessions in Canada during this time,²⁵ MBOs equipped the RCMP with a useful tool for bolstering their cases against suspects without having to be overly concerned about the exclusion of evidence at trial. One such illustration is found in the case of *R v Rose*, in which the RCMP deployed a MBO in an effort to ensure conviction after the Crown suffered significant evidential setbacks.²⁶ Rose had been convicted of two murders at his first trial and on appeal, but new evidence that someone else confessed to the crimes granted him a third trial.²⁷ The operation culminated with a hotel-room interview between Rose and Mr. Big, who was portrayed to be an individual who could ‘guarantee’ the dismissal of murder charges through corrupt ties.²⁸ The covert officers strategically began by undermining Rose’s confidence in his possible acquittal.²⁹ Then, after repeated and assertive denials of guilt were met with extreme resistance and counter-pressure from the undercover officers, Rose eventually confessed in a defeated, unconvincing manner with “Well, we’ll go with I did it, okay?”³⁰ Fortunately, closer to the start of the third trial, further DNA testing was carried out and the Crown stayed their charges against Rose due to a serious lack of physical evidence linking him to the murders.³¹

As the technique gained momentum, it quickly spread across Canada. Policing authorities were persistent in its use for attempting to enhance the probability of convictions and ultimately close cases that had long been unsolved. In Manitoba, a MBO was used to convict Kyle Unger on first-

²⁵ See *Grandinetti*, *supra* note 19. MBOs do not engage the right to silence because the accused is not detained by the police at the time he or she confesses; see *R v McIntyre*, 1994 2 SCR 480, [1994] SCJ No 52 (QL) [*McIntyre*]; *R v Hebert*, 1990 2 SCR 151, [1990] SCJ No 64 (QL) [*Hebert*]. Similarly, the confessions rule is also inoperative because the accused does not subjectively know that ‘Mr. Big’ is a police officer when he or she confesses. This is further discussed below.

²⁶ Kouri T Keenan & Joan Broackman, *Mr. Big: Exposing Undercover Investigations in Canada* (Winnipeg: Fernwood Publishing, 2010) at 11.

²⁷ Gisli H Gudjonsson, *A Psychology of Interrogations and Confessions: A Handbook* (West Sussex, England: John Wiley & Sons, Ltd, 2003) at 574; The Crown’s murder theory against Rose suffered a setback after a Californian witness came forward with information that another man had confessed to the murders.

²⁸ *Ibid* at 578.

²⁹ *Ibid*.

³⁰ *Ibid* at 579.

³¹ *Ibid* at 581; see also The Fifth Estate, “Someone Got Away With Murder” (21 January 2009), online: CBC <www.cbc.ca/fifth/episodes/from-the-archives/someone-got-away-with-murder> [perma.cc/QW58-PS45].

degree murder charges that stemmed from the heinous killing of a teenage girl at a rock concert south of Winnipeg.³² Similarly, a confession elicited from a MBO in Brandon, Manitoba led to the conviction of Michael Bridges for the murder of his ex-girlfriend.³³ Fort McMurray RCMP used the technique to solve the murder of Robert Levoir, a man who had been missing for nearly one month.³⁴ Eventually, as the technique grew to become more popular within police forces, it is reported that as of 2008, MBOs had been used more than 350 times in Canada.³⁵

Police departments from other countries recognized the statistical success the RCMP was having with the technique. In Australia, the importation of MBOs crystalized in the early 2000s through the use of the technique to elicit confessions from four different murder suspects in the state of Victoria. All were considered, tried and convicted by the High Court of Australia under the decision of *Tofilau v The Queen*.³⁶ Each of the four cases involved the Victorian Police Undercover Unit implementing an operation nearly identical to that found in Canada. Since the High Court of Australia in *Tofilau* ruled the confessional evidence elicited through MBOs in all four cases admissible,³⁷ the technique has continued to be used by police units throughout the country. More recently, there have been a number of high profile convictions arising from MBO evidence including Brett Cowan, the man found guilty of murdering a 13 year old boy who had gone missing in December 1989,³⁸ and Steven Standage of Tasmania, who was sentenced to 48 years imprisonment for the homicides of Ronald Jarvis in 1992 and John Thorn in 2006.³⁹ With the *Tofilau* decision acting as the main authority for the admissibility of confessions arising from Australian

³² *R v Unger* (1993), 85 Man R (2d) 284, [1993] MJ No 363 at paras 19-24 [*Unger*]; it must also be noted that Unger was acquitted of this murder in 2009.

³³ *R v Bridges*, 2006 MBCA 118 at paras 1-6 [*Bridges*].

³⁴ *Mack*, *supra* note 6 at paras 1, 14.

³⁵ Undercover Operations, *supra* note 2; see also The Honourable Justice Susan Glazebrook, "Mr Big Operations: Innovative Investigative Technique or Threat to Justice?" (Paper delivered at the Judicial Colloquium, Hong Kong, 22-26 September 2015), online: <www.hkcfca.hk/en/documents/publications/speeches_articles/index.html> [perma.cc/JA35-N2J7]; Keenan, *supra* note 26 at 23.

³⁶ *Tofilau*, *supra* note 5 at para 1.

³⁷ The admissions to Mr. Big were found as being voluntary because they were not made to a person in authority and thus were admitted into evidence. The laws are analogous to those found in Canada pre-*Hart*.

³⁸ *R v Cowan*, [2015] QCA 87 at paras 1-2.

³⁹ *Standage v Tasmania*, [2017] TASCCA 23 at para 1 [*Standage*].

MBOs, there are no signs that the deployment of the technique is slowing down.

In New Zealand, undercover police operations that approximated the Canadian version of MBOs were initially seen in the 2007 case of *R v Cameron*, wherein a similar technique was used for the purpose of drawing a murder suspect into an association with a number of covert officers.⁴⁰ In *Cameron*, the homicide victim had been reported missing since October of 1993 and the investigation initially led to dead ends.⁴¹ Nearly 12 years later, in the course of the police operation, the primary suspect was involved in a number of simulated crimes and eventually made admissions to one of the undercover officers who acted as the boss of the organization.⁴² Following these admissions, the police arrested their suspect on a warrant for a breach of community work.⁴³ Upon detention, detectives held several interviews with the accused in which they used his previous admissions to the undercover crime boss as leverage to elicit a confession in a formal police interview.⁴⁴ Ultimately, the suspect detailed his part in the murder to the detectives at his own volition.⁴⁵

Although MBOs are not as prevalent in New Zealand as they are in Canada or Australia, the New Zealand Police Association has explicitly endorsed the technique as a method for gathering evidence.⁴⁶ As of 2016, it is reported that the technique has been deployed on only six occasions, all of which involved homicide cases;⁴⁷ five of those operations resulted in admissions from the accused. Most notably, the leading judgement from the Supreme Court of New Zealand remains *R v Wichman*, which narrowly held by a 3-2 majority that admissions elicited by a Mr. Big-style investigation are admissible in court, subject to a case-by-case analysis and legislative considerations under the *Evidence Act 2006*.⁴⁸ The most recent use of the technique is seen in the 2016 High Court of Auckland case of *R v Reddy*,

⁴⁰ *R v Cameron*, [2007] NZCA 564 at para 2 [*Cameron*].

⁴¹ *Ibid* at para 8.

⁴² *Ibid* at para 2.

⁴³ *Ibid* at para 16.

⁴⁴ *Ibid* at paras 16-24.

⁴⁵ *Ibid* at para 24.

⁴⁶ New Zealand Police Association, "Police Association Supports Undercover Technique", online: <policeassn.org.nz/newsroom/publications/media-releases/police-association-supports-undercover-technique> [perma.cc/S3LQ-B7YA].

⁴⁷ *Wichman*, *supra* note 6 at para 19.

⁴⁸ *Evidence Act 2006* (NZ), 2006/69.

wherein the police initiated a MBO that would help to elicit a confession from Reddy regarding the murder of his wife and daughter.⁴⁹ Reddy, believing that the criminal group was legitimate, led the covert officers to the previously unknown location where he buried the bodies.⁵⁰ The corroborating evidence was sufficient to support the reliability of Reddy's confession and would ultimately lead to his conviction.

Taking note of the risks associated with the technique overseas, New Zealand police forces have placed limits on how the operation is conducted so that it is a "very mild" version of what is seen in Canada or Australia.⁵¹ Indeed, evidence has shown that MBOs in New Zealand are designed on the basis that no violence or threats of violence are used.⁵² Further, police guidelines have been noted to require that no actual offences are committed during the investigation, the participation on behalf of the target must be voluntary, and interaction with the public is kept to a minimum.⁵³ However, this attempt to differentiate itself from Canadian or Australian use of the operation may be superficial given that violence, or threats of violence, used in MBOs is typically implied through the fictitious criminal organization's willingness to use violence against other disloyal members – participating undercover officers – rather than being explicitly and directly used against the target.⁵⁴ Moreover, the highest courts in both Canada and Australia have noted that no actual offences are typically conducted during MBOs because the 'crimes' are merely simulated in a manner that deceive the target into believing that they are real.⁵⁵ Although the New Zealand authorities have not adopted the technique to the extent that Canada or Australia has, they appear to be continuing their use of MBOs in a cautious fashion when circumstances are deemed to be appropriate.

III. BENEFITS AND CRITICISMS OF THE TECHNIQUE

The following analysis outlines the benefits and criticisms of using MBOs to elicit inculpatory statements in order to demonstrate why it is

⁴⁹ *R v Reddy*, [2016] NZHC 1294 [Reddy].

⁵⁰ *Ibid* at para 11.

⁵¹ *Wichman*, *supra* note 6 at para 509.

⁵² *Ibid* at para 89.

⁵³ *Ibid* at para 509, n 639.

⁵⁴ *Hart*, *supra* note 4 at para 59.

⁵⁵ *Ibid* at para 73; see also *Tofilau*, *supra* note 5 at paras 146, 219.

necessary to regulate the technique with a comprehensive and robust system. On balance, this section exhibits that the potential for harmful results stemming from insufficient regulation of MBOs – the most extreme form being the loss of liberty for an innocent person – simply outweigh the possible advantages derived from the operation. Given their nature, MBOs are known to enhance the risk of unreliable and/or prejudicial evidence, two factors which have been stated by the SCC as being traceable to wrongful convictions.⁵⁶ Thus, it is evident that inadequate regulation of Mr. Big confessions directly clashes with the fundamental principle of criminal law that the morally innocent should not be found guilty and punished.

The benefits of the Mr. Big technique are clear: the method can assist in solving crimes, typically of the most egregious category such as murder, that may have otherwise gone unsolved by using conventional police investigative techniques. As noted by Justice Moldaver in *Hart*, “the Mr. Big technique has proven to be an effective investigative tool. It has produced confessions and secured convictions in hundreds of cases...[t]he confessions elicited are often detailed and confirmed by other evidence. Manifestly, the technique has proved indispensable in the search for the truth.”⁵⁷ A number of MBOs have resulted in undiscovered remains of murder victims being located.⁵⁸ A significant number of these operations result in admissions to undercover officers and, ultimately, many lead to the clearance or conviction of targeted suspects.⁵⁹ While the technique creates a risk of false confessions, it has also resulted in many reliable confessions which may have never come to light.⁶⁰ It has been argued that, in consideration of protecting and upholding human rights, a state which authorizes the use of such a clever technique to investigate offences which could not otherwise be solved might be said to be showing greater respect for society than it would if it abstained from such methods.⁶¹

However, there are several criticisms of the technique that remain hotly contested. As mentioned by the highest courts in Canada and New Zealand, the main concern spotlights the ability of MBOs to produce false or

⁵⁶ *Hart*, *supra* note 4 at para 8.

⁵⁷ *Ibid* at para 4.

⁵⁸ *Mack*, *supra* note 6; *Reddy*, *supra* note 51; *Bridges*, *supra* note 33.

⁵⁹ *Wichman*, *supra* note 6 at para 19; see also *Undercover Operations*, *supra* note 2.

⁶⁰ *Mack*, *supra* note 6; *Reddy*, *supra* note 49.

⁶¹ Andrew Ashworth “Should the Police be Allowed to Use Deceptive Practices?” (1998) 114 *Law Q Rev* 108 at 134.

otherwise unreliable confessions.⁶² In the face of powerful inducements, threats, and consistent social pressure, it is not uncommon for an innocent person to admit to a crime they did not commit. The critical issue remains that once a confession is elicited, whether true or false, it provides compelling evidence that can lead judges and juries to convict with a sense of confidence.⁶³ Although it is common for the accused to retract their false confession soon after making it, case history tells us that once a confession is made, the likelihood of conviction at trial is greatly enhanced.⁶⁴ To illustrate, a 1980 English study by Baldwin and McConville, which analysed 1473 Crown Court cases, found that confessions provided the single most important evidence against a suspect; in about 30% of cases, a self-incriminating admission or confession was crucial to the prosecution's case. In comparison, forensic evidence was only important in about 5% of cases.⁶⁵

It must be noted that in the context of a MBO, the targeted person has typically been directly or indirectly accused of the crime in question, whether that be through a previous police interview or accusations from the fictitious gang members.⁶⁶ At minimum, the target typically has some form of knowledge that they are being pursued as a suspect for the particular crime. In a number of cases, this knowledge can be weighing on the accused's conscious for several months or even years before a MBO is initiated. Against this backdrop, an offer, from a seemingly authoritative and highly connected criminal boss, to make evidence or police investigations disappear in exchange for a confession becomes a significant incentive. For some MBO targets, the decision boils down to this: a confession, whether true or false, with no apparent legal repercussions in exchange for membership in a powerful organization with purportedly limitless financial upside and the elimination of serious state allegations against them. Given this offer, suspects may seize the opportunity without appreciating the full consequences of confessing.⁶⁷ The suspect's decision to confess is thus not based on their own protective interest against

⁶² Hart, *supra* note 4 at paras 68-72; Wichman, *supra* note 6 at para 20.

⁶³ Hart, *supra* note 4 at paras 5-6.

⁶⁴ Gudjonsson, *supra* note 27 at 173, 182-183.

⁶⁵ John Baldwin & Michael McConville, "Confessions in Crown Court trials" (Royal Commission on Criminal Procedure Research Study No 5 London: HMSO, 1980); see also Gudjonsson, *supra* note 27 at 132.

⁶⁶ Hart, *supra* note 4 at para 19; Reddy, *supra* note 49; Unger, *supra* note 32 at para 12.

⁶⁷ Wichman, *supra* note 6 at para 315.

penalization, but rather on an anticipation that whatever is admitted will correspondingly make legal problems go away.

Other substantial criticisms advanced in case law include that evidence elicited from MBOs is unfairly prejudicial to the defendant because it necessarily demonstrates that the accused willingly participated in simulated crimes and was eager to gain membership to a criminal organization.⁶⁸ As noted in *Hart*, this evidence “sullies the accused’s character and, in doing so, carries with it the risk of prejudice.”⁶⁹ This prejudicial effect, in combination with the risk of an unreliable or false confession, can unfairly ruin the credibility of the accused and heavily influence a judge or jury’s decision to convict.

Additionally, it has been recognized that MBOs allow police officers to circumvent a number of legal safeguards that are put in place to protect the accused against self-incrimination. As Justice William Young, for the Supreme Court of New Zealand, explains, “Mr. Big operations involve police officers interrogating a suspect unconstrained by the usual safeguards which apply when police officers, acting as such, interview suspects.”⁷⁰ As an example, the SCC has held that MBOs do not engage the right to silence under the *Canadian Charter of Rights and Freedoms* because the accused is not legally considered as “detained” by the police.⁷¹ Likewise, in his dissenting opinion in Australia’s leading case on Mr. Big confessions, Justice Kirby raised concerns that the use of such evidence undermines the common law principle of a suspect’s right to silence, and bypasses ordinary police obligations to warn a suspect before interrogation.⁷² The Canadian common law confessions rule, which ensures that statements made out of court by an accused to a person in authority are admissible only if the statements are proven to be voluntary beyond a reasonable doubt,⁷³ is also inapplicable because the covert officers involved in a MBO cannot be considered by the accused as “person[s] in authority.”⁷⁴ In a conventional custodial interrogation setting, these safeguards help to mitigate the

⁶⁸ *Hart*, *supra* note 4 at para 7; *Wichman*, *supra* note 6 at para 21.

⁶⁹ *Hart*, *supra* note 4 at para 7.

⁷⁰ *Wichman*, *supra* note 6 at para 21.

⁷¹ *McIntyre*, *supra* note 25; *Hebert*, *supra* note 25; see also *Hart*, *supra* note 4 at para 64.

⁷² *Tofilau*, *supra* note 5 at para 148.

⁷³ *Grandinetti*, *supra* note 19.

⁷⁴ *Ibid* at para 40.

disadvantaged position of the accused when he or she is up against the unique, coercive powers of the state.

Lastly, it has been argued that MBOs run the risk of becoming an abuse of process.⁷⁵ It may be improper for the police to engage in certain deceptions that influence a suspect into a confession. The Supreme Court of New Zealand's majority decision in *Wichman* referred to these concerns through a lens categorized as 'general impropriety.'⁷⁶ Such impropriety can include violence, significant intrusiveness into the suspect's life, and/or undue pressure through the use of threats or inducements. For example, some MBO targets are subject to overwhelming inducements such as significant cash rewards, close friendship, and even the illusory prospect of romantic partnership.⁷⁷ The targets are often extracted from their existing lifestyle and placed into one of apparent extravagance. The fictitious gang may also convey an image of violence, and intimate that betrayal or lies within the organization will be met with physical consequences.⁷⁸ The undercover officers engage in lies, trickery and deceit that pressure the suspect to adhere to their practices. As a result, such conduct, along with its psychological impact, has an inherent tendency to overbear the will of the target in their decision of whether or not to confess.⁷⁹ Moreover, the technique has demonstrated a trend of selecting vulnerable persons as pursuable targets.⁸⁰ This enables the police to potentially take advantage of vulnerabilities of the individual concerned such as age, background, unemployment, alienation, and/or psychological condition.⁸¹ As Justice Moldaver noted in *Hart*, significant thought must be given to such kinds of police tactics and society must consider what they are prepared to condone in pursuit of the truth.⁸²

⁷⁵ *Hart*, *supra* note 4 at para 9.

⁷⁶ *Wichman*, *supra* note 6 at para 117.

⁷⁷ Steven M Smith, Veronica Stinson & Marc W Patry, "Using the 'Mr. Big' Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?" (2009) 15:3 Psychol Pub Pol'y & L 168 at 171; see also *R v Cheeseman*, 2008 ABQB 282.

⁷⁸ *Hart*, *supra* note 4 at para 30.

⁷⁹ *Tofilau*, *supra* note 5 at para 148.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* See also Adelina Iftene, "The Hart of the (Mr.) Big Problem" (2016) 63 Crim LQ 151 at 154; Keenan & Broackman, *supra* note 26 at 50-51, where out of 89 cases, 11 suspects were Aboriginal, 29 were from poor social backgrounds, and others had limited education.

⁸² *Hart*, *supra* note 4 at para 9.

IV. A SNAPSHOT OF THE CURRENT LEGAL FRAMEWORK IN CANADA, NEW ZEALAND AND AUSTRALIA

Before conducting a comparative analysis of the substantive law on the basis of three main issues uniquely applicable to MBOs, a brief discussion of the legal framework in each selected country will now be addressed. The purpose of this section is twofold: first, to establish a basic understanding of the applicable legal structures in each jurisdiction and; secondly, to provide context to each country's approach to addressing the admissibility of Mr. Big confessions and pertinent concerns associated with the technique.

The leading authority in Canada for the admissibility of confessions elicited from MBOs is found in the 2014 SCC decision of *Hart*. In *Hart*, the SCC revisited the question from *Grandinetti* of whether Mr. Big confessions should be considered as admissible evidence in court. The majority took the view that, aside from previous jurisprudence relating to the right to silence and the voluntariness of a confession,⁸³ the law necessitated a change because *Grandinetti* and other applicable jurisprudence provided insufficient protection to accused persons who confess during MBOs.⁸⁴ In their new approach, the SCC addressed their concerns regarding the danger of unreliable confessions, prejudicial effects of Mr. Big confessions on the accused, and the risk that the technique creates a fitting atmosphere for police misconduct. Accordingly, a 'new'⁸⁵ principled rule of evidence was established that where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him or her, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible.⁸⁶ This presumption can be rebutted if the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effects. Placing the burden of proof on

⁸³ *Ibid* at para 64; see also *R v Oickle*, 2000 SCC 38 at paras 47-71, for a voluntariness analysis.

⁸⁴ *Hart*, *supra* note 4 at para 67.

⁸⁵ Although considered new by some, it has also been argued that the rules set out in *Hart* are rather a retooled version of basic evidential common law rules. See Brendon Murphy & John Anderson, "Confessions to Mr. Big: A new rule of evidence?" (2016) 20:1 Intl J Evidence & Proof 29 at 40.

⁸⁶ *Hart*, *supra* note 4 at para 10.

the Crown, the court explains, is justified because of the central role played by the state in designing and implementing MBOs, which give rise to unreliable evidence and/or prejudicial effects.⁸⁷ The majority of the SCC also took the stance that a “more robust conception”⁸⁸ of the doctrine of abuse of process be implemented in order to deal with the problem of police misconduct, although the onus of proving an abuse of process remains on the accused.⁸⁹ In theory, this places police conduct that resembles coercion, such as certain forms of inducements or threats, under careful scrutiny to ensure that an abuse of process has not occurred during a MBO.⁹⁰

Constitutionally, the Parliament of Australia has no general power to legislate in relation to crime, thus the majority of criminal matters are left to states and territories.⁹¹ MBOs are routinely considered to be an “authorized controlled operation” under Australian legislation.⁹² It has been noted that Australian state legislatures have been moving progressively towards a unified framework so that all jurisdictions can operate within a system of laws that permit such controlled operations employed by law enforcement authorities.⁹³ In effect, legislative schemes permitting these controlled operations allow investigators to engage in criminal activity – both actual and simulated – and declare that evidence obtained in the course of the investigation is not inadmissible simply because it was gathered by way of a controlled operation.⁹⁴ For example, the *Police Powers and Responsibilities Act 2000* of Queensland provides for the legal authorization, conduct and monitoring of such controlled operations for the purpose of obtaining evidence.⁹⁵ Included in this scheme is approval for a participant in a controlled operation to engage in otherwise unlawful activities only as part of the authorized operation.⁹⁶ There are a number of legislative provisions, outlined in more detail below, within the Australian *Uniform*

⁸⁷ *Ibid* at para 91.

⁸⁸ *Ibid* at para 84.

⁸⁹ *Ibid* at paras 84-86, 113.

⁹⁰ *Ibid* at para 114.

⁹¹ *Ibid*.

⁹² Murphy, *supra* note 85 at 40.

⁹³ *Ibid*.

⁹⁴ *Law Enforcement (Controlled Operations) Act 1997* (NSW), 1997/136, s 3A(3A); see also Murphy, *supra* note 85 at 40.

⁹⁵ *Police Powers and Responsibilities Act 2000* (Qld), 2000/5, s 228(a).

⁹⁶ *Ibid*, s 228(d).

*Evidence Act*⁹⁷ that address the admissibility of confessions generally, and in the specific context of MBOs.

At common law, as seen in *Tofilau*, Australian courts have considered three main arguments against the admission of MBO-elicited confessions. The first being the common law ‘definite rule’ that evidence of a confession may not be received against an accused person if it has been obtained either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.⁹⁸ Second, as per a wider conception of voluntariness, a confession will not be admissible if it is involuntary in the sense that the accused’s will or free choice to speak is overborne by any means.⁹⁹ Lastly, judges possess an overriding discretion to exclude evidence that would be unfair to use against the accused, which has been argued to apply to MBO confessions.¹⁰⁰ This discretionary power allows a judge to exclude a confession if it was found to be inappropriately or unfairly obtained by investigating authorities. In totality, six of the seven High Court justices in *Tofilau* held that confessions elicited from MBOs are admissible, as long as they were voluntarily made without compulsion.¹⁰¹ To date, there are no reported cases from the High Court of Australia that have rendered a Mr. Big confession inadmissible on the aforementioned grounds; nor have any lower court cases been found to demonstrate exclusion of MBO confessions.

New Zealand’s approach to the admissibility of MBO confessions is legislative in nature and involves a comprehensive application of several provisions from the *Evidence Act 2006*.¹⁰² As outlined by the majority in the leading case of *Wichman*, sections 8, 28, 29 and 30 of the *Evidence Act 2006* must be interpreted in a coherent way in their application to Mr. Big investigations.¹⁰³ Section 29 is meant to exclude statements influenced by police impropriety in the context of oppressive conduct by undercover officers¹⁰⁴; s. 28 addresses the exclusion of unreliable statements; s. 30 deals

⁹⁷ *Evidence Act 1995* (Cth), 1995/2 [*Evidence Act Cth*].

⁹⁸ *Tofilau*, *supra* note 5 at para 2.

⁹⁹ *Ibid* at para 6.

¹⁰⁰ *Ibid* at para 65.

¹⁰¹ New Zealand Law Society, “‘Mr Big’ Operations Receive Judicial Support” (23 June 2016), online <www.lawsociety.org.nz/news-and-communications/latest-news/news/mr-big-operations-receive-judicial-support> [perma.cc/BBS3-L33T].

¹⁰² *Evidence Act 2006* (NZ), 2006/69 [*Evidence Act NZ*].

¹⁰³ *Wichman*, *supra* note 6 at para 69.

¹⁰⁴ Oppressive behavior in s. 29 refers to any oppressive, violent, inhuman, or degrading

with impropriety on a wider scale such as evidence obtained unfairly or in contravention of the suspect's rights; and s. 8 is a provision regarding the general exclusion of evidence based on a balance of its probative value and prejudicial effect.¹⁰⁵ Discussed in more detail below, each aforementioned section includes a number of considerations that must be accounted for when determining the admissibility of a Mr. Big confession. Analogous to Australia, there have been no identified cases where MBO confessions were held to be inadmissible by virtue of applicable legislation. This must, however, be taken in conjunction with the fact that New Zealand claims to deploy the Mr. Big technique less frequently and in a less intensified fashion compared to Canada and Australia. In general, the Supreme Court of New Zealand's overall approach follows the view that statements made by a defendant are admissible against that defendant unless excluded on reliability or oppression grounds, or where the prejudicial effect of the evidence outweighs probative value.¹⁰⁶

V. A COMPARATIVE ANALYSIS ON THREE MAIN ISSUES UNIQUELY APPLICABLE TO MBOs

The following three sections will conduct a comparative analysis on the basis of three significant issues, found by the majority of the SCC in *Hart* as being uniquely associated to MBOs. These issues are imperative to address in order to approximate sufficient protection for the accused against the admission of undependable confessions. The first issue to be examined is how courts in each country have reacted to the threat of unreliable confessions arising from MBOs. Secondly, the selected countries are juxtaposed based on their approach to protecting the accused against prejudicial effects which are necessarily connected to the Mr. Big sting. Lastly, the application of laws in each jurisdiction, seemingly meant to guard against the coercive nature of MBOs including police misconduct and/or general impropriety, is analysed and contrasted.

A. The Threat of Unreliable Confessions

As noted above, the threat of producing unreliable or false confessions can be significant in Mr. Big scenarios. There are many variables that play

conduct towards the accused (s 29(5)(a)).

¹⁰⁵ *Wichman*, *supra* note 6 at para 69.

¹⁰⁶ *Glazebrook*, *supra* note 35 at 7.

into how an unreliable confession is created. New Zealand's Justice Glazebrook, writing as dissent in *Wichman*, identifies various risk factors, associated with MBOs that enhance the probability of false confessions. She categorized these risks into two subjects including situational and dispositional risks.¹⁰⁷ Situational risks include suspect isolation, length of interrogation, minimization techniques, and promises or threats. Dispositional risks include the target's age, social status, maturity, intellectual disabilities, and mental health issues. In a noteworthy experiment, minimization, such as downplaying or rationalizing past criminal acts of the target, has been shown to increase the rate of false confessions from 6 to 18 percent.¹⁰⁸ It is also well accepted that the potential for a false confession increases in proportion to the nature and extent of the inducements held out to the accused, or the amount of violence portrayed by the undercover gang during a MBO.¹⁰⁹ Indeed, case law tells us that the Mr. Big technique has in fact led to false confessions which, in turn, resulted in the wrongful conviction of the accused.¹¹⁰

How, then, have Canadian, New Zealand and Australian jurisdictions reacted to this issue in light of these well-known factors and risks? The SCC in *Hart* addressed this issue through their newly adopted evidentiary rule for the admissibility of confessions stemming from MBOs.¹¹¹ Underlying the onus on the Crown to prove, on a balance of probabilities, that the confession is admissible is a judicial analysis of confessional reliability. This hinges on an assessment of the probative value of the confession, balanced against any prejudicial effect that flows from the bad character evidence which is necessarily tendered in court to put the MBO confession into

¹⁰⁷ *Wichman*, *supra* note 6 at para 397.

¹⁰⁸ Melissa B Russano et al, "Investigating True and False Confessions Within a Novel Experimental Paradigm" (2005) 16:6 *Psychological Science* 481 at 485.

¹⁰⁹ *Hart*, *supra* note 4 at para 69; see also *Wichman*, *supra* note 6 at para 20.

¹¹⁰ See *Unger*, *supra* note 32 where the accused was convicted of murder in 1992, based in part on a confession obtained by the RCMP in a MBO. A new trial was ordered because DNA testing ruled out physical evidence that had initially been relied upon to link Unger to the murder scene. The trial was eventually abandoned when the Crown concluded that it would be unsafe to try Unger on the available evidence, which had solely boiled down to the MBO confession. The inference is that a miscarriage of justice occurred due to significant reliance on the Mr. Big confession from the first trial. A false confession was also obtained through a MBO in *R v Bates*, 2009 ABQB 379 wherein the accused, though properly convicted of manslaughter, overstated his involvement to 'Mr. Big' by falsely admitting to having shot a rival drug dealer.

¹¹¹ *Hart*, *supra* note 4 at para 84.

context.¹¹² Essentially, the probative value is assessed through a “cost benefit analysis,” namely, whether the value of the evidence is worth what it costs.¹¹³ First, the reliability analysis involves looking at the circumstances in which the confession was elicited. Justice Moldaver gave a non-exhaustive list of circumstances to consider such as the length of the operation, the number of interactions (or “scenarios”) between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including age, sophistication, and mental health.¹¹⁴ Such considerations are clearly analogous to Justice Glazebrook’s description of situational and dispositional factors mentioned above.

After considering the circumstances, the SCC elaborated that the court should then assess the confession itself for markers of reliability. Here, judges consider the level of detail in the confession, whether it leads to the discovery of additional evidence, whether it identifies elements of the crime that are not known to the public, or whether it accurately describes the details of the crime that the accused would not likely have known had he or she not committed it.¹¹⁵ To illustrate, in application to the *Hart* case, the SCC found that the circumstances casted serious doubt on the reliability of the elicited confessions. Prior to the operation, the target was socially isolated, unemployed, and living on welfare.¹¹⁶ The operation lasted four months and consisted of 63 scenarios in which the accused became very close friends with the undercover officers – so much so that he repeatedly referred to them as his “brothers.”¹¹⁷ The accused was “financially lifted” out of his life of poverty and was induced by the prospect of an apparent \$25,000 payday that was available to him if he was allowed to participate, subject to Mr. Big’s discretion.¹¹⁸ Equally intriguing was the promise of friendship and collegiality that came with membership in the fictitious group. The accused even purported a willingness to leave his wife in exchange for membership in the organization.¹¹⁹ When the target confessed

¹¹² *Ibid* at para 85.

¹¹³ *Ibid* at para 94.

¹¹⁴ *Ibid* at para 102.

¹¹⁵ *Ibid* at para 105.

¹¹⁶ *Ibid* at para 133.

¹¹⁷ *Ibid* at paras 133, 137.

¹¹⁸ *Ibid* at para 134.

¹¹⁹ *Ibid* at para 138.

to Mr. Big, his ticket to a lavish lifestyle and social acceptance was at stake. In totality, the circumstances presented the target with overwhelming incentives to confess, whether truthfully or falsely.¹²⁰ In looking at the confession itself, there were several inconsistencies between the accused's description of how the crime was committed and what was reported by the police. Moreover, Hart's story of the incident completely lacked any confirmatory evidence.¹²¹ The majority of the SCC thus concluded that the surrounding circumstances, considered alongside with internal inconsistencies and a lack of confirmatory evidence, rendered the confession to be of low probative value and, as a result, unreliable.¹²²

Concerns of unreliability in New Zealand are mainly addressed under s. 28 of the *Evidence Act 2006*. The provision establishes a low threshold wherein the defendant must raise the issue of the reliability of the statement "on the basis of an evidential foundation."¹²³ As noted by Justice William Young, writing for the majority in *Wichman*, aside from cases where no practical issue of reliability arises – such as those cases where the MBO target leads the officers to the location of undiscovered remains of a murder victim – a defendant who has made a confession in a Mr. Big interview will usually have no difficulty meeting the initial threshold of s. 28. This can be done by merely pointing out the inducing effect of the promises or threats used throughout the operation.¹²⁴ Where the threshold is satisfied, s. 28(2) states, "the judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability."¹²⁵ Although this decision of reliability is ultimately a decision the judge must make, the onus is realistically placed on the Crown to prove reliability under s. 28 once the evidential threshold in s. 28(1)(a) has been met.¹²⁶ Thus, a parallel can be drawn between this provision and the burden of proof on the Crown to prove admissibility as established in *Hart*. The judicial exercise under s. 28(2) is factual, and s. 28(4) provides a non-exhaustive list of factors that a judge must, in each case, take into account such as any mental or physical

¹²⁰ *Ibid* at para 140.

¹²¹ *Ibid* at para 142.

¹²² *Ibid* at para 144.

¹²³ *Evidence Act NZ*, *supra* note 102, s 28(1).

¹²⁴ *Wichman*, *supra* note 6 at paras 77-78.

¹²⁵ *Evidence Act NZ*, *supra* note 102, s 28(2).

¹²⁶ *Wichman*, *supra* note 6 at para 412.

characteristics of the defendant, the nature of any questions put to the defendant and the circumstances in which they were put, and the nature of any threat, promise, or representation made to the defendant during the operation.¹²⁷

Similar to the application in *Hart*, s. 28 ensures that judges look at the external circumstances and internal consistencies of a confession before determining its reliability.¹²⁸ Although s. 28 does not explicitly tell judges to consider the reliability of the confession itself, case law has interpreted the language of the provision, specifically, the “circumstances in which the statement was made,” to require a judicial observation of what is asserted within the statement against the objective facts and the general plausibility of the statement.¹²⁹ Therefore, the reliability assessment in New Zealand is not far removed from the Canadian approach adopted in *Hart*.

On the contrary, Australian common law has addressed the issue of reliability through a focus on voluntariness. The concept is historically based on the presumption that only a voluntary confession is reliable because people generally do not act against self-interest.¹³⁰ In assessing voluntariness, courts have developed what are known as the “definite rule” and “basal voluntariness” principles. The definite rule is much like what has been rejected in Canada as authority for Mr. Big confessions – specifically, the old ‘persons in authority’ approach from *Grandinetti*. It states that a confession made in response to a threat or inducement held out by a person in authority is inadmissible.¹³¹ However, in the context of a MBO, and as demonstrated in Canadian jurisprudence,¹³² this rule is futile because a covert officer, acting as a gang member, cannot be considered to be a “person in authority.”¹³³ The rationale behind this remains that the Mr. Big target neither knows nor believes that the undercover officer has lawful authority to affect the course of the investigation or prosecution against them.¹³⁴ Therefore, the unique power of the state is not engaged as an

¹²⁷ *Evidence Act NZ*, *supra* note 102, s 28(4)(a)-(d).

¹²⁸ *Wichman*, *supra* note 6 at paras 92, 453-454.

¹²⁹ *Ibid* at para 84.

¹³⁰ *Tofilau*, *supra* note 5 at para 34.

¹³¹ *Ibid* at para 47.

¹³² *Todd*, *supra* note 1; see also *Grandinetti*, *supra* note 19.

¹³³ See *Tofilau*, *supra* note 5 where all statements to Mr. Big were deemed admissible under the “definite rule.”

¹³⁴ Corrupt authority to influence a police investigation also does not make an undercover officer a ‘person in authority’ because a representation to influence corrupt officials

inducing or coercive factor and is not considered as a cause for reliability issues within a confession.

The test for basal voluntariness focuses on confessions made under compulsion that would affect reliability. The key inquiry of this concept is centred on whether the defendant's free choice to speak or remain silent was overborne by "duress, intimidation, persistent importunity, or sustained or undue insistence or pressure."¹³⁵ These are valid considerations as a confession elicited from duress or significant undue pressure cannot be said to be voluntary, or reliable, because the target is likely to give responses that would preclude or avoid any threats from coming to fruition.¹³⁶ However, contrary to approaches in Canada and New Zealand, an assessment of the circumstances from which the confession emerged, such as the length of the interrogation, number of interactions, or social isolation of the accused, is not available to the accused as a method of raising reliability issues in Australian legal proceedings.

Alternatively, the judge also has an overriding discretion to exclude confessions obtained "unfairly, unlawfully or otherwise in ways contrary to public policy."¹³⁷ In application to MBOs, however, this option of exclusion has proven to be toothless. As noted by Justice Gummow and Justice Hayne in *Tofilau*, this discretion involves looking at the conduct of the police and all the circumstances of the case in question to view if it would be unfair to use the confession against the accused.¹³⁸ This has involved an inquiry into the reliability of the confession itself and the relevance of the evidence sought to be excluded.¹³⁹ In *Tofilau*, the majority swiftly discarded this argument because, in their opinion, the accused repeated the same story about the murder to the police in a formal interview following his confession to Mr. Big, and the confession was significantly relevant evidence to the crime.¹⁴⁰ However, there was no consideration of confirmatory or new evidence that corroborated the accused's account of events. Nor was there

could be made by anybody; see *Tofilau*, *supra* note 5 at para 13; *Grandinetti*, *supra* note 19.

¹³⁵ *Tofilau*, *supra* note 5 at para 60.

¹³⁶ Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rile and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60:2 Crim LQ 277 at 283.

¹³⁷ *Tofilau*, *supra* note 5 at paras 4, 166.

¹³⁸ *Ibid* at para 66.

¹³⁹ Lee Stuesser, "Mr Big' comes to Australia" (2008) 14:1 National Leg Eagle 6.

¹⁴⁰ *Ibid*.

any consideration of situational or dispositional factors such as inducements, minimization techniques, or the personality of the accused that may have impacted the reliability of the confession.

Certain sections from the *Evidence Act 1995* (Cth) are arguably applicable to MBO confessions. However, these laws are said to only apply to a minority of jurisdictions and a minority of litigants in Australia.¹⁴¹ Indeed, these were not applicable in *Tofilau*; even if they were in force, the majority agreed that it was unlikely that the confessions would be excluded under such provisions.¹⁴² With regard to reliability, s. 85 of the *Evidence Act* establishes that an admission is not admissible unless the circumstances in which it was made were such to make it unlikely that the truth of the admission was adversely affected.¹⁴³ Similar to the approach in Canada and New Zealand, assessing the truth involves consideration of any relevant condition or characteristic of the person making the confession and the nature of any threat, promise or other inducement made.¹⁴⁴ However, the applicability of s. 85 hinges on whether the undercover officers in the MBO are characterized as “investigating officials” or persons “the defendant knew or reasonably believed to be capable of influencing the prosecution” against the accused.¹⁴⁵ It is unlikely that Australian courts will find the latter to be true given their interpretation of a “person in authority” in MBOs. As to the former, the majority in *Tofilau* found that officers “engaged in covert investigations under the orders of a superior” fell outside the scope of an “investigating official.”¹⁴⁶ Thus, the applicability of s. 85 remains dubious in the context of MBOs.

As case law and legislation demonstrates, the Australian framework to evaluate the reliability of confessions stemming from the Mr. Big technique carries with it many exceptions that are not found in Canada and New Zealand. Moreover, their continued utilization of the ‘person in authority’ rule for statements made to undercover officers relies on a common law principle that has been discarded in Canadian law as an ineffective method for protecting Mr. Big targets.¹⁴⁷ Australia’s focus on voluntariness leaves

¹⁴¹ *Tofilau*, *supra* note 5 at para 322.

¹⁴² *Ibid.*

¹⁴³ *Evidence Act Cth*, *supra* note 97, s 85(2).

¹⁴⁴ *Ibid*, s 85(3)(a)(b).

¹⁴⁵ *Ibid*, s 85(1)(a)(b).

¹⁴⁶ *Tofilau*, *supra* note 5 at para 342.

¹⁴⁷ *Grandinetti*, *supra* note 19 focused on the “person in authority” rule and this was deemed

the accused with little to no protection against the admission of unreliable or false confessions. Without an approach that is specifically tailored – as found in Canada and New Zealand – to analyse the surrounding circumstances, background of the accused, corroborative evidence, and the internal plausibility of the confession itself, Australian targets of MBOs are put at a higher risk of being wrongfully convicted. However, this is not to say that Canada and New Zealand’s approach is fully adequate in terms of protection against unreliability. As discussed below in the next section, the subsequent application of the presumption of inadmissibility from *Hart* has been criticized as being merely another step for Crown prosecutors to take in having the evidence admitted, rather than a true obstacle to overcome.¹⁴⁸ To that end, it appears that Canada’s soft application of the presumption of inadmissibility in *Hart* may warrant a push in the direction of stronger protection. This could be achieved by placing a stronger burden on the Crown to prove, beyond a reasonable doubt rather than on a balance of probabilities, that the Mr. Big confession is reliable. Notwithstanding any proposed changes to the existing framework, however, both Canadian and New Zealand courts have demonstrated in post-*Hart* jurisprudence that they appear to be highly sensitive to the dangers of false or unreliable confessions and other associated risks with Mr. Big evidence.¹⁴⁹ With respect, this awareness among Canadian and New Zealand courts appears to be much higher than what has been seen in Australia.

B. Protecting the Accused Against Prejudicial Effects

Prejudicial effect is arguably the by-product that accompanies virtually all MBO evidence that is sought to be admitted by the Crown.¹⁵⁰ Particularly, the evidence discloses to the court the accused’s willingness to join a criminal organization and participate in what he or she believes to be criminal acts. Likewise, MBO targets are generally encouraged by covert officers to speak enthusiastically about their past crimes ensuring that, when they do confess, they present themselves in the worst light possible.¹⁵¹

ineffective in *Hart*.

¹⁴⁸ Iftene, *supra* note 81 at 166. See also Lisa Dufraimont, “Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence” (2015) 71:18 SCLR 475; Hunt, *supra* note 11.

¹⁴⁹ Dufraimont, *supra* note 148 at 487.

¹⁵⁰ *Hart*, *supra* note 4 at para 78.

¹⁵¹ Khoday, *supra* note 136 at 282.

Admitting this kind of evidence opposes the centuries-old common law rule in Canada that prohibits the Crown from leading evidence of misconduct, engaged in by the accused, which is unrelated to the charges before the court.¹⁵² Justice Moldaver, writing for the majority in *Hart*, elaborated on two kinds of prejudice that stem from such evidence. The first is “moral prejudice” whereby the overall character of the accused is diminished in the eyes of the jury and, as a result, they base their decision of guilt off of the accused’s irrelevant background, or the belief that the accused is deserving of punishment.¹⁵³ There is also “reasoning prejudice,” which may distract the jury’s attention away from the particular charge(s) in question, towards the totality of the accused’s criminal acts or misconduct during the MBO.¹⁵⁴

To safeguard against such prejudice, the Canadian approach is one that is specifically tailored for, and connected to the aforementioned assessment of reliability in Mr. Big confessions. As established above, the Crown carries the burden of overcoming the *prima facie* presumption of inadmissibility by proving that the probative value of the MBO confession outweighs any prejudicial effect that accompanies its admission into evidence. In assessing the prejudicial effects, judges must be cognizant of the dangers posed by admitting evidence that unnecessarily tarnishes the accused’s character, or that distracts the jury away from the charges in question.¹⁵⁵ In the context of a MBO, an example of this would be admitting evidence that demonstrates the accused’s willingness to participate in simulated acts of violence, or that shows the accused boasting about their alleged criminal past. Jury distraction can be found in how long the Crown spends detailing the MBO in court, or any underlying controversy as to whether a particular event or conversation occurred during the operation – assuming it was not recorded.¹⁵⁶ *Hart* illustrates that judges must be aware that the exclusion of evidence, that is unessential to the relevant narrative, may be necessary to mitigate prejudice against the accused and to promote a fair trial.¹⁵⁷ However, given the nature of MBOs, the Crown’s need to submit such prejudicial evidence is quite inevitable. Moreover, because the operation is uniformly conducted, the prejudicial concerns that originate from MBOs

¹⁵² See *Hart*, *supra* note 4 at para 73 citing *R v Handy*, 2002 SCC 56 at para 32.

¹⁵³ *Hart*, *supra* note 4 at para 74.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at para 106.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at paras 107-109.

are likely to be similar from case to case. Therefore, Canadian courts have acknowledged that judges will typically expend more of their analytical energy in assessing the probative value and reliability of a confession when balancing against prejudicial effects.¹⁵⁸ Consequently, it has been argued that this soft approach to prejudicial analysis contributes to the lower standard of admission seen in post-*Hart* cases, given that a Mr. Big confession, without obvious reliability issues, is typically seen as highly probative in the eyes of Canadian judges.¹⁵⁹

In New Zealand, s. 8 of the *Evidence Act 2006* takes into account prejudicial effects on the accused. Similar, but not identical, to the reasoning in *Hart*, s. 8 is a general exclusion provision whereby the judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, or will needlessly prolong the proceeding.¹⁶⁰ However, the main distinction from *Hart* remains that there is no presumption of inadmissibility that the state must overcome by proving that the probative value outweighs any prejudicial effect. Rather, the judge must only take into account the right of the defendant to offer an effective defence when balancing the two concepts.¹⁶¹ This appears to be a legislative codification of a basic common law evidentiary rule which applied to MBOs in Canada pre-*Hart*, but had minimal impact on the exclusion of confessions.¹⁶²

Akin to Canadian law, measuring prejudicial effect in New Zealand focuses on the Crown's tendency to submit evidence that showcases the accused's involvement in criminal activity.¹⁶³ It has been noted that if the value of the Mr. Big confession is limited – likely because it lacks confirmatory evidence or is incomplete – the prejudicial effect on the defendant may outweigh the probative value of the evidence.¹⁶⁴ However, case law in New Zealand demonstrates that it is far from common for the

¹⁵⁸ *Ibid* at para 108.

¹⁵⁹ See Henderson, *supra* note 12 at 2. See also Streiling, *supra* note 6; *R v Magoon*, 2016 ABCA 412 as examples where prejudicial effects are minimally considered by the court.

¹⁶⁰ *Evidence Act NZ*, *supra* note 102, s 8(1)(a)(b).

¹⁶¹ *Ibid*, s 8(2).

¹⁶² *Hart*, *supra* note 4 at paras 64-65. The case of *R v Creek*, 1998 CanLII 3209 (BCSC), [1998] BCJ No 3189 (QL) was the only case found in Canadian jurisprudence where the judge's overriding discretion was used to exclude a confession because its prejudicial effects outweighed its probative value.

¹⁶³ *Wichman*, *supra* note 6 at para 94.

¹⁶⁴ *Ibid* at para 95.

courts to exclude evidence under s. 8 because confessions are often viewed as carrying substantial probative value and are fundamental to the Crown's case.¹⁶⁵ Again, a parallel can be drawn between s. 8 and pre-*Hart* jurisprudence whereby an overriding judicial discretion to exclude confessional evidence that is more prejudicial than probative proved to be futile.¹⁶⁶ Thus, in the context of a MBO confession, s. 8 is likely not as protective for the defendant as one may anticipate based on its language.

In addition, New Zealand's legislation around prejudicial effects not only reflects similarities with *Hart* principles, but its application also appears to be just as narrow as in Canada. For example, in the leading case of *Wichman*, the majority held that the prejudicial effects were not sufficient to warrant exclusion mainly because the simulated crime scenarios that the accused had participated in had no relevance to the crime of which he was suspected of committing.¹⁶⁷ Therefore, the court found that, with appropriate jury directions not to misuse the evidence, there was no logical basis for the jury to regard the accused's willingness to engage in criminal activity as having any significant bearing on guilt.¹⁶⁸ Yet, this seems to be the exact type of character evidence that is to be considered for exclusion on the basis of moral or reasoning prejudice in *Hart* where the simulated crimes that the accused participated in consisted of transporting stolen property, smuggling alcohol, and breaking into a car, all of which were far removed from *Hart*'s charge of first-degree murder. Nonetheless, the prejudicial impact from said simulated crimes on *Hart* was deemed to be significant and exclusion was ultimately granted.¹⁶⁹ Of course, the probative value of the evidence must be taken into account, but the prejudicial effect of these unrelated crimes were not simply brushed off by the court because they were irrelevant to the charge in question.

In Australia, judicial discretionary power to exclude or limit evidence that is found to be unfairly prejudicial to the accused exists both at common law and within legislation.¹⁷⁰ Similar to Canada and New Zealand, this

¹⁶⁵ *Ibid* at para 96.

¹⁶⁶ *Hart*, *supra* note 4 at para 65.

¹⁶⁷ *Wichman*, *supra* note 6 at para 96; it must be noted that the crime the accused was suspected of committing was assaulting a child.

¹⁶⁸ *Ibid* at paras 96, 532.

¹⁶⁹ *Hart*, *supra* note 4 at para 145. Albeit, the probative value of the confession had been deemed low.

¹⁷⁰ See *R v Swaffield*, [1998] HCA 1 at paras 29, 54, 62 [*Swaffield*]; see also *Tofilau*, *supra* note 5 at para 3; *Evidence Act Cth*, *supra* note 97, ss 90, 135-137.

discretion is based on whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.¹⁷¹ For those jurisdictions that are subject to the uniform evidence legislation, s. 90, and ss. 135 to 137 of the *Uniform Evidence Act 1995* (Cth) all provide the court with powers to exclude or limit evidence that is unfairly prejudicial to a party. Akin to Canada, while considering prejudicial factors that may be unfair,¹⁷² Australian judges must be cognizant of evidence that may appeal to a trier of facts sympathies, sense of horror, instinct to punish, or other motives that may lead one to make a decision on the basis of improper reasoning.¹⁷³ Once such evidence is considered to be at risk of being unfairly prejudicial to the defendant, the effect of appropriate judicial directions to the jury must then be taken into account.¹⁷⁴ With intention of neutralizing the unfair prejudicial evidence, courts must consider whether, upon receiving instructions, an “average jury” would “be reasonably capable, as an intellectual exercise” of leaving the prejudicial background of the Mr. Big scenarios out of account for the purpose of maintaining a fair trial.¹⁷⁵ If the unfair prejudice can be overcome by giving instructions to the jury, then it is unlikely to outweigh any probative value that a Mr. Big confession can provide for the Crown’s case (assuming that there are no serious reliability issues within the confession). For this reason, the judicial discretionary power in Australia is similar to Canada and New Zealand in that it likely provides superficial protection for suspects who confess to Mr Big.

In a recent Australian Mr. Big case, for example, the trial judge held that the evidence presented a danger of unfair prejudice towards the accused. The Mr. Big scenarios showed that the accused had been a criminal for most of his adult life, that he successfully grew and trafficked cannabis, and that he possessed, and was ‘very familiar’ with various types of firearms,

¹⁷¹ *Evidence Act Cth*, *supra* note 97, ss 90, 137.

¹⁷² A noteworthy distinction is made in Australian case law – which also applies in Canada and New Zealand – between evidence that is considered “prejudicial”, and evidence that is “unfairly prejudicial”. As stated by Justice Crawford in *Neill-Fraser v Tasmania*, [2012] TASCCA 2 at para 184, “all evidence that may tend to convict an accused person is prejudicial, but that does not mean that it is unfairly prejudicial. What is meant by unfair prejudice is that the jury may use the evidence to make a decision on an improper, perhaps emotional basis.”

¹⁷³ See *Standage*, *supra* note 39 at para 6, citing *Neill-Fraser*, *supra* note 172 at para 128.

¹⁷⁴ *Standage*, *supra* note 39 at para 6.

¹⁷⁵ *Ibid* at para 6.

including guns alleged to be the murder weapons in the particular case.¹⁷⁶ It also demonstrated the accused's voluntary participation in serious organized crime such as illegal prostitution, money laundering, police corruption, trafficking in ecstasy and hashish, illicit diamond sales, and armoured truck robbery.¹⁷⁷ However, the judge found that the evidence could be "compartmentalised" and a reasonable jury, upon being given appropriate instructions, would be reasonably capable of 'editing out' the prejudicial background of the accused.¹⁷⁸ The probative value of the Mr. Big confession thus easily outweighed any unfair prejudicial effects on the accused.

With the exception of slight variations, all three jurisdictions hold similar frameworks to address the risk of unfair prejudice in MBO confessions. Taken at face value, the Canadian, New Zealand, and Australian common law rules and legislation appear to provide adequate protection for the accused. In particular, Canada, through the presumption of inadmissibility from the *Hart* framework, appears to hold an extra barrier for the Crown to overcome prejudicial impact. However, in practice, such protection may be fruitless, as probative value seems to outweigh prejudicial effect more often than not in a Mr. Big setting.¹⁷⁹ At other times, prejudicial effect from MBO evidence is given little to no consideration. For instance, only one of the four cases in *Tofilau* were analysed on the grounds of prejudicial effects.¹⁸⁰ When it is considered, however, it is clear that the exclusion of a confession, on the basis of prejudicial effect, will likely only occur when probative value is clearly trivial, or the prejudice towards the accused is significant and relevant. Otherwise, case law demonstrates that

¹⁷⁶ *Ibid* at para 142.

¹⁷⁷ *Ibid* at para 143.

¹⁷⁸ *Ibid* at para 158.

¹⁷⁹ See *Wichman*, *supra* note 6 at para 96; *Cameron*, *supra* note 40; *Reddy*, *supra* note 49; *Standage*, *supra* note 39. See also post-*Hart* cases such as *Streiling*, *supra* note 6, *R v Johnston*, 2016 BCCA 3 [Johnston], *R v West*, 2015 BCCA 379 [West], *R v Allgood*, 2015 SKCA 88 [Allgood], *R v Caissie*, 2019 SKQB 3; *R v Klaus*, 2018 ABQB 6; *R v Mildenberger*, 2015 SKQB 27; *R v Magoon*, 2016 ABCA 412; *R v MM*, 2015 ABQB 692; *R v Tingle*, 2015 SKQB 184; *R v Balbar*, 2014 BCSC 2285; *R v Keene*, 2014 ONSC 7190; *R v Hales*, 2014 SKQB 411. In *Tofilau*, *supra* note 5, there appeared to be no consideration of prejudicial effects stemming from the MBO evidence.

¹⁸⁰ See *Tofilau*, *supra* note 5 at para 406 for a discussion on *Clarke*. This is also assuming there is no police impropriety or abuse of process found to otherwise render the confession inadmissible.

where prejudicial effects are not severe, the judge will choose to edit and admit the confession through appropriate jury instructions.¹⁸¹ This trend has been demonstrated in Canada by post-*Hart* jurisprudence as evidence from MBOs is admitted in the majority of cases.¹⁸² The *Hart* framework has thus been criticized as being ineffective in its subsequent applications¹⁸³ due to its exclusionary rules being only well suited to capture only the most unreliable or prejudicial evidence.¹⁸⁴

C. Police Misconduct and General Impropriety

Lastly, the issue of police misconduct or general impropriety remains an important concern surrounding MBOs. Due to its inherent coercive nature, MBOs contain the risk that police will engage in tactics that are unacceptable to society. As alluded to in *Hart*, police misconduct can involve undercover officers cultivating an aura of violence through threats or portrayed acts of violence that approximate coercion.¹⁸⁵ Using such conduct for the purpose of eliciting a confession can become abusive; and as a result, the reliability and voluntary nature of a confession are likely undermined. Similarly, ‘general impropriety,’ a term used in New Zealand and Australia, can include police acts such as the lies which are a necessary part of the Mr. Big technique, the commission of simulated crimes and the recruitment of the suspect into such activities, and the intense pressure to confess placed upon the target¹⁸⁶; all of which have the potential to threaten the credibility of a confession. Notwithstanding the reliability and/or probative value of a confession, the SCC has simply held that the courts cannot condone state misconduct that coerces the target of a MBO into confessing.¹⁸⁷

Canadian courts have addressed the issue of police misconduct through the doctrine of abuse of process – a doctrine intended to protect individuals against abusive state conduct that society would find unacceptable, and

¹⁸¹ *Mack*, *supra* note 6; *Standage*, *supra* note 39; *Wichman*, *supra* note 6. It must be noted that when a jury is not present, there is a greater chance that the prejudicial effects will be mitigated through the experience of the judge, sitting alone.

¹⁸² See the non-exhaustive list of post-*Hart* cases, *supra* note 179 where admission was granted at each trial.

¹⁸³ *Henderson*, *supra* note 12.

¹⁸⁴ *Dufraimont*, *supra* note 148 at 490.

¹⁸⁵ *Hart*, *supra* note 4 at para 78, 115.

¹⁸⁶ *Wichman*, *supra* note 6 at para 117.

¹⁸⁷ *Hart*, *supra* note 4 at para 10.

which threatens the integrity of the justice system.¹⁸⁸ This approach gives the court wide remedial discretion to exclude evidence, or issue a stay of proceedings, where an abuse of process has occurred, regardless of whether the evidence is reliable.¹⁸⁹ Although the onus of establishing an abuse of process remains on the accused, *Hart* has made it clear that trial judges must bear in mind that MBOs can become abusive, and that each case must be carefully scrutinized to evaluate how the police conducted themselves throughout the operation.¹⁹⁰ For example, the SCC held that an operation where the police use violence or threats to overcome the will of the accused and coerce a confession will almost certainly amount to an abuse of process.¹⁹¹ Exploitation of particular vulnerabilities of the suspect can also prove to be improper police conduct worthy of excluding evidence. In *Hart*, other, less obvious, factors were considered by the SCC as potentially resulting in an abuse of process. In that case, the accused was prone to having seizures, and had previously had his driving licence suspended to protect against the risk that a seizure would cause him to have a vehicular accident.¹⁹² However, during the MBO, the officers allowed him to drive long distances on populated roads, ultimately putting the general public and the target in danger, in order to make ‘deliveries’ for the organization.¹⁹³ Without having to ultimately conclude on the issue of abuse of process (because exclusion of the particular evidence was already established), Justice Moldaver held that such police conduct raised significant issues, and “might well amount to an abuse of process.”¹⁹⁴ However, aside from exceptional cases,¹⁹⁵ it appears that Canadian courts have taken a soft approach to applying the abuse of process doctrine following *Hart*. In *R v Allgood*, the Saskatchewan Court of Appeal acknowledged that a ‘typical’ MBO alone does not amount to an abuse of process. Rather, something more is required; the police must overcome the will of the accused and

¹⁸⁸ *Ibid* at paras 79, 113.

¹⁸⁹ *Ibid* at 113. As a post-*Hart* example, see the case of *Laflamme v R*, 2015 QCCA 1517 [Laflamme].

¹⁹⁰ *Hart*, *supra* note 4 at para 114.

¹⁹¹ *Ibid* at para 115.

¹⁹² *Ibid* at para 21.

¹⁹³ *Ibid* at para 148.

¹⁹⁴ *Ibid* at para 149.

¹⁹⁵ *Laflamme*, *supra* note 189; see also *R v SM*, 2015 ONCJ 537 where an abuse of process was also found, although the operation conducted by the police was not a typical MBO.

coerce a confession.¹⁹⁶ Prior to initiating the MBO in *Allgood*, the target was unemployed and frequented a pawnshop.¹⁹⁷ During the operation, the target was introduced to a lifestyle of expensive restaurants and hotels, told that he would receive \$25,000 if approved by the boss to participate in an upcoming job, and handled upwards of \$50,000 for the organization.¹⁹⁸ The accused was also exposed to considerable violence such as a kidnapping and staged murder of another undercover officer, as well as an assault on a woman and her daughter.¹⁹⁹ Yet, the court found that “there was no indication that there was violence, threats of violence, or taking advantage of Mr. Allgood’s vulnerabilities on the part of the police.”²⁰⁰ No abuse of process was found as a result. Likewise, in the post-*Hart* cases of *R v Johnston*, *R v West*, and *R v Perreault*, the courts held that no abuse of process arose because the violence and/or threats of violence were not directly aimed at the MBO target or anyone close to the target, but rather directed at individuals outside of the organization.²⁰¹ Another example is found in *R v Streiling*, wherein the British Columbia Supreme Court held that the police allowing the Mr. Big suspect to quit his job and interrupt gainful employment, which would have negative consequences for future employability was of “grave concern” and went “too far” in their view.²⁰² The judge also ruled that the covert officer allowing the target to take the wheel of his vehicle from the passenger’s seat so that the officer could text while driving put innocent civilians at risk, and was an action that could not be condoned.²⁰³ However, none of the police conduct rose to the apparent high level of abuse of process. As post-*Hart* jurisprudence demonstrates, the issue remains that many MBOs continue to create an undertone of violence that is either directly or indirectly aimed at the target, ultimately leaving it up to the target’s imagination as to what consequences may arise if they cross or upset any members of the fictitious organization. Indeed, vulnerabilities are still being preyed upon by police, and courts seldom reject

¹⁹⁶ *Allgood*, *supra* note 179 at para 67.

¹⁹⁷ *Ibid* at para 11.

¹⁹⁸ *Ibid* at paras 11, 17.

¹⁹⁹ *Ibid* at paras 14-15.

²⁰⁰ *Ibid* at para 67.

²⁰¹ For a summary regarding abuse of process in all three cases, see *Johnston*, *supra* note 179 at paras 50-60.

²⁰² *Streiling*, *supra* note 6 at para 148.

²⁰³ *Ibid* at para 149.

evidence based on this under an abuse of process.²⁰⁴ Perhaps the more robust conception of the abuse of process doctrine has not outgrown its reputation as a ‘paper tiger’ that it once carried in pre-Hart jurisprudence.²⁰⁵

In New Zealand, a combination of s. 29 and s. 30 of the *Evidence Act* 2006 address the issue of evidence obtained through police impropriety.²⁰⁶ Given the broad language of these sections, they are likely to be applicable to MBO confessions in a similar manner to what is seen in Canada. Under s. 29(2), a judge must exclude a statement unless satisfied beyond a reasonable doubt that the statement was not influenced by oppression. To trigger this section, the onus is on the defendant to raise, on the basis of an evidential foundation, the issue of whether a statement was influenced by oppression; however, the judge alone may also raise this issue in their analysis and inform the prosecution of the grounds for raising the issue.²⁰⁷ For the purpose of applying this section, s. 29(4) outlines a non-exhaustive list of factors for judicial consideration, such as any pertinent mental or psychological condition of the defendant when the statement was made; the nature of any questions put to the defendant and the manner and circumstances in which they were put; and the nature of any threat, promise or representation made to the defendant.²⁰⁸ It must also be noted that this provision defines “oppression” as “oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or a threat of conduct or treatment of that kind.”²⁰⁹

Likewise, s. 30 provides judicial discretion to exclude evidence that has been improperly obtained.²¹⁰ Such impropriety may exist if the police conduct is overbearing or the suspect is put under pressure to confess by reason of threats or inducements.²¹¹ Furthermore, s. 30(5)(c) establishes a broad discretion that evidence is improperly obtained if it is obtained

²⁰⁴ See non-exhaustive list of post-Hart cases, *supra* note 179, all of which found no abuse of process. However, it must be noted that some of these cases involve Mr. Big evidence of high probative value that strongly justifies its admission.

²⁰⁵ See Hart, *supra* note 4 at para 79 where the SCC refers to the ineffective abuse of process doctrine pre-Hart as a “paper tiger”.

²⁰⁶ *Evidence Act NZ*, *supra* note 102, ss 29, 30.

²⁰⁷ *Ibid*, s 29(1)(a)(b).

²⁰⁸ *Ibid*, s 29(4).

²⁰⁹ *Ibid*, s 29(5).

²¹⁰ *Ibid*, s 30.

²¹¹ *Wichman*, *supra* note 6 at para 122.

“unfairly.”²¹² This fairness analysis, however, has been narrowly interpreted as only requiring an assessment of police conduct short of oppression that has not already led to exclusion under s. 28.²¹³ If the judge finds that the evidence was improperly obtained, they must then determine whether the exclusion of the evidence is proportionate to the impropriety by means of a balancing exercise.²¹⁴ Again, a list of factors is set out in s. 30(3) to guide the balancing exercise. These include, but are not limited to, considerations such as the nature of the impropriety, or whether there were any other, less intrusive, investigatory techniques that could have been used. However, it was found by the Supreme Court of New Zealand that some constraints within the s. 30 analysis do not apply to covert officers acting within Mr. Big scenarios. For example, in addressing the question of why pressure that would otherwise be deemed as improper in a formal police interview could be applied during a Mr. Big interview, the court held that such constraints do not apply to undercover officers because they are not exercising the coercive power of the state.²¹⁵ Thus, similar to Australia’s “person in authority” exception, circumvention of certain constraints through the employment of a MBO may permit for police conduct that may otherwise be improper;²¹⁶ and s. 30 may not be fully available for the defence as a result.

Moreover, in regards to general impropriety, the majority in *Wichman* hinted at the prospect of applying the Canadian “abuse of process” approach from *Hart* to determining whether MBO statements should be excluded.²¹⁷ In that case, the same factors from *Hart* were considered – including whether the operation involved violence or threats of violence, or exploitation of particular vulnerabilities of the defendant – but it was determined that the impugned operation in question held none of the same characteristics as found in *Hart*, and thus admission of the evidence was favoured.²¹⁸

²¹² *Ibid*, s 30(5)(c).

²¹³ *Wichman*, *supra* note 6 at para 70; Section 28 is discussed above under the unreliability assessment for New Zealand.

²¹⁴ *Evidence Act NZ*, *supra* note 102, s 30(2).

²¹⁵ *Wichman*, *supra* note 6 at para 124.

²¹⁶ *Ibid* at para 124.

²¹⁷ *Ibid* at para 125.

²¹⁸ *Ibid*.

At common law, it has been said that Australian courts have had discretionary powers to exclude unlawfully or improperly obtained evidence on the basis of public policy grounds since at least the 1970s.²¹⁹ Under this discretionary authority is the general power to exclude a confession that is obtained by improper police conduct that would make it unacceptable to admit the statement.²²⁰ The High Court of Australia has noted that the main inquiry is whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use the statement against the accused.²²¹ For applicable Australian jurisdictions, the *Uniform Evidence Act 1995* has crystallized a similar form of this discretion into statute under what is now s. 138. The section provides that evidence obtained improperly or in consequence of an impropriety is not to be admitted unless, on balance, the desirability of admitting the evidence outweighs the undesirability of admission based on the way it was obtained.²²² Akin to s. 30 in New Zealand's Evidence legislation, there are similar considerations listed within the provision including the gravity of the impropriety, whether the impropriety was contrary to a legal right of a person, and the difficulty of obtaining the same evidence without impropriety.²²³

Likewise, s. 84, which can exclude admissions influenced by violence and certain other conduct, is also relevant in the context of an MBO confession. Nearly identical to s. 29 of New Zealand's Evidence Act, s. 84 excludes evidence of an admission that was influenced by "violent, oppressive, inhuman or degrading conduct...or a threat of conduct of that kind."²²⁴ The source of such conduct is not restricted to an "investigating official" or "person in authority," thus there is scope for broad application and, in particular, to MBOs wherein the identities of the undercover officers are unknown to the accused.²²⁵ However, a difficult challenge that has been notably attached to this section remains that the accused has the burden of identifying the "oppressive" nature of the conduct, and more importantly, whether it has impacted their voluntariness in making a

²¹⁹ Murphy, *supra* note 85 at 40; *Bunning v Cross* (1978), 141 CLR 54; *Cleland v R*, [1982] HCA 67; *Swaffield*, *supra* note 172.

²²⁰ *Tofilau*, *supra* note 5 at para 3.

²²¹ *Ibid* at para 66.

²²² *Evidence Act Cth*, *supra* note 97, s 138.

²²³ *Ibid*.

²²⁴ *Ibid*, s 84(1).

²²⁵ Murphy, *supra* note 85 at 43.

confession during the MBO.²²⁶ Aside from proving an impact on voluntariness, this approach is comparable to the Canadian approach in *Hart*, where the onus is on the accused to establish an abuse of process.

Alternatively, the aforementioned Australian common law rule of basal voluntariness may render a confession inadmissible on the grounds of improper police conduct. If the covert officers engage in conduct that rises to the level of “duress, intimidation, persistent importunity, or sustained or undue insistence or pressure,” then it could be argued that, through compulsion, the accused’s free choice of whether to speak or remain silent was overborne.²²⁷ However, *Tofilau* establishes a high threshold to meet by placing the onus on the accused to identify why he or she had no choice to speak or stay silent.²²⁸ A cleverly planned MBO is likely to circumvent this rule – and also hinder any success of protection under s. 84 of the *Uniform Evidence Act 1995* – by making it known to the suspect that they are ‘free to go’ at any time, or that they ‘do not have to speak’ during the interview with Mr. Big. In this regard, the suspect will likely be found as voluntarily choosing to confess as there is no considerable level of coercion from the undercover officers.

Under the context of MBOs, the Australian approach to police misconduct and/or general impropriety contains several exceptions that make its application more constricted than comparable laws in Canada and New Zealand. With Australia’s underlying focus on voluntariness, the defendant carries a heavier burden not only to identify which conduct amounts to ‘violence, oppression, inhuman or degrading,’ but also to prove and explain why such conduct impacted their voluntariness to confess to Mr. Big. Although there are also exceptions to police impropriety found in New Zealand’s legislation due to the disengagement of coercive state power, New Zealand’s Parliament has demonstrated that they are willing to take a liberal approach by not only allowing judges to raise issues of impropriety, but also considering and applying Canada’s abuse of process doctrine from *Hart*. It must also be kept in mind that this approach is in combination with a general consensus among police departments to implement MBOs on a ‘very mild’ basis. As such, New Zealand may have some of the better tools

²²⁶ *Ibid* at 44. It has also been held that “Oppressive conduct” is not limited to physical violence or explicit threats, but could extend to “mental and psychological pressure”; see also *Higgins v The Queen*, [2007] NSWCCA 56 at 26.

²²⁷ *Tofilau*, *supra* note 5 at para 60.

²²⁸ *Ibid* at para 64.

and safeguards in place to protect against police impropriety during a MBO, if it arises at all. Analogously, the Canadian method of dealing with police misconduct and impropriety on paper is wide in ambit. Without establishing a bright line rule to distinguish what is and what is not improper, Canadian courts have acknowledged their obligation to carefully scrutinize each Mr. Big case on its own circumstances and to bear in mind that these operations have a tendency to become abuse in numerous ways.²²⁹ However, as seen in post-*Hart* cases, the application of the abuse of process doctrine remains questionable, as lower courts have admitted Mr. Big confessions even where police conduct approximates what was intimated in *Hart* as amounting to an abuse of process.²³⁰

VI. CONCLUSION AND PROPOSED SOLUTIONS

The foregoing comparative analysis demonstrates that each country carries flaws within its framework, and/or application thereof, which result in insufficient protection for those who confess during a MBO. Australia, in particular, holds the weakest protection compared to Canadian and New Zealand regulations. With an underlying focus on voluntariness, Australian laws follow a similar version of an out-dated and rejected approach found in pre-*Hart* Canadian jurisprudence, which ultimately allows for numerous exceptions to safeguards that are put in place to protect against the admission of unreliable confessions. Such exceptions are not found in Canada or New Zealand due to developments in common law or legislative measures. In regard to reliability concerns, an approach specifically tailored for MBOs in Australia, which avoids consideration of the 'person in authority' threshold and rather focuses on situational and dispositional factors, as well as the plausibility of the Mr. Big confession itself, is therefore necessary, at minimum, to approximate stronger safeguards. To enhance reliability protections in all discussed jurisdictions, it is recommended that each country adopt a heightened version of the existing *Hart* framework, one which places the burden on the Crown to prove beyond a reasonable doubt, instead of on a balance of probabilities, that the Mr. Big confession is reliable.²³¹ This would raise the threshold of admissibility in line with the

²²⁹ *Hart*, *supra* note 4 at para 118.

²³⁰ *Ibid* at paras 115-118; see also *Streiling*, *supra* note 6 at paras 148-150.

²³¹ See *Hunt*, *supra* note 11 where the elimination of the 'persons in authority' threshold is proposed in order to extend Canada's confession rule to those who confess to an

Canadian common law confessions rule – without having to remove the ‘persons in authority’ threshold – and provide for greater protection against the admission of false confessions.

As for prejudicial impact on the accused, all three countries appear to be lacking in effective application of existing laws meant to protect against the admission of prejudicially unfair evidence. The highest courts in Canada and New Zealand have, at least, acknowledged a heightened obligation on judges to be cognizant of the innate prejudicial effects that necessarily accompany Mr. Big evidence. However, as recent cases show, the standard of analysing prejudicial effect is often trivial, non-existent, or overshadowed by thorough consideration of probative value found within a Mr. Big confession. Consequently, any prejudicial effect of Mr. Big evidence is typically outweighed by probative value, or edited-out for the trier(s) of fact as irrelevant, and the confession is admitted as a result. It is suggested that greater scrutiny be placed on the analysis of prejudicial effects in judicial proceedings of each country, allowing for a full and comprehensive review of potential prejudice in each case. Such individualized engagement will address the variability of the accused, their background, and surrounding circumstances in each operation, which would create an actual, rather than just illusory, obstacle for the Crown to overcome before admitting Mr. Big evidence.²³²

Under the context of police misconduct or general impropriety during MBOs, the ‘more robust’ Canadian doctrine of abuse of process from *Hart* is a step forward in theory, yet its application remains weak. Likewise, Australian laws appear to make protection from police impropriety even more restricted and burdensome for Mr. Big targets due to its underlying focus on voluntariness. As policing authorities have continued to shape MBOs into an effective investigatory tool, methods are already at play to eliminate conduct that manifests impropriety or an abuse of process in the eyes of the court, thus rendering the current application of laws futile. Therefore, a proactive and broad approach, as seen in New Zealand, is suggested for each country to enhance protection against police impropriety during MBOs. Such an approach should eliminate the accused’s burden of

undercover officer. Although this solution may be able to enhance protection for Mr. Big targets, it has also been argued that eliminating the ‘persons in authority’ threshold could create unintended consequences as those who confess, even to legitimate crime bosses, will always have a voluntariness argument; see Steusser, *supra* note 139.

²³² See Henderson, *supra* note 12 for greater analysis on this proposed solution.

proving the actual police impropriety and its effect on voluntariness, and allow judges to scrutinize police misconduct and raise issues of their own. It should also provide for judicial examination and stronger application of Canada's abuse of process doctrine, on a case-by-case basis, as a method of considering less obvious police misconduct that society (and courts) may not wish to condone. Moreover, it is recommended that each country exclude confessional evidence that is obtained as a result of a MBO which created an aura of violence, or threats thereof – whether directly or indirectly aimed at the accused. Consequently, this would result in a 'very mild' form of the investigative technique, as found in New Zealand, and further shield against unreliable confessions, prejudice, and police impropriety.

Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions

LAUREN CHANCELLOR *

ABSTRACT

This paper investigates news and social media's role in wrongful convictions in the Canadian criminal justice system by utilizing a prior analysis of three men wrongfully convicted of murder in Canada—Guy Paul Morin, Robert Baltovich, and James Driskell—along with multiple studies on the media's role in creating public prejudice against an accused. The presumption of juror impartiality should be reevaluated to account for the prejudicial nature of news and social media. I explore the role the media plays in both causing wrongful convictions through pre-trial publicity and in affecting change by bringing attention to innocence cases. Canadian wrongful conviction research has not seriously addressed the issues surrounding media and the ensuing bias that may lead to the partiality of jurors. I will begin by reviewing the Canadian presumptions of innocence and juror impartiality before reviewing the roles of news and social media with their impact on wrongful convictions. Finally, recommendations will be made for improvements to the criminal justice system to ensure a fairer trial for the accused and to limit wrongful convictions.

Keywords: juror impartiality; presumption of innocence; challenge for cause; wrongful convictions; pre-trial publicity; social media; news media; media bias; judicial instructions

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I. INTRODUCTION

The media has a strong role to play in the criminal justice system through its influence on public opinion. Much of the information the public receives regarding crime and the criminal justice system is through newspaper reports, television news stories, and, more recently, social media. The media frequently focuses on details of individual crimes, which overemphasizes the amount of serious crime in society. This failure to provide the necessary contextual information leaves readers misunderstanding the criminal justice system, which can lead to the prospering of fear of crime narratives and the “perception of criminal justice in crisis.”¹

In recent decades, the public has been made aware of wrongful convictions through media reports and high-profile exonerations, including the Central Park Five in New York. Shows such as *Making a Murderer* and podcasts like *Serial* have made the public question the accuracy of the criminal justice system more seriously. Documentaries like these are crucial in eliciting public sympathy for innocence campaigns.² However, the media can also have a detrimental effect on an accused person’s right to a fair trial by jury. The purpose of crime news is to “give the reader the impression that he is himself a direct witness to the facts” which requires presenting information to the public as though it is fact, whether or not it could be heard in a court proceeding as evidence.³ Pre-trial publicity frequently provides prejudicial information to the public—especially in high-profile or serious crimes—which limits the ability to find truly impartial jurors who have not been affected by the associated publicity.

The presumption of juror impartiality should be reevaluated to account for the prejudicial nature of news and social media. This paper will explore the role both media forms play in both causing wrongful convictions through pre-trial publicity and in affecting change by bringing attention to innocence cases. The paper will begin by reviewing the Canadian presumptions of innocence and juror impartiality before reviewing the roles

¹ Richard Nobles & David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000) at 38.

² Greg Stratton, “Innocent Narratives: Wrongful Conviction, *Australian Story*, and the Influence on Public Opinion” (2013) 27:6 J Media & Cultural Studies 875 at 876.

³ Antoine Garapon, “Justice out of Court: The Dangers of Trial by Media” in David Nelken, ed, *Law as Communication* (Aldershot: Dartmouth, 1996) at 233

of news and social media with their impact on wrongful convictions. Finally, recommendations will be made for improvements to the criminal justice system to ensure a fairer trial for the accused that will limit wrongful convictions.

II. DEFINITIONS

It is important to note the different understanding of wrongful convictions in law and the media or public sphere. Nobles and Schiff provide a legal definition of wrongful convictions as “the people who have been convicted of offences did not in fact commit those offences, or that their convictions were flawed because some part of the process that produced those convictions did not operate as it should.”⁴ This can be referred to as a concern with truth and due process, respectively. However, they also note that the media focuses much less on due process or the rights of the suspect, instead attaching all relevance to concerns with the truth. When someone claims innocence or is exonerated, the media focuses on their innocence in fact—that they are not the person who committed the crime. It is seen as unpalatable to be acquitted on a “technicality,” or due process, when the media still presents the individual as factually guilty.⁵ This difference becomes apparent in the media’s presentation of pre-trial stories compared to the coverage of exonerations.

This paper focuses on the presentations of crime through news and social media. Social media is an ever-changing concept—what was popular ten years ago is no longer utilized today. For example, Myspace lost favour as Facebook, Twitter, and Instagram took over, which will in turn eventually be overcome by ever-newer websites and apps. Generally, social media is participatory and accessible to the masses. It has been described as content “not merely consumed by users, [but] also created, organized and distributed by them.”⁶ For the purpose of this paper, the use of ‘social media’ refers to online platforms that allow for discussion, such as Facebook, Twitter, blogging platforms like WordPress, and editable entries on Wikipedia.⁷

⁴ Nobles & Schiff, *supra* note 1 at 16.

⁵ *Ibid* at 38.

⁶ Australia, Commonwealth, Standing Council on Law and Justice, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice*, by Jane Johnston et al (Melbourne: Standing Council on Law and Justice, 2013) [*Juries and Social Media*].

⁷ See *ibid* at Appendix 1.

In comparison, news media consists of the traditional media originally found in newspapers and on television news programs. In the age of the Internet, these sources have expanded onto online platforms, as well. Newspapers and television programs now have websites online that house their video, audio, and written content, and their stories are shared on social media platforms. To clarify, the distinction between traditional news media and social media is not based on the medium's online capabilities, but instead on the ability of social media to crowdsource and share information independent from traditional journalistic enterprises found in news media. This line becomes indistinct as journalists from traditional media create their own profiles and blogs to share additional content and communicate stories in real-time with their audience on social media. For the purposes of this paper, a distinction will be made between the news media's postings on their own platforms and that which is shared and discussed between individuals on social media.

III. LITERATURE REVIEW

Legal wrongful conviction research often falls into a “familiar plot” of the innocent person unjustly accused and convicted, then later exonerated after a heroic struggle.⁸ Leo argued this created an “intellectual dead end”⁹ as those that conducted such research viewed the miscarriages of justice with the same lens, neglecting to expand their methodological or conceptual understanding.¹⁰ The fields of criminology and sociology have conducted much research on the media's representation of crime. The media has a strong influence over its audience, acting as the “public's surrogate” to produce what the audience expects to be objective and reliable information.¹¹ Previous studies in other disciplines have revealed that the media contributes to many of the causes of wrongful convictions, especially in cases of serious and high-profile offences.¹²

⁸ Richard A Leo, “Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction” (2005) 21:3 J Contemporary Crim Justice 201 at 207.

⁹ *Ibid* at 207.

¹⁰ *Ibid* at 207, 212.

¹¹ Stratton, *supra* note 2 at 875.

¹² Jon B Gould & Richard A Leo, “One Hundred Years Later: Wrongful Convictions after a Century of Research” (2010) 100:3 J Crim L & Criminology 825.

However, Canadian wrongful conviction research has not seriously addressed the issues surrounding media and the ensuing bias that may lead to the partiality of jurors. Although research has been done to associate media coverage of crime with public reactions, it does not frequently assess the effect of such reactions on specific criminal trials. This paper will bridge this research gap by connecting media reporting and the public's perception of the presumption of innocence to jury trials, where that presumption is of paramount importance. If jury members are affected by the pre-trial publicity in a specific case, this may cause an improper weighing of evidence or a neglect of the presumption of innocence altogether.

IV. PRESUMPTION OF INNOCENCE

Section 11(d) of the *Charter* provides a presumption of innocence for all who have been accused of an offence in Canada.¹³ As with many European nations, Canada has two elements to this presumption.¹⁴ First, the prosecution must prove an accused's guilt within a trial. The accused is not required to call a defense to disprove the Crown's case; but instead, it is the Crown's burden to prove to the judge or jury beyond a reasonable doubt that the accused is guilty and should be convicted. The second element is found in European human rights law and takes a wider interpretation of the presumption. This element requires that the pre-trial must also be conducted as if the accused were innocent. This is mirrored in Canada through *Charter* rights and *Criminal Code* provisions that ensure a balancing of the rights of the accused against state and public interests.¹⁵

The reasons this presumption extends beyond the trial itself is three-fold. First, censure and punishment stem from the finding of guilt.¹⁶ Fair procedures must be utilized as the conviction can lead to imprisonment and incredible stigma that may last a lifetime. Second, trials rarely produce absolute certainty. Evidence can be wrong or strongly connected to past miscarriages of justice and the presumption of innocence "allocat[es] the

¹³ *Canadian Charter of Rights and Freedoms*, s 11(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

¹⁴ Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10:1 *Intl J Evidence & Proof* 241 at 243.

¹⁵ See *Charter*, *supra* note 13, s 11; *Criminal Code*, RSC 1985, c C-46, s 515 [*Criminal Code*].

¹⁶ Ashworth, *supra* note 14 at 247.

risk of misdecision.”¹⁷ Finally, the state should view its citizens as innocent.¹⁸ As the state has ample resources for investigation and prosecution, the state should also have the burden to prove an accused’s guilt.

The presumption of innocence leads to issues regarding news and social media’s presentation of suspects and accused people. Although the values espoused in our *Charter* should extend throughout our society, this rarely appears to be the case in news media, which presents the prosecution case and other information it sources as fact, or on social media, where anyone can speculate or share unsupported information and rumours with others. In both instances, media denounces the “artificiality of the law” which includes “the fiction of presumed innocence.”¹⁹ Nobles and Schiff state that “[p]ublic confidence will only be satisfied if the truth the public (as constructed by the media) expects to hear is confirmed in the courts, even if the evidence available does not justify the statement demanded.”²⁰ A stigma is attached to people accused of crimes from the moment news or social media identifies them as a suspect. If information of the crime is reported in news media or dispersed through social media’s word of mouth and the accused has been identified and charged, the public will expect them to be convicted irrespective of whether the Crown prosecutor has provided evidence of the person’s guilt beyond a reasonable doubt. The public can reject the legal process, in turn also shirking the presumption of innocence, through their moral indignation at the crime that has been committed and a demand for someone to be held accountable.²¹

V. PRESUMPTION OF JUROR IMPARTIALITY

Charter subsection 11(d) also requires a trial by an impartial tribunal, whether that is a judge or jury.²² This requires that jurors are not biased or prejudiced for or against the accused. Hence, they must maintain the presumption of innocence that can be stripped away in media presentations of a case. This is necessary to ensure that jurors do not have preconceived ideas of a case before hearing evidence at trial, which should assist in

¹⁷ *Ibid* at 248

¹⁸ *Ibid* at 249

¹⁹ Garapon, *supra* note 3 at 233.

²⁰ Nobles & Schiff, *supra* note 1 at 129.

²¹ Garapon, *supra* note 3 at 235.

²² *Charter*, *supra* note 13, s 11(d).

preventing wrongful convictions based on extraneous and unsubstantiated material. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* clarified that prejudice based on pre-trial publicity is “highly speculative” which necessitates that it is difficult to obtain a *Charter* remedy on those grounds.²³ The *Criminal Code* provides an ability for Crown and defence to challenge a juror for cause during the jury selection process, instead. This is intended to ensure that an accused has a fair trial. Paragraph 638(1)(b) provides that challenges can be conducted if the potential juror is “not indifferent between the Queen and the accused” which allows for applications regarding pre-trial publicity.²⁴

The Canadian courts have addressed this challenge for cause procedure multiple times. In *R v Sherratt*, the Court stated that “while there must be an ‘air of reality’ to the application, it need not be an ‘extreme’ case” to allow challenges for cause to be conducted.²⁵ However, mere publication of the facts of the offence or proceedings is usually not sufficient to warrant such a challenge, as our justice system is open to the public and that publicity is to be expected.²⁶ The Court in *R v Zundel* provided that the real question to be addressed is whether pre-trial publicity “could potentially have the effect of destroying the prospective juror’s indifference between the Crown and the accused.”²⁷ Since *Zundel*, this test has been adapted to a “realistic potential for partiality” that must be established by the party seeking to challenge potential jurors.²⁸

R v Find breaks this threshold into two components.²⁹ First, that “widespread bias exists in the community” and second, that “some jurors may be incapable of setting aside this bias.”³⁰ Both the nature or type of information shared and the time since publication are important to determine the prejudicial potential of pre-trial publicity and whether there

²³ *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, [1995] SCJ No 36 at para 35-36. This case dealt with the prejudicial effect of media publication of an accused’s testimony in a public inquiry before their criminal case was heard. The Court suggested remedies including publication bans, *in camera* hearings, and the postponement of testimony in the public inquiry.

²⁴ *Criminal Code*, *supra* note 15, s 638(1)(b).

²⁵ *R v Sherratt*, [1991] 1 SCR 509, [1991] SCJ No 21 at para 63 [*Sherratt*].

²⁶ *Ibid* at para 42.

²⁷ *R v Zundel* (1987), 35 DLR (4th) 338 at para 100, 31 CCC (3d) 97 (Ont CA) [*Zundel*].

²⁸ *Sherratt*, *supra* note 25 at para 64; *R v Le*, 2008 MBQB 81 at para 3 [*Le*].

²⁹ *R v Find*, 2001 SCC 32 at paras 32-33.

³⁰ *Ibid* at para 32.

are grounds under the first component of the test. Publicity that is deemed to be more prejudicial in nature includes “[r]eports that misrepresent the evidence, publish discreditable information about the accused, engage in speculation about the guilt of the accused, or offer information which would not be admissible in court.”³¹ In assessing the second component, it must be noted that the focus is on whether jurors may be unable or unwilling to put aside the prejudices they may have developed from the pre-trial publications, not whether they hold any opinions on the case at all. The presumption of impartiality indicates that jurors are expected to be able to put aside their potential biases and hear a case impartially as their oath requires.

Despite the safeguards put in place through the challenge for cause provisions in the *Criminal Code*, the pool of potential jurors for any criminal case are made up of the Canadian public who are exposed to news and social media before—and sometimes during—the trial process. The media frequently contains the prejudicial information as listed above in *Le*.³² There are far-reaching impacts of the expanding media presence within people’s lives that have yet to be fully addressed by the courts. Some of the issues related to this publicity and the prejudicial nature of media reports will be discussed in the below sections on news and social media.

VI. ‘TRIAL BY MEDIA’: NEWS MEDIA’S IMPACT ON WRONGFUL CONVICTIONS

It is important to recognize that the news media is a business, focused on attaining a greater readership through the sale of advertisements on television and online. News media provides entertainment through newsworthy and public interest stories, including crime reports. This provides an incentive to follow certain criminal cases—especially serious offences—from discovery of the offending conduct through the trial and subsequent conviction or acquittal. Frequently, the public also has a desire to follow a story through the investigative and trial processes to ensure justice is attained. Nobles and Schiff describe the news media’s presentation of crime stories as newsworthy through what crime has been committed rather than if the suspect has committed the offence.³³ This has a powerful

³¹ *Le*, *supra* note 28 at para 9.

³² *Ibid.*

³³ Nobles & Schiff, *supra* note 1 at 97.

impact on the public who read crime stories in news media, as these stories are frequently accompanied by “misperceptions and prejudicial accounts.”³⁴

Media coverage of crime can contribute to wrongful convictions in two capacities. First, pressure is put on the criminal justice system to apprehend those responsible for serious crimes through media narratives that create a “connection between crime and public emotionality.”³⁵ This can lead to rushed investigations and heightened tunnel vision that may lead to the incorrect person charged with the offence.³⁶ Second, once a person has been charged with a crime, pre-trial publicity can lead to a trial by media. This phenomenon has been defined as “a market-driven form of multi-dimensional, interactive, populist justice in which individuals are exposed, tried, judged and sentenced in the ‘court of public opinion’”³⁷ As jurors are selected from the public that is exposed to these publications, pre-trial publicity can become a serious issue when prejudicial material is reported to the public.

After the United States Supreme Court ruled that pre-trial publicity seriously compromised an accused’s right to a fair trial in the 1960s, the American Bar Association [ABA] provided a list of types of information that would be prejudicial if dispersed by lawyers or published by the media.³⁸ This was created in the hopes that news media in the United States would refrain from reporting prejudicial information and solidify an accused person’s procedural rights to a fair trial. The Canadian Judicial Council [CJC] also released documentation regarding pre-trial publicity and the prejudicial information that may impact someone’s right to a fair trial.³⁹ Key

³⁴ Katherine Rozad, *Critical Champions or Careless Condemners? Exploring News Media Constructions in Cases of Wrongful Conviction* (MA Thesis, Wilfrid Laurier University, 2013), online: <scholars.wlu.ca/cgi/viewcontent.cgi?article=2867&context=etd> [perma.cc/SRC2-FSSS] at 21.

³⁵ *Ibid* at 8.

³⁶ Tunnel vision is a single-minded or overly focused police investigation or prosecutorial theory. This can cause information to be utilized incorrectly, to ensure it fits within the specific theory espoused by the police or prosecutor. See Fred Kaufman (1998) *The Commission on Proceedings Involving Guy Paul Morin: Report*.

³⁷ Rozad, *supra* note 34 at 11 [emphasis added].

³⁸ Rafaële Dumas, Nadia Lepastourel & Benoît Testé, “Press Articles and Influence Processes: The Different Effects of Incriminating Information and Crime Story Information on Judgments of Guilt” (2014) 20:7 *Psychology, Crime & L* 659 at 660; The American Bar Association, *ABA Criminal Justice Section Standards*, Chicago: ABA, 8-1.1(b)

³⁹ Canadian Judicial Council, *The Canadian Justice System and the Media*, (Ottawa: CJC,

types of this information include reported confessions, criminal history, and other evidence not before the jury. The Canadian report also specified that the “media must avoid linking an accused directly to a crime” or providing sensationalized information which will be more influential to “people who could wind up on the jury.”⁴⁰ Nonetheless, this information is frequently reported. According to a 1979 US study, researchers found that two thirds of examined newspaper articles contained prejudicial information from the contemporary ABA list.⁴¹

Katherine Rozad studied the media coverage surrounding three Canadian wrongful convictions: Guy Paul Morin, Robert Baltovich, and James Driskell. Rozad canvassed newspaper articles from four major sources regarding these cases, from the time the victims were murdered or went missing until the subsequent exoneration of these three men. It is important to note that all of these cases occurred before the boom of social media, with the third exoneration occurring in 2008, which would likely increase the public fervor surrounding a similar case today. Rozad found that the media has two opposing roles as the “public’s surrogate.”⁴² The media contributes to wrongful convictions through the creation of fear of crime narratives. Fear of crime narratives describe “psychological and social reactions to perceived threats of crime and/or victimization” and can be developed through the media’s portrayal of victims and the offenders or accused persons.⁴³ Women have a greater fear of crime than men, perhaps due to the sensational nature of reports of violence against female victims.⁴⁴ The second role of news media is to support innocence claims at the exoneration stage if there is sufficient information to change public perception. This will be discussed further, below.

In the pre-trial context, publicity hinders an accused person’s ability to have a fair trial due to the media narratives that are constructed. Examining the media surrounding Morin and Baltovich pre-trial and Driskell at appeal

2010) [CJC, “CJS and the Media”].

⁴⁰ *Ibid* at 4-5.

⁴¹ James W Tankard, Kent Middleton & Tony Rimmer, “Compliance with American Bar Association Fair Trial-free Press Guidelines” (1979) 56 *Journalism Quarterly*.

⁴² CJC, “CJS and the Media”, *supra* note 39 at 1.

⁴³ Rachael E Collins, “Addressing the Inconsistencies in Fear of Crime Research: A Meta-Analytic Review” (2016) 47 *J Crim Justice* 21 at 21.

⁴⁴ Rachael E Collins, “‘Beauty and Bullets’: A Content Analysis of Female Offenders and Victims in Four Canadian Newspapers” (2016) 52:2 *J Sociology* 296 at 297 [Collins, “Beauty and Bullets”].

showed three main constructions that negatively impacted the accused.⁴⁵ First, the victims of these crimes were constructed sympathetically to garner public interest that would induce people to follow the story until its conclusion. This began a melodramatic narrative with easily identifiable good and bad sides.⁴⁶ In Morin, Christine Jessop was depicted as an innocent nine-year old riding her bike and buying bubblegum before her abduction and murder, a pure individual that would draw audience sympathy and worry over their own children.⁴⁷

The second construction is the building of audience fear. “[F]ear is entertaining and readers have ‘come to expect entertainment’” in their media.⁴⁸ News media utilizes this tactic to ensure people take their stories seriously and become engaged in knowing the result. This fear can be created through reporting on early details of the crime, speculating on a motive, or, in an article on Baltovich’s case, connecting Elizabeth Bain’s death to other murders and the steadily rising rates of reported sex assaults in Toronto.⁴⁹ Readers are connected to victims through “excessive detail of their victimization,” and reinforcements of the victim as a normal person create fear of the consumer’s own potential victimization.⁵⁰

Finally, pre-trial publicity also creates a focused direction for moral outrage in the suspected or accused person. When the news media identifies a specific suspect, the audience expects justice against this person who is “seemingly deserving of blame.”⁵¹ Rozad noted that the media would present somewhat indirect connections between a victim and the suspect. For example, an article linked Baltovich to the victim through an FBI profile that said Bains knew her killer. In other instances, the media would provide direct information such as a Provincial Court judge in Morin’s case ruling that there was sufficient evidence to proceed to trial.⁵² When Driskell’s case

⁴⁵ Rozad, *supra* note 34 at 66: Rozad found minimal coverage of the Driskell case in the pre-trial or trial stages of his case. This is likely due to the focus on sympathetic victims and developing a fear of crime narrative, while “criminals murdering criminals” does not fit this portrayal.

⁴⁶ *Ibid* at 52.

⁴⁷ *Ibid* at 45.

⁴⁸ *Ibid* at 53.

⁴⁹ *Ibid* at 55.

⁵⁰ Collins, “Beauty and Bullets”, *supra* note 44, at 298.

⁵¹ Rozad, *supra* note 34 at 59.

⁵² *Ibid* at 60, 63.

finally made headlines at the appeal stage, he was cast in a similar predatory manner by focusing on his criminal background.

Morin and Baltovich were both subject to media trials, characterized by “massive and intensive coverage” that discussed everything from personal idiosyncrasies of the accused, continued sympathetic framing of the victims, and Othering the “evil predatory criminal.”⁵³ Past actions of the accused men were framed as “indicative of guilt,” prejudicial information was shared—even if it was not presented at trial—and vast evidentiary issues in a case were pushed aside as understandable mistakes rather than the intentional tampering of evidence or framing a suspect.⁵⁴

Prejudicial pre-trial publicity results in the limited possibility of a fair trial for the accused. Studies conducted with mock jury trials show that media attention affects a juror’s decision-making. It is essential to the Canadian presumption of innocence that all jurors “hear the same thing in a case, and nothing else”⁵⁵ as extrajudicial information “has the potential to create a bias against the [accused] prior to the trial even beginning.”⁵⁶ This can create assumptions of guilt in members of the public, which becomes problematic if those members are selected for jury duty as they may not be able to fulfil their oath in setting aside the information they have already heard.

VII. ‘WORD OF MOUTH’: SOCIAL MEDIA’S IMPACT ON WRONGFUL CONVICTIONS

In addition to the issues surrounding news media’s coverage of crime is that of social media and the Internet. On social media, there is limited fact checking of information and people are generally unaware of the legal constraints on what information can be shared. It allows for competing accounts of guilt and innocence to be heard, rather than the singular news media narrative as discussed above. However, this can continue to have a prejudicial effect on the accused throughout their trial. Information that used to be difficult for layperson jurors to find has now become readily available through simple Internet searches.⁵⁷ It has become second nature

⁵³ *Ibid* at 68, 69, 85.

⁵⁴ *Ibid* at 85, 93-99.

⁵⁵ Garapon, *supra* note 3 at 241.

⁵⁶ Rozad, *supra* note 34 at 11.

⁵⁷ Nancy S Marder, “Jurors and Social Media: Is a Fair Trial Still Possible” (2014) 67 SMU

for many people to quickly research on their phones, yet this is problematic in the context of a juror in a criminal trial.

Jurors have an increasing ability to access additional information about the case they are currently hearing, whether through intentional searches or being “inadvertently exposed” while online or engaging with their social media.⁵⁸ An anonymous self-reporting study of jurors post-verdict in the United States asked whether jurors had looked for information on the internet during the trial. 12 percent of jurors had actively engaged in social media research for high-profile cases while 26 percent came across the material without explicitly searching for it.⁵⁹ Other jurors have been found to share information of their experience on social media during the trial. Reuters Legal monitored Twitter for three weeks in 2010 and found new tweets posted every three minutes from people identifying as prospective or sitting jurors.⁶⁰ This can provide the appearance to others that jurors are not taking their role seriously, they are open to influence or additional information, and—depending on the information in the tweet—that they have already made their decision.⁶¹ Reuters Legal also found at least 90 trials with juror social media misconduct causing retrials or overturned verdicts from 1999–2010.⁶² In the United Kingdom, there have been cases of jurors contacting the accused mid-trial, posting details from testimony on social media, and making a Facebook poll to decide the verdict.⁶³

These numbers are incredibly concerning, as it shows that a substantial number of jurors do not follow their oath to hear only the information presented in trial, and that even more are affected unintentionally. Canadian courts must focus attention on the issue of prejudicial pre- and mid-trial publicity and consider the impact that social media has on juror impartiality. This assessment must be conducted throughout the trial, in addition to at the jury selection stage.

L Rev 617 at 626.

⁵⁸ *Ibid* at 617.

⁵⁹ *Ibid* at 634.

⁶⁰ *Ibid* at 631.

⁶¹ *Ibid* at 629.

⁶² *Juries and Social Media*, *supra* note 6 at 10.

⁶³ *Ibid*.

VIII. COMPASSIONATE MEDIA: MEDIA'S POSITIVE IMPACT ON EXONERATIONS

Despite these constructions which contribute to wrongful convictions, news media can also be helpful when investigating claims of innocence post-conviction and shedding light on miscarriages of justice.⁶⁴ News media can push a case to be re-opened if they cast “doubt on the accuracy of the conviction” and social media has the ability to create public support for such cases.⁶⁵ The *Serial* podcast allowed for Adnan Syed to open another appeal. This podcast garnered substantial public attention for Syed's case which in turn brought more funding and legal assistance for Syed.

News media has shifted from a “pro[-]prosecution hostility” against those claiming innocence, towards a favourable reporting of innocence claims which are found to be worthy.⁶⁶ However, Rozad notes that exoneration media coverage is still largely unwilling to critique the criminal justice system altogether.⁶⁷ The exonerees were given sympathy through the effects of their wrongful convictions such as imprisonment and lost time, but the news media rarely turned to depictions of the system in crisis. In the UK, Nobles and Schiff noted that the public can lose confidence in the criminal justice system upon learning of wrongful convictions.⁶⁸

Although news media was still recognized as very important to wrongful conviction activism, social media's benefits of immediate connectivity provided additional supports to those working in the field. Social media provides activists with “a platform to protest the innocence of the wrongly convicted.”⁶⁹ It allows for quick mobilization of a supportive base for such protest movements. From a case study of those involved in the Amanda Knox and Raffaele Sollecito innocence campaign, a prominent goal was to have their views heard. None of the interviewees claimed the social media campaign had a direct impact on Knox and Sollecito's exonerations, but one did espouse a belief that international attention placed more pressure

⁶⁴ Rozad, *supra* note 34 at 7.

⁶⁵ Eza B Zakirova, “Media Framing of Wrongful Convictions” (2018) *CUNY Academic Works* at 24 [unpublished].

⁶⁶ Marvin Zalman, Matthew J Larson & Brad Smith, “Citizens' Attitudes Toward Wrongful Convictions” (2012) 37:1 *Crim Justice Rev* 51 at 52.

⁶⁷ Rozad, *supra* note 34, at 150-151.

⁶⁸ Nobles & Schiff, *supra* note 1, at 99.

⁶⁹ Lieve Gies, “Miscarriages of Justice in the Age of Social Media: The Amanda Knox and Raffaele Sollecito Innocence Campaign” (2017) 57 *Brit J Crim* 723 at 723.

on the Italian justice system to right this wrongful conviction.⁷⁰ Their attention was placed on combatting the prejudicial information found in much of the pre-trial news media and disputing social media theories of guilt in the hopes of alleviating the stigma the wrongfully convicted individuals faced.

IX. RECOMMENDATIONS

Now that this paper has shown that the public—and, in turn, juries—have been and continue to be affected by the coverage of crime in news and social media, a discussion of multiple recommendations will seek to redress this issue. There have been no formal recommendations in Canada regarding media and its effect on wrongful convictions. Although the CJC did provide a report regarding media coverage of trials, these recommendations were created to guide journalists regarding contempt and publication bans rather than to advise those in the justice system when prejudicial information has been publicized.⁷¹ An Australian judicial report regarding social media and jurors listed multiple recommendations for how to combat social media's troubling effects, and there are also multiple American papers that discuss approaches to media.⁷²

A. Rebutting the Presumption of Juror Impartiality

It is unrealistic to expect that jurors will not be affected by media's portrayals of accused people. Justice Dawson states in *Ahmed* that “[e]xtensive pre-trial publicity is problematic if jurors may be unable to set aside what they have heard outside the courtroom and reach a verdict based only on the evidence and the trial judge's instructions.”⁷³ Studies have shown that this is not only an issue for extensive publicity, but also for publicity which provides crime story information. A 2014 study compared individuals' reactions to articles with crime story information, which provides details of the crime but does not discuss the guilt or innocence of the accused, with reactions to articles containing incriminating information, compromising evidence that goes towards the accused's guilt.⁷⁴

⁷⁰ *Ibid* at 732.

⁷¹ CJC, “CJS and the Media”, *supra* note 39.

⁷² See *Juries and Social Media*, *supra* note 6; Marder, *supra* note 57.

⁷³ *R v Ahmad*, 2010 ONSC 256 at para 15.

⁷⁴ See Dumas, Lepastourel & Testé, *supra* note 38.

They found that the more incriminating information present in publicity, the more likely readers were to find the accused guilty.⁷⁵ This was a relatively unsurprising finding as incriminating information is largely what the ABA describes as prejudicial to an accused's right to a fair trial. However, the study also found that articles with more crime story information arose a heightened anger level in readers, which in turn promoted a stronger formation of guilty verdicts.⁷⁶ This indicates that even pre-trial publicity without inherently prejudicial information may still affect the jury's decision-making process.

It is necessary for the courts to address the public's potential inability to set aside previous ideas and hear a case impartially, as required when acting as a jury member. *Zundel* indicates that publication bans can be utilized to effectively curtail the release of prejudicial information that may affect the impartiality of the public or jurors.⁷⁷ It will be necessary to utilize publication bans in more circumstances where prejudicial information is available to be dispersed by the media. This may be utilized as an effort to curtail the issue of partial jurors before they hear or read such prejudicial information. Additionally, it may be necessary to seek an order for a change of venue if the pre-trial publicity has become so prejudicial that it would be unlikely to find appropriate impartial jurors at the originating venue.

In *Le*, a challenge for cause was approved for pre-trial publication despite the time since the prejudicial publications that provided information of the accused's criminal past.⁷⁸ Challenges for cause should be approved in more cases to combat the issue of juror partiality. The test provided post-*Zundel* of a "realistic potential for partiality" should not be a high threshold, but instead should be routinely allowed when there has been media coverage of a case relevant to the accused.⁷⁹ This would dramatically lower the presumption of juror impartiality regarding the effect of pre-trial publicity. Furthermore, it would assist in limiting wrongful convictions as accused individuals would be able to maintain their presumption of innocence that should be held in a juror's mind.

⁷⁵ *Ibid* at 661.

⁷⁶ *Ibid* at 667.

⁷⁷ *Zundel*, *supra* note 27 at para 111.

⁷⁸ *Le*, *supra* note 28 at para 19.

⁷⁹ *Ibid*.

B. Juror Education and Judicial Instructions

Continuous education must be provided to jurors throughout the trial process. The Australian judicial report has recommended specific training modules for jurors pre-trial that would teach fundamental legal principles such as the beyond a reasonable doubt standard and would also provide strong guidelines on news and social media.⁸⁰ A more comprehensive system that continues juror education throughout the trial process must be put in place. This may include frequent warnings to the jury not to access news or social media, implementation of an anonymous juror questionnaire post-verdict to assess what jury members based their decisions on, and additional challenges or reporting when a jury member has been compromised or prejudiced by news and social media.

The primary judicial instructions to the jury must specifically refer to social media and online research, with examples of simple things that jurors may not consider—such as searching for definitions online or looking up witnesses or the accused on social media.⁸¹ These instructions should be written in plain language and provide a comprehensive reason why research is prohibited and the use of social media is strongly warned against. The current Canadian Judicial Council guideline provides a preliminary jury instruction regarding social media:

Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, Apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom.⁸²

A further instruction provides that jurors should not research anything regarding the case. These instructions provide much of the requisite information, yet there are no examples or a mention of research on social media as this paper argues is necessary. These guidelines should be updated to provide reasons why the instructions against research and social media use are imperative.

Despite the need for stronger jury warnings and more fulsome juror training, the banning of electronic devices or immediate sequestering of a

⁸⁰ *Juries and Social Media*, *supra* note 6 at 24.

⁸¹ Marder, *supra* note 57 at 629.

⁸² Canadian Judicial Council, *Model Jury Instructions: Preliminary Instructions*, (Ottawa: CJC, 2012) at para 61.

jury are likely not successful strategies. Both of these options would cause jury duty to become additionally cumbersome and would result in fewer individuals that are available or willing to become jury members.

X. CONCLUSION

Wrongful convictions are harmful to society as they cause the public to lose faith in the justice system. However, more damaging is the effect to the innocent individual. Those who are wrongfully convicted may suffer lasting trauma associated with their incarceration, as well as a continued stigma post-exoneration due to their time in prison and lasting public assumptions of guilt.

The presumption of innocence is a *Charter* right that needs to be respected within society. One cause of wrongful convictions is prejudicial news and social media coverage before and during a trial. This prejudicial publicity can create bias within the public and cause partiality in jury members that lead to an accused's conviction. News media frequently sensationalizes or dramatizes crimes to entertain viewers. This publicity has been shown to negatively affect the right to a fair trial by jury, per subsection 11(d) of the *Charter*, yet jurors are presumed to remain impartial with little education or instruction.

The presumption of juror impartiality should be relaxed to allow for a fulsome analysis of potential juror's bias stemming from prejudicial pre-trial publicity. Challenges for cause should be extended to more accused individuals, to ensure that jurors have not already formed an opinion on the case from news and social media publications and discussions. In addition, jury instructions should be bolstered with examples and additional explanation regarding why social media use and research are prohibited. Jury education programs should be developed or adapted to account for these prejudices, and jury members should be informed that they can report discoveries of prejudicial information to the court to aid in an analysis of prejudice or partiality.