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# Criminal Law Edition (Robson Crim)

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# CALL FOR PAPERS: Closes April 2, 2024
# Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 46(4), 46(5), and 46(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we 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 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
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- 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
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We will be reviewing all submissions on a rolling basis with final submissions due by April 2, 2024. 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 possible, conform with the Canadian Guide to Uniform Legal Citation, 10th ed. (Toronto: Thomson Carswell, 2023) – 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 April 2, 2024 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or Brandon Trask 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, WestlawNext, and Heinonline. It is also 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.

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# Harm to Self-Identity: Reading Goffman to Reassess the Use of Surreptitious Recordings as Evidence

ROBERT DIAB *

## ABSTRACT

For decades in Canada, surreptitious recordings made by civilians have been admissible in criminal and family trials and labour and employment cases. Courts and tribunals have applied a similar test for admissibility that asks whether a recording is more probative than prejudicial. Recordings are readily seen to be invasive, but the concept of prejudice applied in most cases concerns the fairness and accuracy of what is captured in a recording and not its social or psychological impact on the person affected. This article draws on privacy theory and on Erving Goffman's *The Presentation of Self in Everyday Life* to argue that jurisprudence to date has failed to recognize the nature and degree of prejudice surreptitious recordings cause an affected person. A better understanding of this supports a revised test for admission. A recording that captures a private conversation should not be admitted, except in the last resort, which would include where the prosecution has no other means of proving a material fact in issue, where innocence is at stake, or in a civil case where it is necessary to rectify a significant power imbalance affecting credibility.

## I. INTRODUCTION

Surreptitious recording is an invasive but long-standing practice, made more common today by the ubiquity of small recording devices. Recognizing the severity of this form of intrusion, the *Criminal Code* makes it a crime to record a conversation to which one is not a party.[1] Police or police

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1 *Criminal Code*, RSC 1985, c C-46, s 184(1) [*Criminal Code*].

informants, and civilians who are party to a conversation, may make a recording without committing an offence under the *Code*,[2] but it may be tortious for civilians to do so under provincial privacy law.[3] Yet, despite a surreptitious recording being criminal, possibly tortious, or at the very least morally questionable, for decades, courts in criminal, family, and employment cases and tribunals in labour cases have routinely admitted them into evidence.[4]

People make secret recordings to capture an admission. Most of the jurisprudence dealing with civilian-made recordings involves audio recordings made surreptitiously by a party to the conversation. Yet, whatever the form or scenario in which recordings are made, courts and tribunals are concerned not with their legality but with their admissibility. The precise test for admission differs across the four areas of law noted, but they commonly involve a balancing of probative value and prejudice.[5] Where a recording has strong probative value, it stands a good chance of being admitted. By admitting, courts and tribunals implicitly condone the practice of secret recording, enabling, if not abetting, its further use.

While the use of a balancing test makes admission likely where probative value is high, recordings are admitted with some frequency due also to a limited understanding of their prejudicial effect. In most cases, courts and tribunals consider prejudice primarily in terms of the fairness or accuracy of the conversation a recording depicts—which is to say, the concern about prejudice relates primarily to the impact a recording may have on the fact-finding process rather than on the individual him or herself. The inquiry into prejudice, therefore, often duplicates or extends the assessment of probative value. Family and labour cases present a partial exception to this in commonly expressing a policy concern that admitting secret recordings will encourage the practice, making family separations more acrimonious or complicating power relations between management and labour.[6] Yet courts and tribunals, along with earlier scholarship on the topic, have tended to say little more about prejudice beyond noting the invasiveness of the practice or the notion that, as one author put it, "[t]here is something inherently devious in surreptitiously recording conversations…

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2 *Ibid*, s 184(2); police and police informants need a warrant in order for recordings they make to comply with the guarantee to be "secure against unreasonable search or seizure" in section 8 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 [*Charter*]; *R v Duarte*, [1990] 1 SCR 30, 65 DLR (4th) 240 [*Duarte*].

3 Legislation is discussed in Part II below.

4 The cases are surveyed below.

5 The test in each context is explored in Part II below.

6 Cases are cited in Part II below.

[a] malodorous hallmark of dishonesty."[7] Case law and commentary have tended not to inquire into the social or psychological impact that admitting a recording may have on a person.

This article draws on privacy theory and Erving Goffman's dramaturgical theory of self-presentation to advance the argument that courts and tribunals have failed to recognize the nature and degree of harm that surreptitious recordings may cause. A better understanding of this supports a more nuanced and restrictive test for admission.

Privacy theory illuminates the impact of surreptitious recording by shedding light on the connection between a person's ability to control information or observations about themselves and their ability to maintain personal and professional identity, relationships, and mental health. A number of canonical privacy theorists point to Goffman's *The Presentation of Self in Everyday Life*[8] to explain the nature of these connections. Goffman develops a theory of self-identity and personhood premised on the idea of "impression management" and of the self as the performance of a character before a specific audience. For Goffman, the self is the product of a performance of character, not the cause. Carrying out the performance depends on an effective separation between a "front" and "backstage" region, engaging in "defensive practices" that preserve the integrity of a performance, and maintaining "audience segregation" in performing different roles. As Goffman and other theorists have suggested, a disrupted performance, an image or impression of oneself meant to be presented to one audience involuntarily exposed to another, can lead to deep humiliation or embarrassment. More broadly, as other theorists note, involuntary exposure of information or observation about oneself can result in a profound degree of anxiety, a nervous breakdown, or in some cases, suicide.[9] While many, if not most, surreptitious recordings will likely cause harm falling short of this, the theory drawn upon here helps to explain why many recordings, when brought to light, will deeply undermine personal autonomy, security, and well-being.

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7 Stephen Thiele, "To Record or Not To Record: The Implications of Secret Recordings" (2019) 50 Adv Q 235 at 237 [Thiele]; other scholarship includes Martha Shaffer, "Surreptitiously Obtained Electronic Evidence in Seven Simple Steps" (2019) 38 CFLQ 259; John Burchill, "Tale of the Tape: Policing Surreptitious Recordings in the Workplace" (2017) 40:3 Man LJ 247; Carol M Bast, "What's Bugging You: Inconsistencies and Irrationalities of the Law of Eavesdropping" (1998) 47:4 DePaul L Rev 837; and Abraham Abramovsky, "Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics" (1982-1983) 57:1 Tul L Rev 1.

8 Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Doubleday Anchor Books, 1959) [*Presentation of Self*].

9 Examples are canvassed below.

Current common law tests for admission should be revised to reflect this deeper sense of harm. This article proposes that where a secret recording captures a private or intimate conversation, rather than balancing probative value and prejudice, courts and tribunals should bar admissibility unless the recording is probative and necessary. A recording should be admitted in criminal cases only where the prosecution demonstrates that it contains the only evidence on a material fact in issue or where the accused shows it is the only means of raising a reasonable doubt. In civil cases, a secret recording should also be admitted only where necessary, such as where one party's credibility is at issue in light of a significant power imbalance, and they have no other means to support this. This revised approach would not preclude the admission of a surreptitious recording of a private conversation that captured the accused or the defendant making a crucial, "smoking gun" admission—but it would preclude admission where the recording would simply serve to corroborate other evidence. A more nuanced test would help minimize or avoid the court or tribunal's complicity in the injustice engendered by the recording and its dissemination.

Part II of this paper provides a brief overview of the test for admitting secret recordings in criminal and family trials and labour and employment law to provide context for how prejudice is currently approached in case law. Part III draws on seminal contributions to privacy theory, along with facets of Goffman's *Presentation of Self* noted above, to better comprehend the harmful effects of surreptitious recording. Part IV applies these insights to craft a more restrictive test for admission. It draws on recent decisions in criminal and employment law to demonstrate how a more nuanced test would lead to different outcomes that would more effectively address the harm at issue.

## II. LEGAL CONTEXT

### A. Legal Status of Secret Recordings

In 1974, Parliament added a framework to the *Criminal Code* for lawful wiretapping.[10] A cornerstone of the framework is the offence of "intercepting" private communication with a device.[11] Among the exceptions carved out of the offence is one for persons who intercept a conversation with the consent of one party.[12] The Supreme Court in *R v Duarte* held that police could not circumvent the requirement to obtain a

10 *Criminal Code*, *supra* note 1, Part VI.
11 *Ibid*, s 184(1).
12 *Ibid*, s 184(2).

warrant by obtaining an informant's consent to record a conversation with a target.[13] While the *Charter* does not protect us from the risk of speaking to a "tattletale," Justice La Forest reasoned, the risk of our interlocutor "making a permanent electronic record" is a risk of a "different order of magnitude."[14] The Court's other cases dealing with surreptitious recordings—*Wong*,[15] *Araujo*,[16] *Fliss*,[17] and *Proulx*[18]—concern whether police were authorized to make a recording or what use might be made of the fruit of a recording police have made unlawfully.[19] None deal with the use of a recording by an independent civilian.

As noted earlier, while it may not be an offence to make a surreptitious recording to which one is a party, it may be a tort under provincial legislation or common law. Under the *Privacy Act* of three provinces, making a recording without consent is *prima facie* evidence of the tort of violating privacy and actionable *per se*.[20] British Columbia's *Privacy Act* contemplates the possibility that surreptitious recording can be an invasion of privacy.[21] Excluding the recording from a civil proceeding is a possible remedy.[22] In provinces without privacy tort legislation, depending on the facts, a case might be made that a surreptitious recording is actionable at common law under the recently recognized torts of "public disclosure of private facts" or "intrusion upon seclusion."[23] In these cases, however, the concern would be with the disclosure of private information rather than the creation of a recording itself.

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13 *Duarte*, *supra* note 2.

14 *Ibid* at 48.

15 *R v Wong*, [1990] 3 SCR 36, 60 CCC (3d) 460.

16 *R v Araujo*, 2000 SCC 65.

17 *R v Fliss*, 2002 SCC 16.

18 *Proulx v Quebec (Attorney General)*, 2001 SCC 66.

19 Surreptitious recordings also arise in other Supreme Court cases, but not ones in which the admissibility of a recording is central. These include *R v Hart*, 2014 SCC 52 [*Hart*] and *R v Mack*, 2014 SCC 58 (dealing with the admissibility of Mr. Big confessions); *R v Bradshaw*, 2017 SCC 35 (considering the use of a recording as corroborative evidence when assessing the admissibility of other hearsay evidence) and *R v Jarvis*, 2019 SCC 10 (considering whether making a surreptitious video recording constituted the *Criminal Code* offence of voyeurism).

20 *Privacy Act*, RSS 1978, c P-24 (Saskatchewan); *The Privacy Act*, CCSM, c P125 (Manitoba); *Privacy Act*, RSNL 1990, c P-22 (Newfoundland and Labrador).

21 *Privacy Act*, RSBC 1996, c 373, s 1(4), stating that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

22 Section 7 of *The Privacy Act* of Manitoba, *supra* note 20, makes this explicit; see also Section 7 of Saskatchewan's *Privacy Act*, *supra* note 20; s 6 of Newfoundland and Labrador's *Privacy Act*, *supra* note 20.

23 *ES v Shillington*, 2021 ABQB 739 and *Jones v Tsige*, 2012 ONCA 32.

In addition to possibly being an offence or a tort, making a surreptitious recording might also violate rules of professional conduct in certain contexts. Lawyers are prohibited from recording conversations with clients or others, potentially leading to disciplinary action.[24] Doctors as well are barred from making secret recordings of their meetings with patients, and doing so can result in discipline for unprofessional conduct.[25]

## B. Tests for Admission into Evidence

While criminal, tort, and regulatory law recognize the moral turpitude of surreptitious recording, courts and tribunals have approached the issue from a different angle. In most cases where a civilian-made secret recording is at issue, the question is not whether it was made lawfully but whether it should be admitted into evidence in the proceedings. The tests vary in different areas of law, but they commonly involve a balancing of probative value and prejudice. Yet prejudice here tends to be assessed, for the most part, in terms of the accuracy of a recording and thus merely extends or duplicates the inquiry into probative value.[26]

In criminal law, when the Crown seeks to rely on a civilian recording, courts commonly cite the Alberta Court of Appeal's decision in *R v Bulldog* for the test of whether to admit a surreptitious audio or video recording.[27] Surveying case law from across Canada, the court in this case holds that a recording may be admitted where it is a "substantially accurate and fair representation of what it purports to show," it is relevant, and its probative value outweighs its prejudicial effect.[28] A recording may be admitted where it is distorted or not completely accurate, so long as the deficiency is neither material nor substantial enough to mislead.[29] The standard for assessing accuracy and fairness is a balance of probabilities.[30] Courts considering admission in criminal law have tended to frame the prejudice a recording

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24 See e.g., Rule 7.2-3 of the Law Society of Ontario's Rules of Professional Conduct and *Law Society of Upper Canada v Birman*, 2005 ONLSHP 6 considering this rule in a case involving a surreptitious recording. For further discussion, see Thiele, *supra* note 7 at 239-40.

25 See, e.g., *College of Physicians and Surgeons of Ontario v Dombrowolski*, 2016 ONCPSD 2, cited in Thiele, *ibid* at 241.

26 Where surreptitious recordings are more probative than prejudicial, admitting them might entail the use of hearsay evidence. This use is permitted under the categorical exception for party admissions: *R v Schneider*, 2022 SCC 34 at para 52 [*Schneider*]; *R v Couture*, 2007 SCC 28 at para 75; *R v SGT*, 2010 SCC 20 at para 20 [*SGT*].

27 *R v Bulldog*, 2015 ABCA 251 at paras 31-33 [*Bulldog*].

28 *Ibid* at para 33; the court at para 31 cites *R v Crawford*, 2013 BCSC 2402 at para 48 for the point about accuracy.

29 *Bulldog*, *supra* note 27 at para 31.

30 *Ibid* at para 38.

causes the accused in terms of its potential to be misleading or inaccurate.[31] Judges simply assume that admission would further violate the accused's privacy or briefly acknowledge this and move on.[32]

Family law cases also weigh probative value and prejudice, but the balancing is typically framed in a way that marginalizes consideration of the prejudice caused to the affected party. An often-cited case is *Mathews v Mathews*,[33] in which the court recognized a "limited discretion to exclude relevant evidence in this context" depending on a balancing of "the probative value of the evidence as against its prejudicial effect."[34] In that case, assessing the probative value of the recording involved consideration of whether it may have been "manipulate[d]... so as to cast the other party in an artificial light."[35] Prejudice may arise in relation to the party opposing admission, the trial process, or the reputation of the administration of justice.[36] By prejudice to the opposing party, Justice Barrow meant "[t]o the extent evidence is of uncertain provenance, is incomplete or capable of manipulation, it will operate prejudicially."[37] Courts across Canada in family cases have adopted a similar test,[38] conceiving prejudice to the affected person in terms of fair or accurate representation[39] though in some cases, concerns are centered on how relations between a parent and child may be affected.[40] More commonly, the concern with admitting a recording is grounded in policy, relying on *dicta* in *Hameed v Hameed*.[41] In that case, Justice Sheer suggested that secret recordings by family law litigants "should be strongly discouraged" on the basis that:

> There is already enough conflict and mistrust in family law cases, without the parties' worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the courts work with the family to rebuild

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31 Discussed further in Part IV below are *R v GJ*, 2012 ONSC 5413 [*GJ*]; *R v Iyer*, 2015 ABQB 577 [*Iyer*] and *R v Parsons*, 2017 CanLII 82901 (NL SC) [*Parsons*]; and *R v Vey*, 2019 SKQB 135 [*Vey*].

32 This is true of *GJ*, *Iyer*, and *Parsons*, *ibid*; in ways explored further below, *Vey* (dealing with a couple who were surreptitiously recorded by a third person) contains more analysis of the impact that creating a recording has had and admitting it would have on the two accused's privacy.

33 *Mathews v Mathews*, 2007 BCSC 1825.

34 *Ibid* at para 43.

35 *Ibid* at para 44.

36 *Ibid* at para 53.

37 *Ibid*.

38 See, e.g., *Sordi v Sordi*, 2011 ONCA 665; *Ostrovski v Ostrovski*, 2021 MBQB 160, *FS v TWS*, 2019 YKSC 25; and *AJU v GSU*, 2015 ABQB 6.

39 See, e.g., *LN v DEN*, 2006 CanLII 42602 (ON SC), *Tillger v Tillger*, 2019 ONSC 1463.

40 *JCP v JB*, 2013 BCPC 297.

41 *Hameed v Hameed*, 2006 ONCJ 274.

> trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive to this process.[42]

The test in this case was to "weigh these policy considerations against [the recording's] probative value."[43]

In the labour context, arbitrators have also been wary of admitting secret recordings on the basis of broader policy concerns about their effects on labour relations. "In British Columbia, the prevailing opinion," wrote arbitrator Dorsey, "is that the evidentiary probative value of surreptitious recordings of workplace conversations is outweighed by the possible deleterious and chilling effect admissibility of such recordings will have on workplace cooperation."[44] Arbitrators elsewhere in Canada have also excluded for policy reasons.[45] In some cases, however, arbitrators have admitted secret recordings on the basis that they were made to "deal with a relationship power imbalance in order to objectively establish their credibility in the face of being accused of being a perpetrator or liar, rather than a victim."[46] But arbitrators in other cases have not been so restrictive, admitting recordings primarily based on their relevance and probative value.[47]

Finally, in employment cases, courts perceive surreptitious recording as a threat to the trust relationship central to the contract of employment. In actions for wrongful dismissal, courts refer to employees making secret

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42 *Ibid* at para 11.

43 *Ibid* at para 13. Other family law cases refusing admission to discourage others from making such recordings include *St Croix v St Croix*, 2017 ABQB 490 and *Shaw v Shaw*, 2008 ONCJ 130.

44 *British Columbia Government and Service Employees' Union v British Columbia Public Service Agency*, 2016 CanLII 77600 (BC LA) at para 13 [*BC Government*].

45 See, e.g., *United Steelworkers, Local 9074 v HCN-Revera Lessee (Waverley/rosewood)LP*, 2016 CanLII 36270 (MB LB) (noting at para 10 that admission would have "a chilling effect on the conduct of labour relations and, in addition, would [...] sanction an unwarranted invasion of the privacy rights of individuals in the workplace"); *Jazz Aviation LP v Canadian Airline Dispatchers' Association*, 2014 CanLII 39814 (CA LA) (refusing admission, at 15, on the basis that it would "seriously undermine the relationship between these parties" and condone it among "the labour relations community at large"); and *Greater Niagara General Hospital and OPSEU, Loc 215, Re*, 1989 CanLII 9272 (ON LA) [*Greater Niagara*] [finding at 301-2 that admission would "destroy or deteriorate the longer-term relationship between the parties... [or] cause the parties of other relationships to frisk each other before a meeting would commence."].

46 *BC Government*, *supra* note 44 at para 14; see also the discussion in *Greater Niagara*, *ibid* at 300-01.

47 See, e.g., *Direct Energy Marketing Limited v Unifor, Local 975*, 2013 CanLII 89953 (ON LA); *General Electric Canada and CEP Local 544*, [2007] 89 CLAS 28; *Greater Toronto Airports Authority v PSAC* (2007), 158 LAC (4th) 97; *Ready Bake Foods Inc v UFCW, Local 175*, [2009] OLAA No 208.

recordings of meetings or other communication as a breach of loyalty or confidentiality, possibly amounting to just cause.[48] But courts have admitted recordings where their probative value is compelling in light of a power imbalance or the difficulty of proving something by other means.[49] However, as in the labour relations context, the focus tends not to be on the impact of a recording on an individual personally.

The balancing test applied in these cases forms part of a broader rule at common law for the admission of evidence. Before exploring the question of prejudice further, an important consideration is whether a more expansive concept of prejudice would be consistent with this rule. The rule holds that evidence is to be admitted if it is relevant, not subject to a rule of exclusion, and the court finds it more probative than prejudicial.[50] Supreme Court jurisprudence on the scope of what constitutes prejudice points to a concern not to avoid evidence that is adversarial to one party but, more precisely, evidence that is "unfair" to them—or unfair in a broader sense. The Court has held that evidence can be unfair where it is likely to give rise to "moral" or "reasoning" prejudice; for example, by distracting a jury with evidence of a party's involvement in other crimes, especially violent crimes, and giving rise to general propensity reasoning.[51] But the Court has also held that evidence can be excluded as prejudicial where there was "a significant unfairness associated with obtaining it."[52]

In different contexts, this concern with unfairness in a broader sense is addressed in different ways. In Mr. Big cases, the Court has imposed an additional "abuse of process" test alongside the balancing test noted here to address concerns of police conduct arising in that context.[53] The "abuse" test serves an analogous role to the component of the confessions rule that allows exclusion on the basis of police trickery that would "shock the community."[54] In the context of sexual offences, the Court has held that to

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48 See, e.g., *Hart v Parrish & Heimbecker Ltd*, 2017 MBQB 68 at para 59; *Schaer v Yukon (Government of)*, 2018 YKSC 46 at para 61; *Sankreacha v Cameron J and Beach Sales Ltd*, 2018 ONSC 7216 at para 155.

49 See, e.g., *Rooney v GSL Chevrolet Cadillac Ltd*, 2022 ABKB 813 (employee recording to prove he was being constructively dismissed) [*Rooney v GSL Chevrolet*]; and *Hanni v Western Road Rail Systems (1991) Inc*, 2002 BCSC 402 (employee recording to prove she was dismissed and did not quit—though the court does not discuss reasons for or apply a test for admission) [*Hanni v Western Road Rail*].

50 *Schneider*, *supra* note 26 at paras 36,59; *R v Khelawon*, 2006 SCC 57 at paras 2-3.

51 *Hart*, *supra* note 19 at para 106; *R v Handy*, 2002 SCC 56 at paras 137-47.

52 *Schneider*, *supra* note 26 at para 59.

53 *R v Hart*, supra note 19 at paras 84-89.

54 *R v Oickle*, 2000 SCC 38 at paras 65-67, Justice Iacobucci , for the majority, noting at para 67: "There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness *per se*, is so appalling as to shock the

be fair to complainants, the right of cross-examination is limited by barring counsel from "resorting to harassment, misrepresentation [and] repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value."[55] Parliament has codified a requirement on the part of courts to weigh the effect of admission of sexual history evidence on a complainant's "dignity, privacy and equality interests"[56] and also to advance "important societal objectives, including encouraging the reporting of sexual assault offences."[57] These examples point to a more expansive concept of prejudice than one relating to faulty inferences or reasoning processes alone.

In turning next to privacy theory and the work of Erwin Goffman, I argue that the balancing tests employed in the four contexts surveyed above fail to recognize the nature and extent of the impact—the unfairness—that admitting surreptitious recording may entail. This will serve as a basis for a test more consistent with the Supreme Court's more expansive concept of prejudice.

## III. A THEORETICAL INQUIRY INTO PREJUDICE

When a person secretly records a private conversation, they deprive one or more of its participants of a fundamental assumption that shapes their conduct. Believing they will be speaking in private inclines the person to make choices about who to speak to and what to say, but also, more generally, how they present themselves in the course of the exchange. When a recording of a private conversation is played to another audience, it reveals utterances a person did not choose to make in that other context, but also—more crucially—it presents the person in a guise they did not choose to assume in any other place or exposes them conducting themselves in a way they would not have chosen to do otherwise. I draw on privacy theory in this part and on Goffman's more specific theory of self-presentation to help illuminate how and why the violation that a recording brings about may have a more profound social or psychological impact than mere embarrassment or a feeling of betrayal—rendering the balancing tests surveyed earlier inappropriate to the harm at issue.

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community. I therefore believe that the test enunciated by Justice Lamer in *Rothman*, and adopted by the Court in *Collins*, is still an important part of the confessions rule." (Citing *Rothman v The Queen*, [1981] 1 SCR 640, 121 DLR (3d) 578 and *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508.)

55 *R v Lyttle*, 2004 SCC 5 at para 44.

56 *R v RV*, 2019 SCC 41 at para 40.

57 *Ibid*, discussing the factors in s 276(3) of the *Criminal Code*, *supra* note 1.

## A. Privacy Theory, Control, and Personhood

Most of the salient contributions to privacy theory date to the 1960s and 70s, a period in which tools for surreptitious audio recording were first becoming pervasive in Western culture. The prospect of secret surveillance and recording—primarily by the state—provoked considerable reflection and debate on the nature of privacy in general and law reform to better protect it in an evolving technological landscape.[58] A key theme in many theoretical works on privacy of the period is the link between privacy, control, and self or personhood. Ideas about the fundamental nature of privacy varied, yet scholars formed a consensus on the point that privacy involves control over access to information about oneself or observations of one's behaviors—and that without this control, a person's relationships, identity, and sense of self would be significantly harmed or impeded.

For Sidney Jourard, privacy is closely linked to the "act of concealment."[59] It is the "outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action."[60] The desire for privacy is, for Jourard, essentially a "desire to control others' perceptions and beliefs vis-à-vis the self-concealing person."[61] Similarly, Charles Fried asserts that privacy is "related to the concept of secrecy, to limiting knowledge of others about oneself."[62] But rather than involving "an absence of information about us in the minds of others," privacy involves "the control we have over information about ourselves."[63] For James Rachels, there is a "close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people."[64]

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58 This included debate and passage in the US Congress of a general framework for obtaining a wiretap warrant in what would become Title III to the *Omnibus Crime Control and Safe Streets Act of 1968*, Pub L 90–351. In 1967, the US Supreme Court in *Katz v United States*, 389 US 347 extended the guarantee against unreasonable search and seizure in the Fourth Amendment of the US Constitution from property to persons, or more precisely, matters over which a person has a "reasonable expectation of privacy." (See also Peter Winn, "*Katz* and the Origins of the Reasonable Expectation of Privacy Test" (2016) 40 McGeorge L Rev 1 at 2-3 and 9; and Brian Hockman, *The Listeners: A History of Wiretapping in the United States* (Cambridge: Harvard University Press, 2022) chapter 7.) In 1974, Canada would include what is now Part VI of the *Criminal Code*, *supra* note 1, setting out the offence of surreptitious recording and a framework for "authorized intercepts" or wiretap warrants.

59 Sidney Jourard, "Some Psychological Aspects of Privacy" (1966) 31:2 Law & Contemp Probs 307 at 307 [Jourard].

60 *Ibid.*

61 *Ibid.*

62 Charles Fried, "Privacy" (1968) 77:3 Yale LJ 475 at 482 [Fried].

63 *Ibid* [emphasis added].

64 James Rachels, "Why Privacy is Important" (1975) 4:4 Philos & Public Aff 323 at 326

Complementing these approaches, Ruth Gavison asserts that "[o]ur interest in privacy... is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention."[65]

Privacy theorists also draw a close link between privacy and personhood. For Stanley Benn, privacy engages a "more general principle of respect for persons."[66] This relates to control through the concept of choice. As Benn writes, "[t]o conceive someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors."[67] "Covert observation" or "spying" is, in his view, "objectionable because it deliberately deceives a person about his world, thwarting, for reasons that *cannot* be his reasons, his attempts to make a rational choice."[68] Developing Benn's theory, Jeffrey Reiman conceives privacy as "an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own."[69] "To be a person," he argues, depends on an individual's ability to "recognize that he has an exclusive moral right to shape his destiny."[70] Privacy is "necessary to the creation of selves out of human beings, since a self is at least in part a human being who regards his existence—his thoughts, his body, his actions—as his own."[71] When others respect our privacy, they condition and confirm a sense of separateness, agency, and identity we associate with personhood.

Theorists have offered similar views of the consequences of losing control over perceptions of oneself—for identity, relationships, and mental health. As noted, for Rachels, different relationships are "defined" by "different patterns of behavior," and changes in perception of those patterns can disrupt the relationships.[72] On discovering that a person one assumes to be a friend has behaved more informally with others, made more intimate disclosures to others, or seen them socially more often, one might reassess

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[Rachels].

65 Ruth Gavison, "Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421 at 423.

66 Stanley Benn, "Privacy, Freedom, and Respect for Persons" in Ferdinand David Schoeman, ed, *Philosophical Dimensions of Privacy: An Anthology*, (London: Cambridge University Press, 1984) 223 at 228 [Benn].

67 *Ibid* at 229 [emphasis added].

68 *Ibid* at 230.

69 Jeffrey Reiman, "Privacy, Intimacy, and Personhood" (1976) 6:1 Philos & Public Aff 26 at 39 [Reiman].

70 *Ibid.*

71 *Ibid* [emphasis added].

72 Rachels, *supra* note 64 at 326.

the nature of the friendship.[73] This extends to professional relationships and identity, in the sense that one's relations with another in the capacity of employer and employee, doctor and patient, etc., "involves a conception of how it is appropriate for [the persons] to behave with each other" and more broadly, "a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have."[74] To maintain these conceptions—and the relationships themselves—we need to "separate our associations."[75] This allows us to "behave with certain people in the way that is appropriate to the sort of relationship we have with them, without at the same time, violating our sense of how it is appropriate to behave with, and in the presence of, others with whom we have a different kind of relationship."[76] And to be able to control our relationships, we must have "control over who has access to us."[77] Similarly, Benn asserts that "[p]ersonal relations... are, in their nature, private. They could not exist if it were not possible to create excluding conditions."[78]

At a further extreme, depriving a person of control over access to information about themselves or their conduct can profoundly damage one's sense of self. Reiman and other theorists have turned to Erwin Goffman's work to make this point, including the latter's essay "On the Characteristics of Total Institutions."[79] In that study, Goffman examined the effects on self-identity of the complete loss of privacy to which authorities force a person to submit in mental hospitals, prisons, and concentration camps—including a loss of control over information about past conduct, social associations, and ethnicity. Persons are also stripped here of physical privacy, forced to submit to a strict regime of movement in space and time, and at no point left completely alone, resulting in what Goffman terms the "mortification of the self."[80]

In Fried's terms, to be deprived of control over "what we do but [also] who we are" constitutes "the ultimate assault on liberty, personality, and self-respect."[81] Alan Westin, writing in a similar context, asserts that where

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73 *Ibid* at 328.
74 *Ibid.*
75 *Ibid* at 330.
76 *Ibid.*
77 *Ibid* at 331.
78 Benn, *supra* note 66 at 236.
79 Reiman, *supra* note 69 at 40, citing Erving Goffman, "On the Characteristics of Total Institutions" contained in *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Anchor Books, 1961) [Goffman, "Characteristics"]; see also Alan Westin, *Privacy and Freedom* (New York: IG Publishing, 2002), citing Goffman's essay in chapter 2, fn 32 [Westin].
80 Goffman, "Characteristics," *ibid* at 21.
81 Fried, *supra* note 62 at 485.

a person loses control over information about him or herself, they can be "seared by the hot light of selective, forced exposure," resulting in "numerous instances of suicides and nervous breakdowns."[82] Ample evidence of this can be found in the common recent phenomenon of suicides that follow in the wake of online exposures of sexual or other compromising images.[83]

## B. Goffman's Presentation of Self

Privacy theorists also pointed to Goffman's *The Presentation of Self in Everyday Life* (1959) to illuminate the link between privacy, control, and self or personhood.[84] Goffman's dramaturgical theory conceives personal identity to be the product of conduct and context rather than an expression of a stable or persisting quality of persons. For Goffman, the self is the product of a performance of character, not the cause. We perform a character—a self—effectively by conducting ourselves differently in "front" and "back" regions, engaging in "defensive practices" to sustain the integrity of a performance, and maintaining what he calls audience segregation. A failure or lapse on any of these fronts results in a failed performance, an appearance out of character, or the inability to present oneself in the manner of one's choosing, which may cause significant anxiety and distress. In ways to be seen, surreptitious recording subverts all three fundamental dimensions of a performance of self, harming a person's sense of identity and autonomy.

Goffman's focus in this work is the study of interpersonal dynamics in a workplace or other "social establishment" where there are "fixed barriers to perception" as a group of people engage in a routine, specific undertaking.[85] A concept at the core of his analysis is "impression management." Individuals present an identity to others by sustaining a performance "in character," which gives rise to "some kind of image, usually creditable," one seeks "to induce others to hold in regard to him."[86] A "self

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82 Westin, *supra* note 79.

83 See Andrea Slane, "Sexting and the Law in Canada" (2013) 22:3 CJHS 117, noting 117 cases that include the suicides of Amanda Todd and Jessica Logan following the exposure of sexual images; see also the cases noted in Jane Bailey & Mouna Hanna, "The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision" (2011) 23 CJWL 405 at 407.

84 *Presentation of Self*, *supra* note 8. Privacy theorists citing *The Presentation of Self* include Westin, *supra* note 79, chapter 2, fn 29 and 30; Jourard, *supra* note 59 at 307; and numerous contributors to the Schoeman anthology *Philosophical Dimensions of Privacy*, *supra* note 66.

85 *Presentation of Self*, *supra*, note 8 at 238.

86 *Ibid* at 252.

is imputed to him" on the basis of this image, but as Goffman asserts, "this self itself does not derive from its possessor, but from the whole scene of his action."[87] More specifically,

> [a] correctly staged and performed scene leads the audience to impute a self to a performed character, but this imputation — this self — is a product of a seeing that comes off, and is not a cause of it. The self, then, as a performed character, is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.[88]

Individuals carry out a performance of self alone or work in conscious but not overt coordination with a "team of performers" to "present to an audience a given definition of [a] situation."[89]

Goffman posits a distinction between spaces in which performances of self unfold. In a "back region," an individual or team prepares for a performance to be presented to an audience in a "front region"—for example, a kitchen separate from a dining room in a restaurant.[90] "Access to these regions," Goffman writes, "is controlled in order to prevent the audience from seeing backstage, and to prevent outsiders from coming into a performance that is not addressed to them."[91] Backstage, a performer can "reliably expect that no member of the audience will intrude."[92] "Vital secrets" are visible here, and "performers behave out of character."[93] A "familiarity prevails," "solidarity is likely to develop," and "secrets that could give the show away are shared and kept."[94] Frontstage, a person aims to "foster the impression that the routine they are presently performing is their only routine or at least their most essential one."[95] The audience, in turn, often assumes the character performed "is all there is to the individual."[96] This both assumes and enables "audience segregation," or a commitment a person makes to "ensur[ing] that those before whom he plays one of his parts will not be the same individuals before whom he plays a different part in another setting."[97]

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87 *Ibid.*
88 *Ibid* at 252-53 [emphasis added].
89 *Ibid* at 9, 238
90 *Ibid* at 238.
91 *Ibid.*
92 *Ibid* at 113.
93 *Ibid.*
94 *Ibid* at 238.
95 *Ibid* at 48.
96 *Ibid.*
97 *Ibid* at 49.

In the course of a performance, an individual or team might be confronted with events that "contradict, discredit, or otherwise throw doubt upon" the role or image they seek to maintain. This can lead to shame, embarrassment, hostility, or a "kind of anomy that is generated when the minute social system of face-to-face interaction breaks down."[98] Persons will engage in "defensive practices" to avoid or "save the definition of the situation" or the impression they were seeking to project.[99] Among these practices are "dramaturgical loyalty," or not "betray[ing] the secrets of the team,"[100] "controlling access to back regions and front regions,"[101] and relying on the "tact" of others to "stay away from regions into which they have not been invited."[102]

As noted earlier, "disruptive events" such as the interruption of a performance, a breach into the backstage region, or a failure to keep audiences segregated can leave a person "ill at ease," "ashamed," or "deeply humiliated."[103] But more than shame or embarrassment, the disruption engenders a profound sense of disorientation. "Assumptions upon which the responses of the participants have been predicated become untenable," Goffman writes, "and the participants find themselves lodged in an interaction for which the situation has been wrongly defined and is now no longer defined."[104] A person in these moments loses control over a performance of self but also has no clear means to repair or "save the situation." What is at stake in these moments, Goffman suggests, is the recognition that we have relinquished a moral claim on others. When a person maintains an image of self or "makes an implicit or explicit claim to be a person of a particular kind," they exert a "moral demand" on others, "obliging them to value and treat him in the manner that persons of his kind have a right to expect."[105] When a person fails to maintain an appearance, he "foregoes all claims to be things he does not appear to be."[106] The anxiety and distress experienced in disruptive moments reflect a fear of this deeper loss.

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98 *Ibid* at 12.

99 *Ibid* at 13-14.

100 *Ibid* at 212.

101 *Ibid* at 229.

102 *Ibid*. As Goffman notes, "when outsiders find they are about to enter such a region, they often give those already present some warning, in the form of a message, or a knock, or a cough, so that the intrusion can be put off if necessary or the setting hurriedly put an order in proper expressions fixed on the faces of those present."

103 *Ibid* at 12,244.

104 *Ibid* at 12.

105 *Ibid* at 13.

106 *Ibid.*

Goffman wrote *The Presentation of Self* at a time when audio recording technology had yet to become pervasive and surreptitious recording a common cultural practice. Had this been the case, it would have furnished Goffman with a signal instance of a disruptive event—one that violates all the necessary conditions for the effective performance of self. A conversation secretly captured, either by a party to the conversation or a third party, which is then played to uninvited others effects a transgression of front and back regions. It suspends audience segregation. It also makes defensive practices all but impossible to "save the situation" or permit an affected person to maintain an image of self or identity before contaminated audiences. A recording might, in this way, foreclose or preclude the possibility of maintaining a certain impression of self, which in some cases may render it difficult, if not impossible, for the person to sustain a relationship, a professional identity, or an institutional position.

A surreptitious recording forecloses possibilities and deprives a person of choice or control over how they present themselves because it links them with a certain impression of self in contexts beyond their control. The most notorious historical example of this may be the surreptitious recording that surfaced in the British press in 1993 of a phone conversation then-Prince Charles had in 1989 with Camilla Parker Bowles in which the two engaged in a form of phone sex.[107] At one point, Charles suggested that if he returned in another life, "I'll just live inside your trousers or something."[108] She suggested he might return "as a pair of knickers." He added, "God forbid, a Tampax."[109] The disclosure of the conversation violated his privacy in the sense of revealing information about his intimate desires, but it also permanently associated Charles with this peculiar, salacious image. Regardless of how formal or stately an impression of self the King may attempt to present, he will forever be associated on some level with a far more intimate and compromising impression. "Camillagate" illustrates *in extremis* the violence to personal identity, autonomy, and self or personhood that surreptitious recording is capable of affecting.

Secret recordings made by a person not party to a conversation are more invasive than those made by a person who is a party, which are more common in the litigation considered in this paper. One might question whether secret audio recordings made in the latter case—by a party to a conversation—result in significant harm or deprive an affected person of choice or control over the presentation of self. The person to whom one

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107 Sally Bedell Smith, *Prince Charles: The Passions and Paradoxes of an Improbable Life* (New York: Random House, 2017) at 244 describes the exchange in these terms.

108 *Ibid* at 245, quoting the published exchange.

109 *Ibid*.

makes a disclosure can always turn around and share this with other audiences. By choosing to present oneself in a certain way to certain people, are we not risking the disclosure of that self-impression to everyone our interlocutor might speak to? The purpose of drawing on Goffman's theory was to support the argument that there is a qualitative difference between a person revealing things another person has said to them in private and a person playing a recording of them doing so. In one case, we glean information about a person's opinions, beliefs, or knowledge. In the other case, we gain direct access to a performance of self—one that indelibly marks our impression of a person's character and identity.

Further examples involving recordings made by persons present or parties to a conversation do not prove this point. But they illustrate how the disclosure of a recording itself can be more damaging to a person's self-identity than a mere disclosure of statements a person has made. In 2014, a recording surfaced of Donald Sterling, then-owner of the NBA's Los Angeles Clippers, in which he could be heard making disparaging comments about black people. The recording stirred public outrage that could not be subdued by attempts to contextualize or deny the statements, resulting in his being banned from the NBA for life.[110] In 2010, actor Mel Gibson's ex-girlfriend revealed recordings in which he had made racist and sexist comments to her in the course of a hyperbolic rant with which he has become notoriously associated. In 1972, a recording intended to remain private became public in which President Nixon discussed the Watergate break-in. The now infamous recordings made clear that he had ordered the cover-up of the scandal, but they also captured him speaking in dark, conspiratorial tones that would significantly contribute to a shift in public opinion and a loss of party support that would result in his resignation.[111] In each of these cases, an unintended audience gains more than new information about a person; they gain a direct glimpse at a presentation of self that is inconsistent with earlier impressions, beyond the control of the affected party, and one with which they become permanently associated.

The point is not that people with racist opinions or criminal ambitions should have their "true" selves sheltered from public exposure. The point is that a secret recording deprives a person of choice and control over the presentation of self, and the loss can significantly impair one's identity,

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110 Jon Swaine, "NBA bans LA Clippers owner Donald Sterling for life over racist comments" (29 April 2014), online: *The Guardian* <www.theguardian.com/world/2014/apr/29/nba-la-clippers-donald-sterling-lifetime-ban-racist-comments [perma.cc/ZQ7H-L3BQ].

111 Rick Perlstein, "Watergate Scandal" (last modified16 June 2023) online: *Britannica* < www.britannica.com/event/Watergate-Scandal> [perma.cc/E9LZ-UQFK].

relationships, and career. The examples here involving celebrities are sensational and extreme in their consequences, given the scale of the reputations involved. One might suggest as a counter-argument that the secret recordings in everyday litigation may result in some degree of embarrassment, but the harm could never be on the same scale since the reputations and the stakes are far more limited.

In many cases, this may be true. A recording that exposes a non-celebrity's private performance of self to an unintended audience may not lead to significant harm. It may not foreclose—in any meaningful way—possibilities and choices for self-presentation elsewhere. The point, however, is that this could happen and is more likely to happen when a person presents him or herself in an intimate setting. The greater likelihood of harm resulting from the fact that a private conversation would be exposed by its use in court supports a rule that such recordings be presumptively inadmissible, with limited exceptions.

## IV. A More Nuanced Test for Admission

### A. Elements of the Test

As noted in Part II, courts and tribunals acknowledge the moral turpitude of surreptitious recording, but they do not generally consider this to be sufficiently serious to warrant a blanket exclusion on admission. There is a good reason for not doing so. Not all surreptitious recordings capture private conversations, and when they do, not all private conversations will lead to harm when a recording of them is exposed. A test that considers recordings case by case is appropriate.

The principal concern highlighted here is the capture of an intimate or private conversation that takes place in a space analogous to Goffman's backstage region or where a person presents an impression of self they would not have chosen to present to any other audience. This may or may not be captured in a recording made in a workplace; it may or may not involve the intimacy of only two people. The question is whether a person had a reasonable expectation of privacy in the situation—or whether they would have had no reason to assume they were being recorded.[112] The test and case law dealing with when a person has a reasonable expectation of privacy for

[112] A relevant consideration here—beyond the scope of this paper—is what effect now ubiquitous listening devices in intimate settings, such as Amazon's Alexa, Google's Nest Hub, or Apple's HomePod, would have on such expectations. One would assume these might diminish but not preclude an expectation that entire conversations will not be recorded or disseminated.

the purposes of a search under section 8 of the *Charter* is extensive.[113] When deciding on the admission of a surreptitious recording, courts, and tribunals need not engage in an inquiry of that depth. A simpler question about the nature of the communication might be whether making a recording vitiates a person's choice about who to speak to, what to say, or how to conduct themselves. Had they known they were being recorded, would the person still have chosen to act in the way they did?

The discussion in Part I was meant to show that when a secret recording vitiates this choice, it can profoundly affect a person's autonomy, identity, relationships, and well-being. Current tests for admission of recordings in criminal, family, employment, and labour law fail to address this concern effectively. As noted in Part II, the test in each area involves a balancing of prejudice and probative value, but the inquiry into prejudice is mostly limited to assessing the fairness or accuracy of the conversation depicted or general policy concerns. Recordings tend to be admitted where their probative value is strong.

A revised test would set aside balancing and place equal weight on prejudice, probative value, and necessity. It would ask, first, whether a recording contains a fair and reasonably accurate depiction of the conversation it captures and whether making and disseminating the recording vitiates a person's choice over who to speak to and how to conduct themselves in a given context. Where the recording is either inaccurate or violates a person's expectation of privacy in the sense noted, it should be inadmissible except in limited circumstances. Criminal courts confronted with a recording the Crown seeks to tender should follow the approach that Parliament took in Part VI of the *Criminal Code* for a standard wiretap warrant—one where no party to a conversation has consented to being recorded. This requires police to demonstrate "investigative necessity," or show that other investigative procedures have failed, are unlikely to succeed, or are impracticable.[114] The Crown seeking to tender a recording the complainant made about her conversation with the accused should be required to demonstrate an analogous form of necessity: i.e., that no other evidence on a material fact in issue is available. Where the recording would simply corroborate the complainant's testimony, it should not be

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113 An overview of the Supreme Court of Canada's jurisprudence on point can be found in Robert Diab & Chris DL Hunt, *Search and Seizure* (Toronto: Irwin Law, 2023), Chapter 4 [Diab & Hunt].

114 *Criminal Code*, *supra* note 1, s 186(1). The Supreme Court in *R v Araujo*, 2000 SCC 65 at paras 29, 39, cautioned that the test with respect to "other investigative procedures" is not which measures are "most efficacious," as some lower courts had held, but which are left when there is "practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry."

admitted.[115] Similarly, the accused should be permitted to adduce a secret recording only where it is the only means by which he or she may establish innocence—a rule that would function in an analogous manner to which criminal courts approach the waiver of informer or solicitor-client privilege.[116] In a civil case, a claimant's recording of a private conversation should be admitted only where the claimant suffers a significant power imbalance casting their credibility into question—such as a case involving an employee alleged to have committed acts against her employer amounting to wrongful dismissal.[117]

I canvas examples below but make two points here. This revised test is premised upon a different conception of prejudice operative in the current common law test. There, the court is concerned primarily with "the prejudicial effect of the evidence on the trier of fact, which is its propensity to distort or undermine the fact-finding process."[118] Here, the court is concerned with both prejudice to the fact-finding process and a broader unfairness in the acquisition or use of the evidence. The revised test would bear a similarity in this way to the Supreme Court of Canada's approach to

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115 Under s 184.2 of the *Criminal Code*, police may obtain a warrant to record a conversation where they have one party's consent without having to establish investigative necessity. In this case, a secret recording could be admitted in a criminal case on the basis of police having only demonstrated reasonable and probable grounds to believe the conversation would yield evidence of an offence. This would entail invasive recordings being admitted where the evidence may not be necessary to the prosecution (in the sense of being the only evidence of a matter in issue). The argument in this paper supports a case for amending the *Criminal Code* to include an investigative necessity component as a requirement for obtaining a consent wiretap warrant in s 184.2. An analogous component to necessity is implied in the *Criminal Code*'s third category of wiretap authorizations—emergency interceptions—which limit these to cases involving exigent circumstances: see the overview in Diab & Hunt, *supra* note 113, Chapter 6.

116 The general framework for waiving informer privilege where innocence is at stake can be found in *R v Leipert*, [1997] 1 SCR 281 at para 21, which requires "a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused." The test for waiving solicitor-client privilege where innocence is at stake is found in *R v McClure*, 2001 SCC 14. Justice Major, writing for the Court, held at para 48 that "[b]efore the test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way." At para 50, in the first stage of the test, the accused establishes that a privileged communication "could raise a reasonable doubt about his guilt." At para 51, in the second stage, the judge reviews the communication to decide "whether, in fact,... it is likely to raise a reasonable doubt."

117 As noted in Part III, this has been a component of the assessment of whether to admit in some but not all labour and employment cases.

118 *Rooney v GSL Chevrolet*, *supra* note 49 at para 18.

assessing privilege over therapeutic records in the hands of a third party in *M(A) v Ryan*,[119] *R v O'Connor*,[120] and *R v Mills*,[121] and the admissibility of documents engaging a complainant's privacy in the hands of the accused, under section 278.92 of the *Criminal Code*, in *R v JJ*.[122] The Court, in these cases, crafts a framework for admission or guidance for applying a statutory framework, which calls on a judge to assess the impact of admission on the complainant's privacy—its potential impact on her personally—and also its impact on future complainants. The test proposed here brings a sensitivity to individual harm found in these contexts to the case of surreptitious recording.

The second point is that the revised test would not preclude admitting into evidence recordings of a highly private conversation in which a person makes a "smoking gun" admission—but it would restrict their admission to cases where they are probative and necessary, rather than being more probative than prejudicial. Necessity would function here in an analogous but distinct sense from the way it does in the case law on the principled exception to hearsay. In that context, evidence is necessary where the declarant or the hearsay testimony is not available and no adequate substitutes can be found.[123] Here, necessity would be established only after persons with knowledge of the content of a recording have testified and the content remains in issue. For example, if a plaintiff testified to something they heard a defendant say in a conversation the plaintiff surreptitiously recorded, necessity would be made out only once the plaintiff is cross-examined and it remains uncertain precisely what the defendant said (e.g., where the defendant disputes the plaintiff's evidence). The rule is meant to protect the defendant from the invasiveness of having the recording played in open court; it is not meant to shield them from the truth.

In ways to be explored below, this revised test would lead to different results in many cases and would better reflect the injustice courts and tribunals should seek to minimize or avoid. On a practical point, the change proposed here might be adopted by modifying the common law rule or by amending legislation, including the *Canada Evidence Act*.[124] The quicker and more practical path to reform would be to change the common law, given the variety of statutes on point and the slower pace of legislative change.

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119 *M(A) v Ryan*, [1997] 1 SCR 157, 143 DLR (4th) 1.
120 *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.
121 *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1.
122 *R v JJ*, 2022 SCC 28.
123 *R v Khelawon*, 2006 SCC 57 at paras 76-78.
124 *Canada Evidence Act*, RSC 1985, c C-5.

## B. Examples of the Test Applied

Here, I briefly canvas three cases to illustrate how a revised test would apply to situations involving differing degrees of prejudice, probative value, and necessity.

In *R v Iyer*,[125] a property developer made fraudulent misrepresentations at meetings with investors caught on surreptitious recordings made by the boyfriend of one of the investors. The court found the recordings were substantially accurate depictions of what they captured. The accused had made statements relevant to and probative of elements of the 33 counts of fraud he was charged with, and the court found that this outweighed any prejudice that admission might cause.[126] The decision is unclear as to whether the meetings were open to the public, but they involved potential investors presumably comprised of members of the public. The recordings would not meet the necessity portion of the revised test proposed here because they merely corroborated the testimony of the complainant and her boyfriend. But the court would not reach that stage of the test. The recordings would be admissible by virtue of not being significantly prejudicial. The accused had a low—if any—expectation of privacy in his remarks at the meetings. Had he known he was being recorded, he would likely have still chosen to speak and conduct himself in substantially the same way—apart from making fraudulent assertions.

But had the investors in *Iyer* consisted of a small group of friends in an intimate setting—a dinner party—on the revised test proposed, a recording of it may not have been admissible. In this case, admitting the recording could entail a significant violation of the accused's privacy while only corroborating the testimony of defrauded investors. To be clear, the recording would be excluded in recognition of the court placing a higher value on disassociating from the invasive conduct at issue rather than making use of evidence that would merely corroborate other evidence on point.

The facts in *R v Vey* provide a more dramatic example of the concerns at issue.[127] A wife, Brigitte, suspected her husband, Curtis, was having an affair and hid an iPod under the dining room table of the family home. It captured a discussion Curtis had with another woman, Angela, when no one else was home—about killing Angela's spouse. Brigitte brought the device to the police station, gave a statement, and handed an officer the

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125 *Iyer*, *supra* note 31.

126 *Ibid* at paras 57-60, Justice Moen does not discuss how admitting the recording might cause prejudice here, but simply asserts that "the recordings are more probative than prejudicial."

127 *Vey*, *supra* note 31, discussed in more detail below.

iPod.[128] She testified to wanting to hand over the device to police but also that the officer had said to her, "I'm going to have to take this from you."[129] Three days later, Curtis and Angela were arrested and charged with conspiracy to commit murder. The accused sought to exclude the recording on the basis that the officer had unlawfully seized it and then listened to it without a warrant in violation of section 8 of the *Charter*.[130] The court agreed and excluded the recording under section 24(2), given the finding that police ought to have known the conversation on the iPod was private and required a warrant and that it was created illegally.[131]

The decision in *Vey* is not clear on the content of the conversation captured on the recording. But one might infer from the fact that the couple was charged with conspiracy to commit murder that it captured, with reasonable accuracy, the *actus reus* of the charge: an agreement among two or more persons to commit murder—i.e., rather than merely a discussion about the possibility of killing Angela's spouse.[132] Assuming this was the case, the recording in *Vey* would likely satisfy the current common law test for admission, surveyed in Part II, on the basis of being more probative than prejudicial. But it would be excluded under the revised test proposed here, on the basis of being probative but not necessary.

The Crown could still call Brigitte, the wife who made the surreptitious recording, along with any other person who heard the recording (in this case, her son and two police officers), to testify as to their recollection of its content—and that evidence would be permitted under the party admission exception to the rule against hearsay.[133] The Supreme Court of Canada held

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128 *Ibid* at para 36.

129 *Ibid* at paras 37,39.

130 One can surmise that under the common law test for admission, which asks only whether the recording is more probative than prejudicial, it likely would have been admitted. For further discussion of this case and its finding that police receipt and review of the recording constituted a violation of section 8, see Robert Diab, "Surreptitious Recordings by Civilians in Criminal Trials: Challenging Their Admissibility at Common Law and Under the Charter," forthcoming in the Canadian Criminal Law Review.

131 *Vey*, *supra* note 31 at para 152.

132 *United States of America v Dynar*, [1997] 2 SCR 462, holding at para 86 that conspiracy consists of "an intention to agree, the completion of an agreement, and a common design" and citing the Court's earlier decision in *Papalia v The Queen*, [1979] 2 SCR 256 at 276, for the proposition that "[t]he *actus reus* is the fact of agreement."

133 In *SGT*, *supra* note 26 at para 20, Charron J for the majority holding "statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents." Justice Charron distinguishes statements made to "ordinary persons, such as friends or family members," which are presumptively admissible, from those made to a "person in authority," which require the Crown to prove voluntariness beyond a reasonable doubt.

in *R v Fliss* that a police informant who makes what turns out to be an unlawful secret recording of a conversation (which is excluded) may testify to the content of the conversation and refresh his memory by consulting the recording.[134] A similar logic would apply here. The recording would be excluded in recognition that admitting it at trial would permit the Crown to rely on a highly invasive and unlawful act but not hinder the Crown from relying on information gleaned from it.

*Hanni v Western Road Rail Systems* offers an example of how the revised test proposed here might apply in the civil context.[135] In this case, the plaintiff worked as an office manager for 12 years for a company that loaded lumber onto railway cars. She had a reputation among employees and customers for being "gruff" and abrasive.[136] Her employer urged her to address this, to no avail. The employer then imposed a series of changes to her employment while issuing an ultimatum that she could accept the changes or receive two months' pay in lieu of notice and be dismissed. The plaintiff surreptitiously recorded a conversation she had with her supervisor to clarify the situation. The discussion captures the supervisor presenting her with the ultimatum, which the court found was tantamount to her dismissal.[137] The decision does not indicate whether the recording was admitted after a *voir dire* or what considerations were applied in admitting it.

However, on the revised test proposed here, the recording would be admissible on two grounds. First, it did not capture an intimate or highly private conversation. It does not compel the inference that had the supervisor been aware that he was being recorded, he would have conducted himself in a substantially different way. And second, even if it did, it was necessary in a way that related to the plaintiff's credibility. The defendant presented plausible evidence that she was a difficult employee and marshalled various other evidence to support its version of events. The recording was the only means by which she could seek to rectify this power imbalance in support of her credibility.

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In *Vey*, the wife was not prompted to make the recording by police and would not meet the test for being an agent in *R v Broyles*, [1991] 3 SCR 595 or for being a person in authority, in *R v Grandinetti*, 2005 SCC 5.

134 *R v Fliss*, 2002 SCC 16.

135 *Hanni v Western Road Rail*, *supra* note 49.

136 *Ibid* at para 19.

137 A transcript is excerpted at para 32 of the decision, *ibid*.

## V. CONCLUSION

The law on surreptitious recording in Canada is inconsistent and in conflict. It criminalizes secret recording where a person is not a party to the conversation and makes it tortious to do so in some cases where a person is a party. But where a person has made a recording, and the recording is invasive and deceitful in nature, courts and tribunals will admit it so long as its probative value outweighs the prejudice it may cause. Yet the concern with prejudice is, in most cases, largely confined to a concern over the fairness and accuracy of a recording—which does little more than extend the inquiry into probative value. And while some judges and adjudicators have raised policy concerns about the effect of condoning the practice on future litigants, generally, they tend not to think about prejudice in terms of the effect of admitting a recording on the person whose privacy it would violate.

The survey of privacy theory and the work of Erving Goffman in this paper aimed to show that the impact on a person surreptitiously recorded can be profound. By exposing a person's private conversation to an audience they had not chosen to speak to, a recording can deprive a person of a significant measure of autonomy and control over how they present themselves. This can do more than invade privacy in the sense of exposing information or capturing an admission. It can deeply affect a person's identity, relationships, and well-being.

The common law test for admission in criminal, family, labour, and employment law should be revised to better reflect the nature and extent of the harm at issue. Rather than weighing probative value against prejudice in the limited sense noted above, courts and tribunals should admit secret recordings that capture intimate or private conversations only where probative and necessary. This would not hinder the use of such evidence where it is essential, yet it would also make its admission less routine, reflecting a recognition of the harm it may cause and a value placed on not condoning it.

# "Interrogators often use honey, not vinegar, in pursuit of the truth": Resistance, the Constitutional Right to Silence and Judicial Responses to Cell-Plant Operations

AMAR KHODAY*

## ABSTRACT

Police officers employ numerous tactics to elicit incriminating statements from an accused. For instance, law enforcement officials will sometimes insert undercover police officers into a detention cell to procure evidence – cell-plant operations. During the 1990s, the Supreme Court of Canada held that where undercover state agents actively elicit incriminating statements from an accused while in detention, such conduct violates the latter's right to silence situated in section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Remaining silent is a legitimate way to resist the power of the state when it conducts investigations. Police officers undermine this right and ability to resist when dispatching undercover officers in this manner, since an accused is unaware that they are speaking to state agents. However, an accused person with the assistance of their lawyer(s) may further resist the prosecution's intended use of these incriminating statements through litigation – specifically, applications to exclude evidence under the *Charter*. While the Court has not considered cell-plant cases since 1999, Canadian trial courts at the superior court level have developed the right to silence jurisprudence concerning cell-plant cases. In addition, the Supreme Court of New Zealand has adopted the legal tests formulated by its Canadian counterpart. This article examines this jurisprudence, revealing how some decision-makers are showing sensitivity

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to the spatial context in which these operations occur. The case law also exposes how undercover officers may impact their exchanges with accused persons by building temporary and situational relationships with them. This is despite the lack of a prior relationship between the accused and undercover agent(s). In turn, this raises concerns about whether state actors have actively elicited incriminating statements from an accused. The jurisprudence also highlights how undercover officers are engaging in the functional equivalent of an interrogation despite the Supreme Court of Canada's decisions in the 1990s admonishing against these tactics. An examination of this jurisprudence provides tools to challenge prosecution attempts to use cell-plant statements in future cases.

***Keywords***: *Canadian Charter of Rights and Freedoms*; cell-plant operations; constitutional law; police trickery; resistance; right to choose; right to silence; undercover interrogations.

## I. INTRODUCTION

During police investigations, law enforcement officials seek to procure crucial information to solve crimes. Authorities acquire knowledge about an offence by, *inter alia*, speaking with people as well as collecting physical, documentary, and/or digital evidence. The more incriminating and admissible evidence that police officers can obtain, the stronger the case can be made against those whom the state alleges are responsible for committing crimes. For many investigators, arrested or detained suspects are obvious target-rich environments from whom inculpatory evidence may be harvested. Through their statements, an accused may, amongst a range of information, reveal motives for crimes, confirm their presence at a crucial place and time, concede to committing acts that constitute the *actus reus* (or guilty act), and/or admit to having the intent to commit certain acts to bring out the natural and foreseeable consequences of their conduct. To access this potential evidentiary treasure trove, police interrogators use various techniques, including deception and lies, to elicit incriminating statements from suspects. Confronted with such tactics, suspects who maintain their resolve to remain silent engage in an act of resistance to the overwhelming power of law enforcement officials and institutional power.[1] This resistance deprives state actors of potentially crucial incriminating evidence which can be used by Crown prosecutors.[2] With respect to serious offences like

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1 Hannah Quirk, *The Rise and Fall of the Right of Silence* (London: Routledge, 2018) at 18 [Quirk].

2 There is also an important role for lawyers advising on how to resist cooperating with

murder, police investigators may not rest content in allowing an individual's silence to stand. Investigators may use other creative and deceptive measures to circumvent the individual's choice not to speak to authorities.[3] These measures include planting an undercover police officer or officers into detention cells to masquerade as fellow inmates who then surreptitiously question an accused. I refer to these techniques as "cell-plant operations" and an undercover officer who acts as an inmate in these operations as a "cell-plant." Individuals subjected to these tactics are, in turn, typically unaware that they are speaking to an undercover state agent. These deceptive techniques constitute powerful and problematic tools that undermine an accused's ability to make an informed choice to speak to state actors about crimes they are suspected of perpetrating. When prosecutors have sought to use incriminating statements procured through cell-plant operations ("cell-plant statements"), various accused have resisted such efforts with the crucial assistance and advice of counsel by launching pre-trial legal challenges to their admission.

In numerous countries, there are legal norms that ostensibly preserve an individual's ability to resist the state's attempts to use cell-plant statements at trial.[4] In 1990, the Supreme Court of Canada ("SCC" or the "Court") interpreted the *Canadian Charter of Rights and Freedoms* to incorporate a constitutional pre-trial right to silence within section 7.[5] This provision provides that "[e]veryone 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."[6] The SCC recognized the right to silence as a principle of fundamental justice and that its purpose is to

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state actors. *R v Lafrance*, 2021 ABCA 51 at para 48 [*Lafrance ABCA*] (stating, "The consultation with counsel provides an opportunity for a lawyer to inform the detainee of their rights, but also to discuss the benefits and drawbacks of cooperating with the police investigation, as well as strategies to resist cooperation should that be the detainee's choice" at para 48). See also *R v Lafrance*, 2022 SCC 32 at paras 71, 75 [*Lafrance SCC*].

3 In some instances, police interrogators may be able to extract admissible confessions during standard questioning but may still engage in surreptitious questioning to secure further evidence.

4 For example, in the United States of America (US), the protection can be found in the right to assistance of counsel under the Sixth Amendment to the US Constitution. The application of the Sixth Amendment to cell-plant contexts can be found in *United States v Henry*, [1980] 447 US 264 [*Henry*]. As discussed below, New Zealand law furnishes protections too. See also *Allan v The United Kingdom*, [2003] 36 EHRR 12; *R v Swaffield*, [1998] HCA 1.

5 *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1 [*Hebert* citing to SCR].

6 *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 [*Charter*].

protect an individual's freedom to choose whether to speak to authorities.[7] This right is breached whenever an undercover state actor actively elicits incriminating statements from an accused who is in detention.[8] In a later decision, the Court further clarified that an accused does not have to be subjected to an atmosphere of oppression when state actors surreptitiously and actively elicit incriminating statements.[9] Furthermore, an accused is not required to have expressly invoked their right to silence prior to being subjected to a cell-plant interrogation to benefit from its protection.[10] If a court determines that an individual's right to silence has been infringed, it may then consider whether the evidence should be excluded pursuant to section 24(2) of the *Charter*.[11]

During the 1990s, the SCC decided four cases concerning undercover operations occurring within the detention context where the defendants claimed breaches of their right to silence – *Hebert* (1990),[12] *Broyles* (1991),[13] *Brown* (1993),[14] and *Liew* (1999).[15] Of the four judgments, the SCC provided its own substantial reasons in *Hebert*, *Broyles*, and *Liew*; they are often most cited, and together they have been referred to as a trilogy by various trial courts.[16] However, *Brown* has been overlooked. In that case, the SCC issued a very brief decision reversing the Alberta Court of Appeal, substantially for the reasons provided by Justice Harradence, the dissenting judge.[17] The SCC's decision does not provide clues to the importance of the facts. Since *Liew*, the SCC has not adjudicated any further cell-plant cases. Yet, numerous trial court decisions have addressed *Charter* claims relating to cell-plant operations in response to pre-trial defence applications in criminal cases to exclude evidence procured during these operations. While several judges have ruled against such motions, numerous others have excluded

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7 *Hebert*, *supra* note 5 at 186.

8 *Ibid* at 184–185; *R v Broyles*, [1991] 3 SCR 595 at 611, 68 CCC (3d) 308 [*Broyles*].

9 *R v Liew*, [1999] 3 SCR 227 at para 37,137 CCC (3d) 353 [*Liew*].

10 *Ibid* at paras 44–45.

11 *Charter*, *supra* note 6, s 24(2); *R v Grant*, 2009 SCC 32.

12 *Hebert*, *supra* note 5.

13 *Broyles*, *supra* note 8.

14 *R v Brown*, [1993] 2 SCR 918, 83 CCC (3d) 129 [*Brown* SCC].

15 *Liew*, *supra* note 9.

16 *R v Radjenovic*, 2010 BCSC 1459 at paras 7, 13, 19 [*Radjenovic*]; *R v Deboo*, 2015 BCSC 69 at para 26 [*Deboo*]; *R v Quigley*, 2016 BCSC 2308 at para 6 [*Quigley*]; *R v Sparks and Ritch*, 2020 NSSC 128 at para 69 [*Sparks and Ritch*].

17 However, in *Brown*, the Court heard the case by right of appeal and reversed the majority decision of the Alberta Court of Appeal. Writing for the majority of the Court, Justice Iacobucci asserted, "I am of the opinion that this appeal should be allowed for substantially the reasons given by Harradence J.A. in the Alberta Court of Appeal [...] solely on the ground of the alleged violation of the appellant's rights under section 7 of the Canadian Charter of Rights and Freedoms." *Brown* SCC, *supra* note 14 at 920.

evidence pursuant to section 24(2) on the grounds that undercover state agents violated an accused's *Charter* right to silence by actively eliciting incriminating statements.

These trial court decisions, all occurring after the SCC's cell-plant decisions have received scant, if any, scholarly attention, and this article seeks to fill this gap.[18] In addition, as part of the discussion on the development of the jurisprudence surrounding cell-plant operations, I shall consider a decision of the Supreme Court of New Zealand ("SCNZ") from 2015, *R v Kumar*.[19] Although set in another jurisdiction, the *Kumar* decision draws heavily on the SCC's right to silence jurisprudence by adopting the legal tests articulated by it. The *Kumar* decision provides important insights about the very legal tests articulated in *Broyles* with respect to active elicitation. Notably, the SCNZ is New Zealand's highest appellate court, and its jurisprudence is persuasive and worthy of consideration.

In examining these various decisions by Canadian trial courts and the SCNZ's decision in *Kumar* that exclude evidence based on cell-plant operations, I argue that they offer significant insights into the nature of cell-plant operations and the development of the jurisprudence concerning them. Indeed, they address concerns and factual scenarios not fully fleshed out or addressed in the SCC's trilogy. For individuals seeking to resist the attempted admission of cell-plant statements through litigation, the decisions contain the following indicia about how to mount a successful constitutional challenge. First, such judgments highlight the rather active nature of many undercover officers in seeking to elicit incriminating statements despite, in the Canadian context, the ostensible limits provided in *Broyles* and *Liew*. The newer jurisprudence also highlights aspects of the exchanges between the accused and state actors not addressed in *Broyles* and *Liew*. Second, I posit that these decisions recognize and shed light on how undercover officers may forge temporary and situational relationships with

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18 Much of the scholarship to date regarding cell-plant operations concerns earlier jurisprudence. Patrick Healy, "The Value of Silence" (1990) 74 CR (3rd) 176; David Tanovich, "The Charter Right to Silence and the Unchartered Waters of a New Voluntary Confession Rule" (1992) 9 CR (4th) 24; Gordon Wall, "Doubts Cast on Hebert Limits on the Pre-Trial Right to Silence" (1995) 36 CR (4th) 134; 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 [Khoday].

19 *R v Kumar*, [2015] NZSC 124 [*Kumar*]. Though notably, in his concurring opinion, Chief Justice Elias would dispense with the majority's adoption of the test articulated in *Broyles* in favour of a more direct causal inquiry. Such an inquiry would examine whether the actions of the police agents elicited the statements in cases where a police agent is placed in the cell of a person detained in order to obtain admissions. See *ibid* at paras 78–79.

detainees in the absence of pre-existing bonds, and to such a degree that they contribute to a finding of active elicitation. Third, I contend that these decisions legitimize and reinforce the importance of the right to silence and, drawing from *R v Lafrance*, the ability to resist cooperation with the state's investigation of the accused.[20] When undercover state actors actively elicit incriminating statements from an accused, they undermine and breach the right to silence and the accused's underlying freedom to choose whether to speak to the state. Launching a *Charter* challenge is a way to resist the power of the state, albeit well after such constitution-infringing police conduct has already occurred. An accused does not need to resist at the very moment that police officers are breaching their constitutional rights. This is true in the case of cell-plant operations, where an accused is unaware that their right to silence has been infringed until after the fact.

This remainder of this article will be divided into four parts. Part II provides some definitional scope to the concept of resistance and situates the use of litigation as a form of resistance. Drawing on the work of Alice Ristroph in the United States legal context, I will discuss how bringing a *Charter* claim alleging a violation of the right to silence serves as a way to resist the dominant power of the state and, in particular, the prosecution's intended use of evidence through putatively unconstitutional means.

Part III situates cell-plant operations in two broader contexts. First, they are a species of police interrogations. Many of the techniques relevant to formal police questioning in an interrogation room are also relevant and employed in cell-plant interrogations. Since an accused is unaware of the true identity of their interrogator(s) in cell-plant operations, such standard questioning and related techniques may be more effective. The second context is the detention environment and the social dynamics and norms within such a setting that make an accused vulnerable and susceptible to surreptitious questioning. These conditions facilitate the weakening of an accused's ability to remain silent. This context is crucial to understanding how the legal test articulated by the SCC in its trilogy with respect to active elicitation should be understood and developed.

In Part IV, I provide a brief history of the *Charter* right to silence, its integral connection with cell-plant operations, and the SCC's jurisprudence governing the analysis. This history will also delineate the limitations of the Court's jurisprudence in protecting one's resistance to the state and foreground how recent decisions provide valuable insights and developments on the right to silence.

Part V is divided into four sections, each highlighting certain aspects of the right to silence jurisprudence developed in Canadian trial court

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20 *Lafrance SCC*, *supra* note 2 at para 71.

decisions and the SCNZ's decision in *Kumar*. The first section focuses on how some decisions address the spatial and temporal considerations of cell-plant interrogations. The close and confined spaces accentuate the vulnerabilities of the accused. The second section identifies how other asymmetries of power affect communications between state agents and the accused, specifically cell-plants' pre-operation preparation and their prior interrogation experiences. Sections three and four tackle the two series of factors relating to active elicitation covered under recent jurisprudence. Section three addresses how courts have examined the nature of the relationship between cell-plants and the accused in substantial ways beyond the SCC's decisions in the 1990s. This includes the building of temporary and situational relationships. These examinations include closer scrutiny of the rapport-building techniques of cell-plants. The fourth section focuses on how courts examine the interrogation techniques of cell-plants to determine whether they are the functional equivalent of an interrogation. Despite the lessons of the SCC jurisprudence, many officers have engaged in active forms of elicitation in tandem with building a relationship with the accused, resulting in the breach of their right to silence and the exclusion of evidence.

## II. *CHARTER* LITIGATION AS RESISTANCE

Is engaging in litigation a form of resistance? For many, the relationship between litigation and resistance may seem odd or counterintuitive. Litigation deals with the process of resolving a legal dispute within an adjudicative context. It is a legal process whereby one seeks to vindicate their rights. Resistance often appears to implicate the violation of legal norms rather than the deployment of the law itself for the purpose of carrying out an act of defiance. However, resistance is not limited to the use of force, engaging in civil disobedience, or any other forms of defiance typically associated with the breaching of legal norms. Utilizing law and legal processes may be useful and suitable weapons to resist some forms of dominant or hegemonic power. This is even the case when the power being opposed is the state itself. Through litigation, individuals may challenge the constitutionality of the conduct of state actors, and particularly, police officers.[21]

In designating litigation as a form of resistance, it may be helpful to define the latter. Although there is no singular definition of resistance, there are at least two key components that likely constitute it. First, many scholars

[21] Litigation may also be used to challenge other aspects of state conduct, including the passing of legislation or creation of criminal prohibitions. See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5.

argue that, at its core, resistance stands in opposition to something.[22] That "something" is often associated with those who hold and exercise dominating power. Various types of actors and institutions possess such power within a given society, including those within the state. Second, scholars have also identified intentionality as a key element of resistance.[23] After all, resistance does not happen by accident.[24] Drawing on these concepts and my past work,[25] I define resistance to include acts or omissions committed individually or collectively that intentionally challenge the dominant or hegemonic[26] power of another individual, group, institution, entity and/or (section of a) society—regardless of whether such power is rooted in, or affiliated with, state authority.[27]

When police officers arrest or detain an accused, they clearly exercise dominant power over them. Although an accused may physically resist their detention or arrest, they are likely to be unsuccessful in escaping captivity. A detainee may also resist by refusing to cooperate in any way with the state's investigation and questioning of them. Indeed, the role of legal counsel includes advising an accused of their right to remain silent in the face of police questioning and "strategies to resist cooperation should that be the detainee's choice."[28] Realistically, these forms of resistance can often give way to the overwhelming power of the state. Many individuals subjected to

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22 Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (Toronto: Oxford University Press, 2012) at 253; Elizabeth Stanley & Jude McCulloch, "Resistance to state crime" in Elizabeth Stanley & Jude McCulloch, eds, *State Crime and Resistance* (Toronto: Routledge, 2013) at 5 [Stanley & McCulloch]; Sally Engle Merry, "Law, Culture, and Cultural Appropriation" (1998) 10:2 Yale JL & Human 575 at 599–600.

23 See e.g. Stanley & McCulloch, *supra* note 22 at 5.

24 Though accidents may nevertheless have an adverse impact on those exercising dominant power or their interests.

25 See e.g. Amar Khoday, "Resisting Criminal Organizations: Reconceptualizing the 'Political' in International Refugee Law" (2016) 61:3 McGill LJ 461.

26 Hegemonic power may be understood as the maintenance of dominant power exercised "not through the use of force but through having [the] worldview [of the dominant power] accepted as natural by those over whom domination is exercised." BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 Intl Community L Rev 3 at 15. Dominant power that is not hegemonic may require the use or threat of force or other coercive means, such as the legal system or law enforcement to control or impose itself on others. See e.g. Joanne P Sharp et al, "Entanglements of Power: Geographies of Domination/Resistance" in Joanne P Sharp et al, eds, *Entanglements of Power: Geographies of Domination/Resistance* (New York: Routledge, 2000) 1 at 2.

27 In past work, I left out the word "intentionally" but have explicitly included it here. Though intentionality is likely inferred in relation to challenging dominant or hegemonic state power, it is helpful to be more precise.

28 *Lafrance SCC*, *supra* note 2 at para 71.

lengthy interrogations without the assistance of a lawyer present during questioning often succumb and reveal incriminating information.[29]

Yet, when law enforcement officials initiate a cell-plant operation, the target is unaware that they are speaking to an undercover state agent or agents and hence do not even realize that they should be resisting these state actors by remaining silent. This raises the following question: once police investigators have procured all their principal evidence and the prosecution is ready to litigate the matter, are further efforts to resist the methods employed to gather some or all of the evidence foreclosed? Thankfully, the answer is no. The litigation process with respect to criminal prosecutions, and particularly applications to exclude unconstitutionally obtained statements, offer a further and crucial avenue to resist the state's methods to procure and use such incriminating evidence.[30]

How do the definitional components stated earlier regarding resistance apply to and incorporate the concept of litigation? In particular, how do these components pertain to litigation that challenges the allegedly unconstitutional conduct of police officers? By initiating such litigation, an accused and their defence counsel intentionally oppose the power of the police to employ such techniques in the first place, as well as the prosecution's attempted exploitation of such evidence. Furthermore, where a court recognizes explicitly that police officers have acted unconstitutionally and assuming the criteria for excluding the impugned evidence have been satisfied, such resistance via litigation is vindicated.

Each of these constitutional victories contributes to the building of a resistance jurisprudence. The cases that comprise this jurisprudence illustrate that resistance need not happen only when an exercise of dominant power is occurring (e.g., during an arrest, standard interrogation, or cell-plant operation). Resistance can transpire at a much later stage during legal proceedings, where it arguably really counts. Indeed, as Alice Ristroph contends, the considerable harms that are occasioned by a constitutional breach, namely conviction and punishment, occur when other state actors (i.e., prosecutors) use the information police have gathered at trial.[31] As a practical matter, the prosecution's use of such evidence would likely force many accused to take the witness stand to explain why they (falsely) confessed and render them vulnerable to cross-examination.

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29 Under SCC precedents, an accused does not possess a constitutional right to have a lawyer present during questioning. See *R v Sinclair*, 2010 SCC 35 at paras 1, 2, and 42 [*Sinclair*].

30 *Charter*, *supra* note 6, s 24.

31 Alice Ristroph, "Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure" (2015) 95 BUL Rev 1555 at 1573 [Ristroph].

The notion that litigation may qualify as a form of resistance finds support in other scholarly writing. Some academic writers examine how litigation strategies have been deployed as part of resistance efforts against colonial[32] and authoritarian states.[33] Other scholars explore the use of litigation as a resistance strategy to assert one's rights and/or otherwise challenge human rights violations in or by democratic states.[34] Most apropos to this writing is Alice Ristroph's article regarding litigation as a means to resist constitutional violations by state actors in the United States context. In "Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure," Ristroph challenges the notion that the primary purpose of constitutional criminal procedure is the top-down judicial regulation of police officers.[35] Instead, she advances a refocusing of this purported purpose where the accused takes centre stage asserting constitutional claims as a form of resistance to state power and coercion.[36] Ristroph contends: "Every mundane motion to suppress evidence is a claim that the government has overstepped its power, and thus a claim about the appropriate scope of government power."[37] Furthermore, she argues that:

> Rights claims are a form of resistance to the state, and a Fourth, Fifth, or Sixth Amendment claim [under the United States Constitution] is a way of resisting punishment. These acts of resistance are part of our constitutional design. The litigation and jurisprudence they produce are an important part of our political discourse – even if defendants lose, and even if the resulting doctrines fail to regulate the police well.[38]

Constitutional rights are mechanisms that limit state power and, as Ristroph rightly contends, invite principled challenges that are initially

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32 Sanjukta Das Gupta, "From Rebellion to Litigation: Chotanagpur Tenancy Act (1908) and the Hos of Kolhan Government Estate" (2016) 19:2 Irish J Anthropology 31.

33 Junxin Jiang, "Rightful Resistance through Public Interest Litigation in China" (2015) 1 Asia in Focus 13; Xin He, "Maintaining Stability by Law: Protest-Supported Housing Demolition Litigation and Social Change in China" (2014) 39:4 Law & Soc Inquiry 849.

34 Jules Lobel, "Victory Without Success? – The Guantanamo Litigation, Permanent Preventive Detention, and Resisting Injustice" (2013) 14 JL in Soc'y 121; Robert Nicholson, "Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts" (2012) 39:2 Syracuse J Intl L & Com 381.

35 Ristroph, *supra* note 31 at 1556–1565.

36 *Ibid* (stating: "Constitutional criminal procedure is also an adversarial project in which individual defendants resist the power of the state. It is a forum to discern and to debate our most basic conceptions of government power and its limits" at 1564).

37 *Ibid* at 1563.

38 *Ibid* at 1564.

bottom-up.[39] Indeed, they require subjects of the state to initiate the mechanism of limitation.[40]

Though Ristroph's article concerns the United States legal context, her positions have salience for other legal systems, including the Canadian legal system, where constitutional and other legal norms circumscribe state conduct. In Canada, the *Charter* places various limits on the state, which includes, *inter alia*, how police officers gather evidence. These constitutional limits include the right to be secure from unreasonable search or seizure, the right not to be arbitrarily detained or imprisoned, the right to retain and instruct counsel upon arrest or detention, and the right to remain silent while in detention.[41] As indicated above, such constitutional norms are not self-actuating and require an accused to initiate proceedings via an application and to prove the constitutional violations on a balance of probabilities.[42] In making such applications based on the purported violation of one or more *Charter* provisions, rights claims are forms of resistance to the Crown prosecutors' attempted use of evidence obtained by police through putatively unconstitutional means.

Having explained how *Charter* litigation qualifies as a form of resistance, I next turn to how the nature of cell-plant operations and the detention environments in which they occur make it highly challenging, if not improbable, to resist these actions as they are occurring. Post-investigation resistance through litigation to exclude unconstitutionally obtained cell-plant statements may be the only practical defiance available to an accused.

## III. Police Interrogation Techniques, Turn-Taking Violations and Carceral Environments

To characterize certain behaviour as resistance requires that a resister possesses some requisite knowledge concerning the circumstances they face and are challenging. While an accused who is physically detained in a police station or state detention facility is typically aware of their confinement (assuming no cognitive deficits or mental health issues), during a cell-plant operation, they are unconscious of the state's efforts to elicit incriminating statements. Thus, they lack full knowledge of the circumstances of what is occurring, and their ability to resist (and appreciate whether they should) is diminished, if not non-existent. But if these conditions were not enough, there are other contextual factors that make it difficult to resist the

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39 *Ibid* at 1596.
40 *Ibid*.
41 *Charter*, *supra* note 6, ss 7–10.
42 *R v Oickle*, 2000 SCC 38 at para 30 [*Oickle*].

investigative efforts of undercover state agents. First, many techniques that police interrogators successfully employ during non-undercover custodial interrogations ("standard interrogations") are also deployed in cell-plant scenarios to great effect. Second, there are certain informal norms governing carceral contexts which make it exceedingly difficult for an accused to remain silent about their alleged crime(s). The perceived consequences flowing from violations of such norms could coerce many accused to answer questions from undercover state agents for fear that the refusal to do so will result in punishment by fellow inmates and particularly their cellmate(s). I address both in this part.

## A. Police Techniques

During standard interrogations, detainees may refuse to disclose incriminating statements to police officers. They may assert their right to remain silent, particularly after a lawyer has advised them of this right and how to exercise it. Undaunted, police interrogators have adopted myriad techniques in the context of standard interrogations to weaken a detainee's resolve, and in various cases, they have successfully elicited incriminating statements. In addition, an interrogator's success will be facilitated by the reality that police are not required to permit an accused's lawyer to be present during an interrogation,[43] and the right to silence does not require interrogators to refrain from questioning for lengthy periods and despite an accused's repeated assertions that they wish to remain silent.[44] During cell-plant operations, a lawyer will similarly not be present to remind the accused to remain silent and that they may be conversing with an undercover state agent. Thus, many accused may be more susceptible to the psychological ploys of undercover state agents since they are not even aware of the true identity of their cellmate(s).

During standard interrogations, police adopt diverse techniques to elicit incriminating statements from detainees while exploiting the environment and their domination over the accused. These techniques include the "use of intimidation, bluffs, gentle prods, silence, simulated friendship, sympathy, concern, self-disclosure, appeals to religion and God, the presentation of trickery and false evidence [...]."[45] Officers place suspects in isolated and unfamiliar surroundings.[46] Because an accused is under state

43 *Sinclair*, *supra* note 29 at paras 1, 2 and 42.

44 *R v Singh*, 2007 SCC 48 [*Singh*].

45 A Daniel Yarmey, "Police Investigations" in Regina A Schuller & James RP Ogloff, eds, *Introduction to Psychology and Law: Canadian Perspectives* (Toronto: University of Toronto Press, 2001) at 81.

46 *Ibid.*

control, police officers create a context wherein they create the impression that they are omniscient and omnipotent.[47] During questioning, interrogators can interrupt and change topics indicating control and dominance. In addition, the experience of isolation and the stress of confinement can produce heightened suggestibility.[48] As a result of such conditions, detainees may be "disarmed and lulled into a false sense of security by offers of sympathy, moral justification, face-saving excuses, rationalizations, blame-the-victim accusations, and down-playing of the seriousness of the crime."[49] However, even in such an obviously police-controlled environment, police manuals will advise that interrogators question a suspect in close quarters (roughly three to four feet away) while wearing civilian clothing, being unarmed, and without any badges or other indicators of police affiliation.[50] This is an attempt to place some distance between the interrogator and their status as a state actor in the mind of the detainee.

Although cell-plant operations present different investigative environments in contrast to standard interrogations, undercover officers may nevertheless utilize similar techniques to elicit incriminating responses. Indeed, several interrogation practices may translate very well and be more effective when coming from someone who does not appear to be a police officer but another inmate. For instance, undercover state agents may try to establish a rapport and temporary friendship, feign sympathy and concern, and engage in self-disclosure about alleged crimes, all amidst a heightened context of trickery where they are pretending to be fellow inmates in a similar predicament. Within the cell-plant environment, an accused is largely confined to a detention cell, perhaps without anything to read or use to pass what may feel like vast and excruciatingly slow passages of time, all while experiencing the anxieties associated with confinement. An accused may be highly suggestible and open to speaking to a friendly and loquacious individual to help pass this difficult yet often boring time. Similar to a standard interrogation, within a cell-plant operation, an undercover officer may direct the conversation to subjects of interest; though, as discussed below, such techniques run the risk of courts concluding that the conduct veers into the zone of active elicitation. Notably, these techniques are not employed in a social or normative vacuum. I turn to these issues next.

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47 *Ibid.*
48 *Ibid.*
49 *Ibid.*
50 Michael Skerker, *An Ethics of Interrogation* (Chicago: University of Chicago Press, 2010) at 93.

## B. Turn-Taking Violations

When someone is being spoken to, remaining silent and refusing to speak is not as easy as it seems, even in non-custodial contexts. Drawing from scholarship in linguistics, Hannah Quirk posits that refusing to speak or answer questions, even in standard questioning, "breaches the normal rules of 'turntaking' in conversation. Linguists often label silence as a 'turn-taking violation.'"[51] Georgina Heydon asserts that "to offer silence as a response to a question by another speaker, or even to delay one's turn to talk, is to challenge the structural integrity of that fundamental element of conversation, the adjacency pair."[52] She adds that such a challenge may not prove to be an obstacle to the social relationship between two close companions. However, this barrier may not be easy to overcome between interlocutors who are not close in a relational sense, such as between an undercover officer masquerading as an inmate trying to establish a rapport with the accused, who is the target of the cell-plant operation. To rebuff queries from a fellow inmate with silence or minimal communication may invite an unfriendly response. This brings the discussion to the next key point, the location where these operations occur and the social norms that govern these environments.

## C. Carceral Environments

The right to silence and the concept of active elicitation must be understood in relation to the distinct environment in which cell-plant operations occur – detention facilities. There are numerous reasons why an undercover officer might be able to elicit incriminating statements from an accused in a cell without being too "active" and still arguably infringe on their right to silence. For instance, where the target of a cell-plant operation has no prior experience of arrest and detention, the introduction to this carceral environment can be jarring and destabilizing. Through his research into Canadian carceral spaces, including interviews with incarcerates, Michael Weinrath has observed, not surprisingly, that inmates experience considerable distress upon entering custody. He writes, "[n]ew inmates focused on withstanding the initial shock, maintaining communication with friends/family outside, and securing stability/safety in a potentially volatile realm."[53] In addition, Weinrath contends, "first-time incarcerates had to contend with the stigma of arrest and detention, and also had to

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51 Quirk, *supra* note 1 at 79.

52 Georgina Heydon, "Silence: Civil Right or Social Privilege? A Discourse Analytic Response to a Legal Problem" (2011) 43 J Pragmat 2308 at 2308.

53 Michael Weinrath, *Behind the Walls: Inmates and Correctional officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016) at 77 [Weinrath].

manage both the ambiguous setting of custody and the attendant discomfort in dealing with new people. In most cases, subjects experienced considerable angst and trepidation on entering custody."[54]

For new inmates, there might be an inclination to be or appear stoic, aggressive, or demonstrate a willingness to be violent.[55] Weinrath asserts that while obtaining respect by behaving appropriately was important over time, in the initial stages, it was also important not to lose respect.[56] New inmates might retain or earn respect by "acting strong, not showing fear, and being stoic, but this might not be enough; being strong might require a willingness to be violent."[57] It is well understood or perceived that carceral spaces can be violent domains. In anticipation of this, some inmates may try to compensate by recounting actual or fabricated versions of their own histories of violence. As US Supreme Court Justice Thurgood Marshall once expressed in a dissenting opinion in relation to a cell-plant case, "where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts."[58] On a connected point, with respect to how inmates might interact with one another, Weinrath explains that inmates might engage in small talk, including the telling of crime stories of past offences, anecdotes about their lives on the streets, or "war" stories about past incidents in prisons.[59]

In approaching the jurisprudence on the right to silence in the context of cell-plant operations and the factors used to determine whether a state actor has actively elicited incriminating information, one must be cognizant of the context in which these statements may be elicited from detainees. Whether they have committed the offences for which they have been detained, many individuals are nevertheless in a vulnerable condition. Given the carceral environment in which a detainee is forced to reside, their ability to remain silent in the face of questioning by an ostensible inmate may be significantly weakened. As discussed above, this may be because of the shock and lack of acclimatization to being confined, the awkwardness and fear of the consequences of engaging in turn-taking violations, or the desire to earn respect in the carceral setting by appearing strong (or even violent).

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54 *Ibid* at 79.
55 *Ibid* at 87.
56 *Ibid.*
57 *Ibid.*
58 *Illinois v Perkins*, [1990] 496 US 292 at 307 (Marshall J, dissenting) [*Perkins*].
59 Weinrath, *supra* note 53 at 93.

As the discussion in this part has sought to demonstrate, remaining silent in the face of state efforts to elicit incriminating statements during cell-plant operations can be incredibly difficult. Realistically, resistance will have to take place through *Charter* litigation to attempt to exclude the incriminating evidence. In Parts IV and V, I set out how legal action by various accused and their defence counsel have helped develop resistance strategies through litigation and, importantly, how courts have responded.

## IV. THE ORIGINS OF THE *CHARTER* RIGHT TO SILENCE AND CELL-PLANT OPERATIONS

Individuals who engage in resistance have the capacity to transform societies. When people use litigation as their method to successfully resist police conduct that violates constitutional norms, they can change the course of legal history. Through litigation, police investigative techniques that were once given a wide berth may end up being subsequently limited. Prior to the SCC's decision in *Hebert* which established a constitutional pre-trial right to silence, the Court did not recognize any effective legal limitations on police authorities inserting an undercover agent in a suspect's cell to elicit incriminating statements or evidentiary rules on the statements they procured. Under the common law confessions rule, the Crown must demonstrate beyond a reasonable doubt that an accused gave incriminating statements voluntarily.[60] However, a crucial pre-condition must be satisfied for the rule to be operative. Specifically, an accused must subjectively believe that they were speaking to a person in authority over them, and this belief must be objectively reasonable.[61] In *Rothman v The Queen*, a pre-*Charter* decision from 1981, the SCC concluded that the confessions rule does not apply in instances of cell-plant operations since the accused is not subjectively aware that they are speaking with a person in authority over them.[62] In his concurrence, Justice Lamer (as he then was) articulated that there may be instances where police use dirty tricks that shock the conscience of the community to elicit incriminating statements, and their admission should not be permitted.[63] Examples of such dirty tricks would include officers masquerading as legal aid lawyers or chaplains.[64] Yet, he

60 *Singh*, *supra* note 44 at para 29.
61 *R v Hodgson*, [1998] 2 SCR 449 at paras 31–34, 127 CCC (3d) 449 [*Hodgson*].
62 *Rothman v The Queen*, [1981] 1 SCR 640 at 664, 59 CCC (2d) 30.
63 *Ibid* at 696–698.
64 *Ibid* at 697.

indicated that this new category would not embrace police officers pretending to be another inmate in the context of cell-plant operations.[65]

Less than a decade after *Rothman*, the *Hebert* case reached the SCC. This time, the result was radically different. It is important to note that the following developments would not have occurred but for the accused appealing the SCC and litigating to uphold his *Charter* rights – rights that were unavailable in 1981. Relying on section 7 of the *Charter*, the Court interpreted the principles of fundamental justice to include a pre-trial right to silence. In explaining this *Charter* right, the SCC asserted that it is connected to the privilege against self-incrimination and the confessions rule.[66] At a basic level, this constitutional right to silence applied where a state agent actively elicited incriminating statements from an accused. Unlike the confessions rule, this right to silence applied only in the context of detention[67] and thus did not embrace undercover operations outside of detention – e.g., Mr. Big operations.[68] The rationale for this threshold requirement was that in cell-plant operations, the state is in control of the accused, and the latter is not at liberty to leave; the state is responsible for ensuring an accused's rights are respected.[69] Factually, there was little information provided in *Hebert*. The SCC explained that the accused was arrested for robbery, spoke to legal counsel, and then asserted their right to remain silent.[70] An undercover officer was then placed in Hebert's cell and engaged him in conversation.[71] In doing so, the undercover officer undermined Hebert's stated wish to remain silent with respect to state questioning.

Like many legal developments, the growth of a resistance jurisprudence does not happen in one decision. As important as *Hebert* was in establishing a constitutional pre-trial right to silence, particularly regarding cell-plant operations, much was still missing at a granular level. From a normative perspective, the SCC did not spend any time to properly explain the meaning of "active elicitation." This is a crucial concept needed to show a violation of the right to silence in cell-plant cases. With respect to the factual matrix of the *Hebert* case, various aspects which would have been relevant

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65 *Ibid* at 698.

66 *Hebert*, *supra* note 5 at 164.

67 *Ibid* at 184.

68 *R v McIntyre*, [1994] 2 SCR 480, 153 NBR (2d) 161 [*McIntyre*]. Mr. Big operations involve undercover police officers masquerading as members of organized crime syndicates seeking to recruit a suspect and offering admission into the organization in exchange for incriminating statements. See *R v Hart*, 2014 SCC 52.

69 *Hebert*, *supra* note 5 at 184.

70 *Ibid* at 158–159.

71 *Ibid*.

to considering the nature of the elicitation were left unaddressed. For example, there was no indication of the length of time that the undercover officer was housed with Hebert in the cell. Did the state agent actively elicit the incriminating statements in a few minutes, or did it take several hours? With respect to the content of what was said, the SCC provided no excerpts from the transcript of the conversations between the two indicating the nature of the exchange and how it contributed to being considered active elicitation. In addition to the content of the exchange, there was no examination of the nature of the relationship and whether the undercover officer sought or created a relationship with Hebert. In addition, there was no information about what the undercover officer was informed regarding Hebert prior to entering the cell, the details concerning the crime for which Hebert was arrested, or any instructions that the officer was given. As I discuss below, these are factual components discussed in many Canadian trial-level decisions and the SCNZ's decision in *Kumar* concerning cell-plant operations, which provide important ingredients for a successful outcome when advancing an application to resist the prosecution's efforts to include the impugned evidence at trial.

Following the decision in *Hebert*, further litigation before the SCC has contributed to a resistance jurisprudence. One year after *Hebert*, the SCC provided greater definition to the notion of active elicitation as well as state agency in *Broyles*.[72] The reason for defining the concept of state agency was to address the specific facts presented in that case. In *Broyles*, the accused was charged with murdering his grandmother.[73] The police launched a cell-plant operation. However, rather than inserting an undercover police officer into the detention facility or cell, the chief investigating officer enlisted the assistance of Todd Ritter, a non-inmate and friend of Broyles to speak with him.[74] Investigators outfitted Ritter with a body-pack listening device and provided him access to Broyles in the detention facility.[75] During their conversations, Broyles admitted to knowing that his grandmother died on the day she went missing.[76] Because Ritter did not present as a typical state agent – he was neither an undercover police officer nor an inmate acting as a jailhouse informant – the Court articulated a flexible test for determining whether a person qualified as a state agent.[77] The need for this test was most relevant in circumstances not involving undercover police

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72 The events, as well as the trial court and court of appeal decisions all occurred prior to the SCC's decision in *Hebert*.

73 *Broyles*, *supra* note 8 at 602.

74 *Ibid* at 599–600, 612–613.

75 *Ibid*.

76 *Ibid* at 600–601.

77 *Ibid* at 607–609.

officers or staff in a detention facility. As most reported cell-plant cases involve the use of undercover police officers, including those examined later in this article, I shall dispense with any further discussion of this test regarding state agency.[78]

More importantly, for the purposes of this article, the SCC furnished a series of factors to assess whether an undercover state actor actively elicited incriminating statements from a detainee. Such considerations help to consider how police actors may take steps to undermine an accused's choice to remain silent. At the heart of these considerations is the following inquiry, which centers on the relationship between the state agent and the accused: "considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused?"[79] In view of this framing, the Court in *Broyles* grouped these non-exhaustive factors into two particular clusters.[80]

The first cluster considers the nature of the exchange between the undercover officer and the accused. Given that the elicitation must be "active" in order to infringe the right to silence, one must assess whether the exchange between the agent(s) and the accused could be characterized as being akin to an interrogation, "or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done?"[81] Later in the decision, the Court articulated that one must assess whether the state agent allowed the conversation to flow naturally or if they directed the conversation to areas where police investigators needed information.[82] The *Broyles* Court posited that the focus "should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation."[83] A cell-plant interrogation may carry some indicia of a cordial exchange between two cellmates, however, as the SCC's phrasing suggests, an undercover agent may nevertheless make statements or return the conversation pointedly to subjects about which they are seeking to elicit incriminating statements.

In connection with cell-plant operations, developing a rapport with an accused can be crucial to eliciting incriminating admissions. Interrogations do not occur in a relational vacuum. Accordingly, the second cluster

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78 The issue of state agency has arisen in other decisions. See e.g., *R v Broyles*, 1999 ABCA 102; *R v Fatima*, 2006 CarswellOnt 5523, [2006] OJ No 3634.

79 *Broyles*, *supra* note 8 at 611.

80 *Ibid*.

81 *Ibid*.

82 *Ibid* at 613.

83 *Ibid* at 611.

identified in *Broyles* examines the nature of the relationship between the undercover state agent and the accused and how such a relationship may have some connection with the elicitation of incriminating statements. For instance, the *Broyles* Court asks: "Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?"[84] These factors, particularly the first two, appear more apropos to situations resembling those in *Broyles*, where the undercover state agent was already a friend of the accused and had a pre-existing relationship.

In most reported decisions, such pre-existing relationships have not been the case. The undercover state agent tends to be a police officer who has no prior relationship before the commencement of the cell-plant operation. Yet, as subsequent trial court decisions and the SCNZ's judgment in *Kumar* examined below illustrate, courts have developed the jurisprudence to consider how even short-lived relationships forged in the confined quarters of a cell may nevertheless produce sufficient conditions in which to manufacture a meaningful rapport with an accused. The building of a relationship, however brief, can have a sufficient, if not strong causal link with the eliciting of incriminating statements. Examining such ephemeral relationships and the courts' treatment of them may be part of a successful litigation strategy to resist the Crown's attempt to admit incriminating statements into evidence.

Unlike *Hebert*, the SCC's decision in *Broyles* offered better guidance with respect to understanding active elicitation and state agency. Regarding active elicitation, the Court provided and examined excerpts from the conversation between Broyles and Ritter illustrating the way Ritter engaged in the functional equivalent of an interrogation. It concluded that "there is no question that parts of the conversation were functionally the equivalent of an interrogation."[85] Noticeably, these excerpts did not include Broyles's incriminating statement or Ritter's statements leading up to Broyles's admission, but they were illustrative of Ritter's approach to actively eliciting statements. Tied to the examination of active elicitation, the *Broyles* Court observed the impact of the relationship between Ritter and Broyles on the elicitation generally and when Ritter undermined the advice of Broyles's counsel to remain silent. The SCC posited, "Ritter did exploit the special characteristics of his relationship with the appellant to extract the statement. Ritter sought to exploit the appellant's trust in him as a friend to undermine the appellant's confidence in his lawyer's advice to remain silent and to create

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84 *Ibid.*

85 *Ibid* at 613.

a mental state in which the appellant was more likely to talk[.]"[86] Thus, what one may observe here is the breaking down of Broyles's resistance to maintain his choice not to speak with the police by asking questions to elicit an incriminating statement in tandem with Ritter exploiting his pre-existing relationship to achieve this goal.

While *Broyles* offers some level of guidance, the factual scenario here is distinctive in that the police deployed a friend of the accused to carry out its work. As mentioned above, investigators will typically insert an undercover officer who has no pre-existing relationship with an accused. The conversation and approach to elicitation may look different and be more subtle than that which is deployed by an untrained state agent. An undercover police officer in cell-plant contexts almost always does not have the benefit of a pre-existing relationship with the accused. However, given the nature and context of detention, this lack of a pre-existing relationship is not a necessity for engaging in active elicitation and furthermore in developing a type of impactful relationship in the detention milieu. This was illustrated in *Brown*.

As mentioned earlier, the SCC considered an appeal in *Brown* where the Court reversed the decision of the majority of the Alberta Court of Appeal, affirming the trial court's first-degree murder conviction of the accused.[87] In a very brief judgment, the SCC majority granted the appeal "substantially" for the reasons articulated by Justice Harradence, writing in dissent, who concluded that undercover police officers actively elicited incriminating statements from the accused.[88] The SCC offered no independent analysis of its own.[89] Notably, as in *Broyles*, the cell-plant operation and original trial took place prior to the SCC's judgment in *Hebert*.[90] By the time the Court of Appeal decided the matter in July 1992, the SCC had adjudicated both *Hebert* and *Broyles*. Applying the nature of the relationship and exchange factors articulated in *Broyles*, Justice Harradence concluded that two undercover officers had actively elicited incriminating statements from Brown.[91] The first undercover officer, "J", was the primary cell-plant who was housed with Brown for at least thirty hours following the latter's arrest.[92] The second undercover officer, "L", posed as J's spouse, who visited the accused in detention to elicit

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86 *Ibid* at 614.

87 *Brown* SCC, *supra* note 14.

88 *Ibid*.

89 Such decisions can be unsatisfying as the SCC does not give detailed reasons. For an article examining deeper issues concerning bench decisions, see Alex Bogach, Jeremy Opalsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 SCLR (2d) 251.

90 *R v Brown* (1992), 127 AR 89, 73 CCC (3d) 481 at 520 [*Brown ABCA*].

91 *Ibid* at 495.

92 *Ibid* at 523.

incriminating statements.[93] Justice Harradence determined that L's interactions with Brown were a continuation of what J had commenced, concluding that "the conversations with [L] were founded entirely upon what had previously gone on with [J]."[94]

Justice Harradence first tackled the nature of the relationship between Brown and Officer J. Although J was housed in the same cell with Brown for at least 30 hours and had no prior relationship with him, Justice Harradence asserted that the "creation of a relationship between the accused and the officers — particularly Officer [J] — is a critical element of the over-all scheme designed to obtain incriminating statements." Specifically, undercover Officer J did so in the following ways:

> [J] portrays the experienced criminal, who knows that the police must have strong evidence against the accused. He has been there. He has beaten the murder rap himself. Of course, as a "fellow criminal", [J] offers to help the accused in various ways. He has friends "outside" who can silence witnesses, hide evidence, or even "take the fall" for an appropriate fee. He conveys the ["us] versus the cops" attitude throughout his conversations with the accused. [J's] specific aim is to subvert the accused's clear will not to speak with any state authorities about the offence and he does this by developing a fictitious friendship with the accused — which friendship he then exploits by pressing the accused to speak about the offence.[95]

This passage has tremendous significance concerning the "nature of the relationship" jurisprudence. It recognizes that a fictitious relationship can be forged with an accused within a short span of time. As we shall see in subsequent decisions discussed below, cell-plants like J will present themselves as experienced criminals giving friendly advice, which will likely be well-received. Although the *Broyles* Court placed the nature of the relationship as the second group of factors, it is the nature of the relationship that can give an essential context to the nature of the exchange analysis.[96]

In turning to the nature of the exchange analysis, Justice Harradence posited that the "conversations with the accused were focused upon the accused and his alleged involvement in a murder."[97] In assessing the transcripts, he observed that the "exchanges provide an education in subtle but powerful elicitation techniques, beginning shortly after the accused was brought into the cell with [J]."[98] Such techniques included assertions that the police would not have charged Brown with murder unless he committed the

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93 *Ibid* at 503–504.
94 *Ibid.*
95 *Ibid* at 496.
96 *Ibid* at 501.
97 *Ibid.*
98 *Ibid.*

crime, as well as casting doubts about the integrity of Brown's lawyer.[99] What Justice Harradence describes as perhaps "the most offensive examples of elicitation" in the case involve exchanges where J proposed to Brown that a fictitious individual named "Raymond" would admit to the offence if Brown would provide for Raymond's family. For Raymond to successfully admit to the crime, Brown would have to provide details of the crime to make the confession more believable. On this technique, Justice Harradence opined, "I find it difficult to imagine any type of conduct which better illustrates the sort of 'elicitation' which Hebert made clear was unacceptable."[100]

While *Hebert*, *Broyles*, and *Brown* each concluded with determinations that the defendant's right to silence was infringed and the statements excluded, *Liew* provided an example where the SCC held that an undercover state agent did not actively elicit incriminating statements from the accused.[101] However, once again, the context provided an atypical presentation relative to most cell-plant operations. The state agent was a police officer who was part of an undercover drug operation that also involved the accused. When arrests were made, the undercover officer remained in character and was also seemingly arrested as part of the operation. The agent and accused were transported together to police headquarters. Although separated for some time upon arrival at headquarters, they were later placed in an interview room together, and they sat three feet apart. There the accused initiated the conversation and the Court concluded that the officer followed the natural flow of the conversation even though a question he asked elicited an incriminating statement. The Court posited that "the undercover officer did not direct the conversation in any manner that prompted, coaxed or cajoled the [accused] to respond."[102] Notably, trial courts in recent years have made explicit reference to this language of prompting, coaxing, and cajoling in connection with assessing active elicitation. With respect to the nature of the relationship, the Court determined that there was no "relationship of trust," no evidence that Liew was vulnerable or obligated to the undercover agent, nor did the agent manipulate Liew to bring about a mental state in which he was more likely to talk.[103] From one angle, it might be argued that the state

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99 *Ibid* at 501–503. In other cases, the diminishment of counsel or the advice of counsel, can serve as a basis for finding a violation of the right to counsel under section10(b). See e.g., *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7; *R v Dussault*, 2022 SCC 16.

100 *Brown ABCA*, *supra* note 90 at 503. Notably, this "Raymond" scenario discussed in *Brown* strongly resembles techniques employed in some Mr. Big undercover operations. See e.g., *R v Mentuck*, 2000 MBQB 155 at para 90.

101 *Liew*, *supra* note 9.

102 *Ibid* at para 51.

103 *Ibid* at para 52.

agent did little to subvert Liew's right to silence since the elicitation was not "active." However, at a more basic level, if one is unaware that the person with whom they are speaking is a state agent, that lack of knowledge affects the decision to speak. Here the undercover officer appeared to be arrested and involved in the very operation through which Liew was also arrested. While there may not have been much of a relationship to speak of, there was a decision to place the two together, which may prompt someone in Liew's situation to speak to someone in similar circumstances about their shared jeopardy.

As mentioned above, notwithstanding the Court's conclusion on the facts in *Liew*, it nevertheless clarified that the right to silence does not require the existence of an atmosphere of oppression to coincide with the active elicitation of incriminating statements.[104] In addition, an accused need not invoke their right to silence before statements are actively elicited in order to benefit from the protection.[105] If one sees the right to silence as a means of protecting an individual's right to resist compelled disclosure of incriminating statements to the state, then these were important clarifications. Undercover state agents can counter an accused's ability to remain silent in contexts where there is no (additional) atmosphere of oppression beyond the fact of custody and loss of liberty itself. Indeed, as the United States Supreme Court expressed in a cell-plant case decided under the Sixth Amendment right to counsel, "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."[106]

Following *Liew*, the SCC has not directly considered the *Charter* right to silence in connection with cell-plant operations. In *R v Singh*, a 2007 decision, the SCC clarified that the *Charter* right to silence does not mandate the police to cease questioning in the context of a non-undercover custodial interrogation. Since the accused is aware that they are speaking to a person in authority, any purported claim that the right to silence has been infringed becomes effectively subsumed within the confessions rule analysis.[107] However, where the right to silence continues to retain its

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104 *Ibid* at para 37.

105 *Ibid* at para 44.

106 *Henry*, *supra* note 4 at 274.

107 *Singh*, *supra* note 44 at para 39 (stating: "the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances, the two tests are functionally equivalent" at para 39).

independent quality is in connection with cell-plant interrogations where the confessions rule has no application as set out in *Rothman*.[108]

The SCC's cell-plant jurisprudence offered some important guidance with respect to the scope of the right to silence. However, there were limitations to this jurisprudence given the factual peculiarities of the *Broyles* and *Liew* decisions. These were not decisions that involved typical cell-plant operations where an undercover police officer was placed in a cell with the accused. In *Broyles*, the accused and cell-plant had a pre-existing friendship, which does not normally exist between an accused and the cell-plant. In *Hebert*, there was very little information discussed regarding the conduct of the undercover agent apart from labelling it as a form of "active elicitation." In addition, the Court's analysis neglects to consider how the context of carceral environments may play a role in eliciting incriminating statements, and accordingly, an understanding of what constitutes "active" elicitation may have to be calibrated to account for an individual's vulnerabilities. *Brown* was arguably the most important of the SCC's cell-plant decisions since the case involved the factors developed in *Broyles* and were applied to a more typical cell-plant operation. However, since the SCC relied substantially on the dissenting opinion of Justice Harradence and did not undertake its own analysis within the body of its decision, the case has been overlooked by many subsequent courts. Accordingly, with respect to the *Charter* right to silence, there was significant room to develop the jurisprudence of this entitlement. Many accused and their lawyers would subsequently mount challenges to the admission of incriminating statements procured through cell-plant operations launched against them. I address this jurisprudence below.

## V. Cell-Plant Jurisprudence and Active Elicitation

The SCC's jurisprudence regarding the *Charter* right to silence did not eliminate cell-plant operations. Instead, the Court placed restrictions on how the police could elicit incriminating statements. With the various deployments of these surreptitious tactics, the accused and their counsel would launch *Charter* applications resisting the Crown's use of the incriminating statements at trial. Due to these litigation maneuvers, trial court judges have not only concluded that police actors violated the right to silence of various accused but have expanded on the jurisprudence the SCC constructed in the 1990s. The courts have identified various facts that have led to their findings of unconstitutional police behaviour. Accordingly, in

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[108] *Ibid* at para 40.

this part, I examine how lower courts have concluded that undercover police officers have infringed an accused's *Charter* right to silence and, as per section 24(2), that the inclusion of the evidence would bring the administration of justice into disrepute.

In evaluating such decisions, I shall focus on how these judges concluded that state actors elicited incriminating statements in violation of an accused's right to silence, with an emphasis on the ways that they have developed the jurisprudence surrounding the concept of active elicitation with respect to the right to silence. Studying this jurisprudence is crucial to the success of future litigation that seeks to resist the efforts of prosecutors to admit evidence obtained through cell-plant operations. As opposed to relying primarily on broad, abstract principles, the devil is truly in the details in these cases, as it is the factual circumstances upon which these decisions are made.

To recall, the notion of active elicitation involves a consideration of two constellations of factors: the nature of the exchange; and the nature of the relationship between the accused and the undercover police officer(s). In addition, I discuss how such courts provide information about the way cell-plant operations are conducted. This information includes how officers are prepared prior to their insertion and interactions with an accused, as well as the ways that undercover officers stimulate conversations and build rapport. All of these techniques work to undermine an accused's ability to resist disclosing incriminating information to the police. Thus, it is important to consider how judges have upheld an accused's right to silence by assessing the state actors' tactics in violating the right. In affirming the right to silence, courts sustain an accused's right to resist cooperation with the state's investigation and its efforts to undermine their choice not to disclose information.

As noted earlier, I focus on Canadian trial court decisions at the superior court level that have evaluated *Charter* right to silence claims. This is unsurprising since many cell-plant operations have been deployed where serious crimes, such as murder, are at issue. Notably, the adjudication of murder is within the exclusive jurisdiction of the superior courts.[109] However, I shall also be analyzing a key decision of the SCNZ in *R v Kumar*,[110] which has adopted the SCC's legal test derived from *Hebert*, *Broyles* and *Liew*. Although the operative source of law in New Zealand is human rights legislation (i.e., the *New Zealand Bill of Rights Act*), as opposed to a constitutional right, the fact that the SCNZ has employed SCC's framework so substantially makes its analysis worthy of consideration.

Overall, it is noteworthy that in all of the cases examined below, the courts held that the accused's right to silence was violated and excluded the evidence.

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109 *Criminal Code*, RSC 1985 c C-46, s 469.

110 *Kumar*, *supra* note 19.

Yet, despite the loss of the incriminating statements and unless otherwise indicated, the prosecuting authorities were nevertheless able to obtain convictions based on other incriminating evidence. Thus, the cell-plant operations and ensuing violations of the defendants' right to silence were not pivotal to securing convictions. Consequently, these tactics are arguably of limited utility.

## A. Spatial and Temporal Considerations

Cell-plant interrogations occur in a particular context – state-controlled detention facilities. In resisting the prosecution's intended use of cell-plant statements, the accused and their counsel might strongly consider addressing how these physical spaces affect both the nature of the exchanges and the relationships between the accused and undercover police officers. The spatial and temporal aspects of such confinement augment the adversities that an accused faces when attempting to remain silent in a cell-plant scenario.[111] At the direction of state actors, an accused is confined with another person in close proximity, and they are unable to leave. The close quarters make it a substantial challenge for an accused to maintain their silence, especially when someone is attempting to converse with them. Temporally, an accused is unaware of how long their confinement with this new cellmate will last. Thus, persisting in silence and refusing to answer questions can be awkward and uncomfortable at the very least, in addition to being difficult to maintain for an extended period. As discussed in Part III, persistent silence breaches a social norm of turn-taking. Indeed, remaining silent may be viewed as antagonistic and disrespectful in a context where such behaviour may elicit an aggressive response. Where the undercover operator is actively engaging a detainee and directing the conversation toward a particular subject matter, the more an accused must exercise their agency to refuse to speak. When the undercover agent is presented to the accused as a fellow inmate and a potentially dangerous one with an established criminal record, this will likely diminish their firmness to remain silent for fear of appearing rude and possibly angering their cellmate. During their time together, a relationship may be forged, either out of fear or desire to diminish their anxiety, or both.

To varying degrees, several courts have noted the significance of these spatial environments and their relevance to cell-plant interrogations.[112]

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111 While an accused may not be aware that they are speaking to a cell-plant, they may be nevertheless reluctant to speak to a stranger.

112 *R v Connors*, 2006 NLTD 61 at paras 32–33 [*Connors*]; *R v Skinner*, 2017 ONSC 2115 at para 40 [*Skinner*]; *R v Whynder*, 2019 NSSC 156 at paras 21, 28 [*Whynder*]; *Kumar*, *supra* note 19 at para 20.

More frequently, cell-plant interrogations occur in very close quarters, thereby creating an environment which makes it exceedingly difficult to avoid conversations or some form of verbal interaction. In some cases, as in *R v Whynder*, an accused may even be eager to converse with another human being to break the monotony and relieve the anxiety of being in captivity.[113] This impulse to talk or the inability to resist conversation by a cell-plant is heightened when detention cells are brightly or constantly lit and may be outfitted with few, if any, distractions such as television sets, books, crossword puzzles, or playing cards.[114] In the context of a cell-plant operation, at least, the cells are set up to do little else but speak with one's cellmate, sleep, or attend to one's bodily functions. Maintaining silence in such settings likely becomes extremely trying for most individuals. As the court in *Whynder* observed, "[i]t is clear that the scenario set up by the undercover operators and the nature and extent of the double bunking custodial arrangement, made Mr. Whynder more susceptible to engaging in conversation with Cst. M. This must be borne in mind as we examine the nature of the discussions between them."[115] Even in circumstances where an accused is reluctant to speak, undercover police officers will often exploit this difficulty to maintain silence when housed in a closed space to draw detainees out to make incriminating statements. In *R v Connors*,[116] the undercover officer testified as follows during a voir dire in connection with assessing the admissibility of a cell-plant confession: "You are in a little confined area. There's got to be conversation. It's just not natural."[117] According to the undercover officer, for him to maintain silence in such tight quarters would be very uncomfortable for both him and the accused.[118]

In many cases, a single undercover officer is housed in a cell with the accused. Such quarters are already compact with two individuals lodged

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113 In *Whynder*, the accused was arrested for murder. The court concluded that the cell-plant actively elicited incriminating statements in violation of Whynder's right to silence and excluded the statements under section24(2) of the *Charter*. However, due to other evidence including other admissions by Whynder and circumstantial evidence, a jury found him guilty of second-degree murder. The Nova Scotia Court of Appeal reversed due to other reasons and sent the matter back for retrial. See *Whynder*, *supra* note 112 at paras 60–63; *R v Whynder*, 2020 NSCA 77.

114 *Whynder*, *supra* note 112 at paras 21, 24–27; *Connors*, *supra* note 112 at para 32.

115 *Whynder*, *supra* note 112 at para 29.

116 Connors was charged and ultimately convicted by a jury for first-degree murder, attempted murder, and robbery. Another individual was tried separately. The jury was presented with evidence of statements made during private conversations with non-state actors and other circumstantial evidence. The Newfoundland and Labrador Court of Appeal dismissed his appeal. *R v Connors*, 2006 NLTD 70; *R v Connors*, 2007 NLCA 55.

117 *Connors*, *supra* note 112 at para 48 [emphasis in original].

118 *Ibid.*

together. In some circumstances, two officers are deployed simultaneously. This heightens the already asymmetrical power dynamics between the state and the accused within confined spaces. In *R v Kumar*, two undercover officers were placed in the same cell with the accused.[119] The SCNZ observed: "The cell had two tables on one wall with bench seats on either side, with room for two people on each bench."[120] Power imbalances may be present even when either or both state agents are not housed in the same cell with the accused. In *R v Skinner*, the accused was placed in his own cell with undercover officers placed in adjacent cells on either side of the accused's.[121] The officers engaged in conversation with each other and Skinner. The court noted this context and its impact:

> While not having to share a holding cell, Mr Skinner nevertheless was situated between an undercover officer in each adjacent cell. In the result, Mr Skinner could not physically retreat very far from conversations with or between the undercover officers, or distance himself more than 6-12 feet from either undercover officer, (depending on where that particular officer was located within that officer's own holding cell), and moving away from one undercover officer would simply bring Mr Skinner into closer proximity with the other.[122]

Whether cell-plant operations involve one or two undercover officers surreptitiously interrogating a detained suspect, the spatial and temporal contexts make an accused more susceptible to their interrogation techniques. This context alone can contribute greatly to breaking down an accused's resolve and ability to maintain their refusal to speak about their alleged crimes. However, it is not only the space and time in which detainees are housed with undercover state agents that play a role in undermining the right to silence. Additionally, the preparation and experience of the undercover officers also increase the asymmetrical power dynamics between the state agents and the accused. I turn to these next.

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119 Kumar was charged with murder along with a co-accused. The victim had been burnt alive after being doused with gasoline. Although Kumar's incriminating statements to undercover agents planted in his cell were excluded from evidence by the trial court, and the SCNZ affirmed this, he and his co-accused were nevertheless found guilty by a jury based on circumstantial evidence. His appeal regarding his conviction was dismissed by the SCNZ. See *Shivneel Shahil Kumar v R*, [2016] NZCA 329; *Shivneel Shahil Kumar v R*, [2016] NZSC 147.

120 *Kumar*, *supra* note 19 at 20.

121 In *Skinner*, the accused was suspected of murdering a one-year-old child in 1994. The matter was a cold case. After the court concluded that the cell-plants actively elicited incriminating statements from the accused in violation of his right to silence, it excluded the evidence under section 24(2). Although a trial had been scheduled, there is no information that any trial occurred. Given that the matter was a cold case, it would seem that the only evidence available would have been the excluded statements.

122 *Skinner*, *supra* note 112 at para 40.

## B. Asymmetries of Power – Pre-Operation Preparation and Officer Experience

Unlike the SCC's trilogy in the 1990s, the trial court decisions under review provide more information about the preparation undercover officers undertake in advance of a cell-plant operation and their prior experience with such roles. Although this is seemingly background information, it offers a further understanding concerning the power disparities and environments in which cell-plant interrogations operate. In many cases, undercover officers are supervised by a handler with whom they consult and develop strategies and modifications to the operation's plan as needed.

In various cases, courts address the fact that cell-plants are provided a briefing sheet that supplies certain information about the accused and the information sought. The quantum of information provided to a cell-plant can vary along a spectrum. In some instances, handlers may furnish cell-plants with limited information. For example, in *R v Leung*, the police suspected that the accused was responsible for the deaths of her two infant children.[123] In the undercover officer's briefing sheet, she was instructed "[t]o seek the truth about the involvement, if any, of Sarah Leung in an incident that took place on or about April 2, 2009 and March 7, 2010 in the City of Vancouver" and "identify any co-conspirators or as yet un-identified witnesses who may have participated in or have knowledge about the above incident."[124] Similarly, in *R v Deboo*,[125] the "fact sheet contained limited information about Mr. Deboo's arrest and the overall objective of the undercover operation. That objective was 'to determine Deboo's knowledge and/or involvement, if any, in the Howsen homicide.'"[126] In the examples provided, the accused are clearly identified; however, the briefing sheet varied in degrees of detail. In *Leung*, the cell-plant was not initially

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123 Leung was charged with the murder of her two infant children. Although the trial court concluded that the accused's incriminating statements were actively elicited in breach of her *Charter* right to silence, the accused was found guilty of infanticide with respect to both children. The evidence to convict included incriminating statements she made during formal questioning which was admissible under the common law confessions rule. *R v Leung*, 2013 BCSC 1229; *R v Leung*, 2014 BCSC 1894.

124 *R v Leung*, 2013 BCSC 1230 at para 6 [*Leung*].

125 In *Deboo*, the accused was charged and convicted by a jury of first-degree murder. The British Columbia Court of Appeal affirmed the conviction. The trial court found that the cell-plant actively elicited incriminating statements from the accused in violation of his *Charter* right to silence and excluded the evidence under section 24(2). Nevertheless, the jury heard other evidence, which included that Deboo admitted to a police officer during formal questioning to murdering the victim. The admission was admitted under the common law confessions rule. See *Deboo*, *supra* note 16; *R v Deboo*, 2014 BCSC 1949; *R v Deboo*, 2014 BCSC 1305; *R v Deboo*, 2016 BCCA 62.

126 *Deboo*, *supra* note 16 at para 12.

informed about the nature of the incident(s) (i.e., that it involved homicide), though she was advised of the possible dates on which incidents occurred and where they occurred. In *Deboo*, the undercover officer was informed that the case involved homicide and identified a particular victim.

In other cases, undercover officers may be provided with more substantial information, which might capture the court's attention and criticism, however slight. In *R v Quigley*, the undercover officer was advised that the victim was found dead in her home.[127] Evidence at the scene caused the police to believe the death was suspicious and that she had been murdered. The briefing sheet then noted that Quigley was "the recently estranged boyfriend/fiancée of" the victim.[128] Regarding the information provided in the briefing sheet, the court observed, "in my view, [the briefing sheet] revealed too much to the undercover officer."[129] Although the court did not specify what particular information provided in the briefing sheet crossed the line, it was possibly identifying Quigley as the estranged boyfriend or fiancé of the victim. Notably, in contrast to *Leung*, the briefing sheets in *Deboo* and *Quigley* both highlighted that the offences were connected to homicide. In *Kumar*, decided by the SCNZ, the Court noted that the two undercover police officers placed in Kumar's cell were provided with the following information: "personal information about Mr Kumar, his criminal history, associated persons and vehicles and details of his interests, social activities and such like."[130] There does not appear to be any attempt to limit the information provided to the cell-plants or criticism about the extent of the information provided to the cell-plants.

From these few examples, what one can perceive are a range of different approaches to briefing undercover officers regarding the information supplied about the target of the cell-plant operation. This raises a question: what may be the rationale for limiting the information provided about the accused and the crime for which the operation was launched? Notionally, it

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127 Quigley was charged with the second-degree murder of his fiancée. The trial court found that the cell-plant actively elicited incriminating statements from the accused in violation of his *Charter* right to silence and excluded the evidence under section24(2). During the trial and following the Crown's final witness, Quigley offer the Crown to plead guilty to manslaughter, which it accepted. During the sentencing decision, the court pointed out that the accused had an addiction to crack cocaine and suffered from mental health issues. His membership in the Okanagan Indian Band was also acknowledged. The court's decision regarding the accused's statements that were actively elicited in violation of the right to silence included no reference to the accused's ostensible First Nations status or mental health issues. *R v Quigley*, 2016 BCSC 2184; *Quigley*, *supra* note 16.

128 *Quigley*, *supra* note 16 at para 9.

129 *Ibid*.

130 *Kumar*, *supra* note 19 at para 16.

is so that the undercover officers do not direct the conversations, consciously or otherwise, to subjects about which they seek answers.[131] Conversations with the accused impermissibly transgress into the realm of active elicitation when it becomes the functional equivalent of an interrogation and where state agents fail to follow the natural flow of the conversation. Being supplied with too much information may tempt cell-plants to direct the conversation to specific areas. While limiting such information would appear to be a helpful strategy to mitigate against such dangers, an inquisitive and overzealous undercover officer may still actively elicit incriminating statements and redirect conversations to areas of interest. This was certainly the case in *Leung*, where the cell-plant was given limited information.

The asymmetrical power relationships between accused individuals and cell-plants are not only influenced by the information provided in the briefing sheet. It is also heightened by the degree of experience possessed by the cell-plants. The information provided in several reported decisions suggests that many of the undercover police officers were very experienced. Conversely, some accused were inexperienced with the criminal justice system and being incarcerated, thus heightening the power imbalance. In *R v Connors*, the undercover officer was a sergeant with 33 years of experience working in the RCMP and 27 years specifically in connection with undercover operations. Part of this experience involved establishing and coordinating cell-plant operations. The sergeant specifically constructed the role of someone charged with a lesser crime (someone involved in drug trafficking) than that of someone who he is investigating so as to not intimidate the accused. Connors was suspected of committing murder, attempted murder, arson, and robbery. In several other instances, courts may not specify a cell-plant's length of service on the force generally or as an undercover operator, but judges may nevertheless posit that a cell-plant is an experienced undercover agent.[132] While such experiences may vary, it nevertheless indicates some level of expertise in playing a role that places them at a heightened advantage vis-à-vis an accused (who is already at a disadvantage due to being in detention).

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131 *Deboo*, *supra* note 16 at para 13 (stating, "Consistent with his training and standard police practice, Cst. A was not told about the details of the Howson murder investigation. The goal of this practice is to avoid leading questions or direction in a cell plant exchange" at para 13).

132 *R v Tse*, 2008 BCSC 1421 at paras 20–21 [*Tse*]; *Deboo*, *supra* note 16 at para 11; *Skinner*, *supra* note 112 at para 21; *Whynder*, *supra* note 112 at paras 2–4. In *Skinner*, the court noted that the two cell-plants had special training in undercover operations, including rapport building. *Skinner*, *supra* note 112 at para 21.

Having established a series of contextual factors with which to consider cell-plant interrogations and the power imbalance, I next turn to how a cell-plant(s) may exploit their dominant power to develop a relationship with an accused.

## C. Nature of the Relationship

One of the two main series of factors for determining whether an undercover police officer has actively elicited incriminating statements is the nature of the relationship between the accused and the state agent(s). When resisting the prosecution's intended use of incriminating statements procured through cell-plant operations, accused persons and their counsel should seek to identify whether and how undercover officers built temporary and situational relationships with the targets. As explained earlier, the SCC first formulated and considered this factor in *Broyles* due to the pre-existing friendship between the accused and the state agent, who was the former's friend. On the face of it, this factor seems most relevant in situations like *Broyles* but seemingly irrelevant in other standard cell-plant operations.

In most cell-plant cases, an accused and a cell-plant meet for the first time in a detention cell or facility – as was the case in *Hebert* and *Brown*. There is no pre-existing relationship, especially where the cell-plant is a police officer. Indeed, this line of thinking was followed by the trial judge in *R v Pickton*.[133] In concluding that there was no relationship of trust between the accused and the cell-plant who met for the first time in the cell, the court observed: "It seems to me that when the authorities speak of a relationship of trust in this context, they are generally referring to a relationship of a more enduring quality than the transient camaraderie between two people sharing a cell."[134] The *Pickton* court distinguished the facts of the case before it and that of *Broyles*, as well as *R v Jackson*, an Ontario Court of Appeal decision.[135] In the latter, a female undercover police officer, masquerading as a student researcher, cultivated a romantic relationship with the accused detainee over a six-month period through various visits.[136] In *Pickton*, the connection between the accused and the cell-plant "was not a relationship cultivated over a sustained period of time."[137] Nevertheless, the trial judge posited,

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133 *R v Pickton*, 2006 BCSC 995 [*Pickton*].
134 *Ibid* at para 325.
135 *Ibid*.
136 *R v Jackson* (1991), 68 CCC (3d) 385, 9 CR (4th) 57.
137 *Pickton*, *supra* note 133 at para 326.

> The undercover officer deliberately and skilfully attempted to foster a bond or rapport with Mr. Pickton; it would have been surprising had he not. He was reasonably successful in that endeavour. To my mind, that cannot be improper. In my view, a concern under this head would arise where this has occurred in such a way that the detainee has been unfairly or improperly manipulated, whether because o[f] his vulnerabilities or otherwise, so that his autonomy is undermined. That did not occur here.[138]

Taken as a whole, the court's conclusion focuses on the brevity of the relationship, in comparison to *Broyles* and *Jackson*, even where an undercover officer is successful in fostering a bond or rapport with an accused.

In contrast to the trial court in *Pickton*, various Canadian trial courts and the SCNZ have developed the jurisprudence regarding the nature of the relationship factor beyond the limited factual circumstances found in cases like *Broyles*.[139] Specifically, these courts have recognized that a sufficiently significant rapport can be established, which contributes to a determination that state actors actively elicited incriminating statements from an accused, absent a pre-existing or long-term relationship. While it is fair to say that the main focus of the active elicitation inquiry will often prioritize the nature of the exchange, such conversations occur in a relational context which may certainly affect the conversations between a cell-plant(s) and an accused. In many cases, it might be said that the statements made by cell-plants to forge a connection with the accused also play a role in the nature of the exchange analysis. Nonetheless, this section addresses some of the main themes arising from the jurisprudence regarding the nature of the relationship and the ways in which undercover officers establish a rapport with suspects and create "situational and temporary" relationships. It is likely safe to conclude that cell-plants will employ a combination of different techniques to establish rapport which in turn facilitate effective strategies to elicit incriminating statements and undermine an accused's will to remain silent vis-à-vis the state.

One key method to establish a relationship between the accused and the cell-plant(s) is to manufacture certain shared commonalities. In addition to both being ostensibly confined in a detention facility for an alleged crime, a cover story may be created where the cell-plant has committed a crime that is similar to or parallels the circumstances of the accused in some

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138 *Ibid* at para 327.

139 Though, as discussed above, the *Brown* case illustrated early on how a relationship could be developed between an accused and an undercover police officer. However, these facts were not apparent in the body of the SCC's decision since the Court simply referred back to the dissenting opinion of Justice Harradence at the Alberta Court of Appeal. See *Brown* SCC, *supra* note 14; *Brown* ABCA, *supra* note 90.

meaningful way. This may assist in forging a relationship between the inmates. For example, in *R v Leung*, the accused was suspected of killing her two infants, one in 2009 and the second in 2010.[140] The cell-plant was briefed that her cover story included her causing injuries to her niece due to drinking and driving.[141] When the cell-plant first attempted to engage Leung in conversation, the latter was not forthcoming. In consultation with her handler, the undercover officer's narrative was revised to foster a rapport with Leung by conveying to her that the cell-plant's niece died.[142] Ultimately, the cell-plant was supposed to portray someone involved in a tragedy resulting from a mistake.[143] Leung began to open up only after the undercover officer returned to the cell appearing distraught and proclaiming that she would never get out of jail. This stimulation (or "stim") tactic succeeded. It broke the ice and made Leung more willing to converse. After the cell-plant's dramatic re-entry, Leung inquired about the reasons for her inmate's statements. The cell-plant then revealed that due to her error, her niece was killed. This opened the door to Leung discussing her circumstances.

The tactics employed in *Leung* similarly paved the way to further conversation and active elicitation in *R v Quigley*. In that case, the accused was suspected of murdering his fiancée.[144] As in *Leung*, the accused was at first minimally responsive to the cell-plant's attempts to engage in conversation. In consultation with his handler, a police officer entered the cell to arrest the cell-plant for domestic assault in Quigley's presence.[145] This manufactured charge, the court observed, was "chosen for its possible parallels to what the undercover officer knew about the nature of the offence charged against Mr. Quigley...."[146] In both *Leung* and *Quigley*, the accused were rather tight-lipped and did not initially engage with their undercover cell-mates until such "stims" were instituted. However effective, there are other ways to forge commonalities between a cell-plant and an accused, as illustrated below.

Police officers may exploit personal characteristics such as race, ethnicity, gender, age, language, and/or cultural identifiers to help develop a situational and temporary relationship between a cell-plant and an accused. For instance, in *Kumar*, the accused was an eighteen-year-old of

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140 *Leung*, *supra* note 124 at para 1.
141 *Ibid* at para 7.
142 *Ibid* at para 8.
143 *Ibid*.
144 *Quigley*, *supra* note 16 at para 1.
145 *Ibid* at para 9.
146 *Ibid*.

East Indian descent.[147] One of the two racialized officers was also of East Indian origin and appeared to be around the age of 25.[148] In tandem with other considerations, the SCNZ observed that "the fact that one of the officers was a young Indian man [...] must have been designed to enable the officers to build a rapport or relationship with Mr Kumar by making him feel comfortable, thus enabling them to engage him in conversation more easily and facilitating his giving of information."[149] Here, ethnicity, gender, and age likely played a substantial and combined role in the rapport-building process. Similarly, in *Leung*, the cell-plant shared similar cultural characteristics with the accused; both were racialized women of Chinese descent who spoke Cantonese.[150] The court posited: "The cell-plant mentioned speaking Cantonese and her parents' traditional attitudes in order to build rapport with Ms. Leung."[151] In addition, the cell-plant was older and knew that she could leverage the inherent respect that comes from this age difference within this specific cultural and relational context.[152] In combination with the fact that the cell-plant made Leung aware that she too was in custody because of a tragic and accidental mistake relating to a family member, these tactics were successful. Due to such efforts, the court found that "a relationship, temporary and situational, was established."[153]

Cultural factors are not only relevant to establishing connections with a racialized accused. Regional identities within Canada may also play a role in contributing to the building of these temporary and situational relationships. In *Garnier*, the accused disclosed that he is from Cape Breton, while the cell-plant revealed that he is from neighbouring Newfoundland.[154] The cell-plant in select instances sought to draw attention to their common cultural and regional connections: "I'm from fucking Newfoundland, you're

147 *Kumar*, *supra* note 19 at paras 18, 66.
148 *Ibid* at para 15.
149 *Ibid* at para 66.
150 *Leung*, *supra* note 124 at para 72.
151 *Ibid*.
152 *Ibid*.
153 *Ibid*.
154 *R v Garnier*, 2017 NSSC 340 at para 22 [*Garnier*]. Garnier was charged with the second-degree murder of an off-duty police officer and improper interference with the officer's remains. The court concluded that the cell-plant actively elicited incriminating statements from the accused in breach of his *Charter* right to silence and excluded the evidence under section 24(2). Although further incriminating statements were excluded under other constitutional and common law norms, other incriminating statements were properly procured and admitted under the common law confessions rule. The jury convicted the accused for the crimes charged. The Nova Scotia Court of Appeal affirmed the sentence and admission of the incriminating statements that the trial court allowed. *R v Garnier*, 2020 NSCA 52.

from fucking Cape Breton, right? You probably still have the fucking trigger fucking temper on you too, do you?"[155] Later in the conversation, the cell-plant stated, "[y]ou seem like a fucking solidguy [sic], man. I worked Cape Bretoners, man, they're basically the fucking same as Newfoundlanders, right?"[156]

In some instances, law enforcement officials may try to prime an accused to be favourably predisposed to the cell-plant before they even meet. In staged events called "bumps"[157] or "takedowns,"[158] police officers arrest the cell-plant in plain view of the accused as the latter is being transported to the detention facility. Witnessing this event implants a connection in the accused's mind about the cell-plant, establishing the latter's credibility as a criminal. Not unlike a "stim" discussed above, a bump or takedown also creates a subject about which both can discuss when they eventually meet in the cell. This type of setup occurred in *Tse* and *Garnier*. In *Tse*, the accused, Nhan Trong Ly, was one of several defendants charged with kidnapping, unlawful confinement, extortion, and assault.[159] Following Ly's arrest, and while he was being transported to an RCMP detachment, he witnessed the cell-plant being dramatically arrested at a gas station. The cell-plant would later testify that Ly "recognized him from the 'bump' and laughed about the attitude [the cell- plant] displayed toward the police while being arrested."[160] As the court would note with respect to the nature of the relationship, through the bump, "the police set the tone of the intended relationship between [the cell-plant] and Ly at its very beginning[.]"[161] A similar technique was employed in *Garnier*, though the court made no mention of its significance in its decision to conclude a breach of the right to silence and exclude the evidence.

Another way in which undercover officers may build a relationship to thwart an accused's ability to remain silent is to play the role of an experienced criminal and insider, lending a sympathetic ear in addition to advice to someone less experienced. In such cases, the asymmetrical quality of the relationship is further augmented. As introduced previously, in

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155 *Garnier*, *supra* note 154 at para 25.

156 *Ibid* at para 26.

157 *Tse*, *supra* note 132 at paras 23–24.

158 *Garnier*, *supra* note 154 at para 11.

159 The court concluded that the cell-plant actively elicited incriminating statements from the accused in violation of the *Charter* right to silence and excluded the evidence under section 24(2). However, based on other evidence, the trial judge sitting without a jury found the accused guilty of various offences and the judgment was upheld by the British Columbia Court of Appeal. *Tse*, *supra* note 132; *R v Ly*, 2013 BCCA 122.

160 *Tse*, *supra* note 132 at para 24.

161 *Ibid* at para 118.

*Connors*, the cell-plant had significant experience in undercover interrogations. The court observed how the cell-plant did his best to "inveigle Mr. Connors to confide in him, implying that talking about the incident might be helpful to him and that he, as an 'insider,' was a potential confidante."[162] For example, the court highlighted certain portions, among others (emphasis in original):[163]

> U/C: Yeah. You know, there's always, it's like everything else, aye? (Unintel). Your mind's all fucked up when you're in here. I don't care how they says that you're not, right?
> Connors: Ummh.
> U/C: (Unintel) sometime, it will always good [sic] to have someone to fuckin' talk to inside, you know (unintel).

The court then explained, "I have underlined portions in the preceding excerpts for two reasons: to emphasize them; and because the comments emphasized seem to imply that Mr. Connors would be better off talking to an insider [...] than anyone else, including Mr. Connors' counsel."[164] The court further observed these types of exchanges occurred during an earlier stage of the operation marking a developmental phase. Having established the relationship, the cell-plant directed conversations the following month when eliciting incriminating statements.

The attempt to gain an accused's trust is an important part of building a relationship between the cell-plant and their target, however temporary and situational. This may go beyond lending a sympathetic ear and extend to offering more significant assistance. In *Kumar*, the SCNZ noted several ways that the two cell-plants housed with the accused in a small cell attempted to gain the accused's trust. For example, they would advise Kumar to be quiet whenever a police officer was close to their cell, thus seeking to limit the possibility of their conversation being overheard by state actors.[165] As older individuals, the cell-plants also offered to obtain a lawyer for Kumar (while undermining his counsel at the time).[166] They also offered to assist Kumar in leaving the country should he be released on bail and to organize lucrative employment for him.[167] While these are arguably significant forms of assistance for any number of accused, they would likely

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162 *Connors*, *supra* note 112 at para 64.
163 *Ibid.*
164 *Ibid* at para 65.
165 *Kumar*, *supra* note 19 at para 64.
166 *Ibid* at paras 64.
167 *Ibid* at para 64.

leave a significant impression on a young person such as Kumar, who, as the SCNZ observed, was in a stressful situation.[168]

In other circumstances, a cell-plant portraying a hardened and experienced criminal may instill sufficient fear into an accused, prompting the latter to bond with them. In *Garnier*, the cell-plant counselled the accused, an individual who was inexperienced with the criminal justice system, to watch how he spoke and carried himself lest he attract unwanted attention and hostility.[169] The following is an excerpt from *Garnier* illustrating this:[170]

> U/C OPERATOR: [...] But a fucking word of advice, man, like I said, I've been around and fucking, that's what I've been told too, and it seemed to work out fucking in my favour, right? Just fucking keep your fucking chin up, you know, and just fucking go with it.
> MR. GARNIER: Yeah.
> U/C OPERATOR: Know whatI mean [sic]? You got guys overthere [sic], fucking, first guys coming in, they think they're fucking hood smart, shit like that, running their fucking mouth, and then the next thingthey're [sic] fucked. It's fucking, you know, (unintelligible) fucking happen to him, right? He's going to fucking run his mouth with the fucking wrong person.
> MR. GARNIER: Yeah.
> U/C OPERATOR: That's it. You learn the fucking hard way. At least it's fucking good, like, I had someone fucking telling me, right, like, you know.
> MR. GARNIER: Yeah.
> U/C OPERATOR: But like I said, we all make fucking mistakes, right, and you learn the fucking hard way a lot of fucking times too, right?

If such advice about how to speak and present oneself was not enough, the cell-plant conveyed to the accused the possibility of the latter being transferred into a new facility late at night.[171] In so doing, the accused would awaken other inmates and infuriate them. The cell-plant advised the accused to make friends with others from Cape Breton and Newfoundland.[172] He added that he could try and arrange to be housed in the same facility and block as the accused: "I'll tell you, man, what I'll do, you go first and I'll see if I can – when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking – we want the fucking same block."[173] In considering these efforts, the court concluded, "[the] undercover operator was clearly trying to scare Mr. Garnier into quickly

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168 *Ibid* at para 66.
169 *Garnier*, *supra* note 154 at para 32.
170 *Ibid*.
171 *Ibid* at para 31.
172 *Ibid*.
173 *Ibid* at para 29.

bonding with him. He was trying to use this fear tactic to intimidate Mr. Garnier into speaking with him."[174]

Cell-plants may develop a relationship by virtue of an accused's desperation to speak with someone or otherwise pass the time to cope with their circumstances. In *Whynder*, the accused expressed his frustration about the limited options available to him and the cell-plant. At one stage, he complained: "Fucking no books, no fucking cards, just the walls and your thoughts."[175] Whynder would proceed to say to the cell-plant: "I am happy they double bunked me with you man cause if I (unintelligible) by myself, my mind would be just fucking racing and racing like... fucking seven days, six days sitting here."[176] Given Whynder's desperation to speak to relieve the circumstances and boredom of confinement, the court concluded, "[i]t is clear that the scenario set up by the undercover operators and the nature and extent of the double bunking custodial arrangement, made Mr. Whynder more susceptible to engaging in conversation with Cst. M. This must be borne in mind as we examine the nature of the discussions between them."[177]

An individual's sense of isolation and search for someone to diminish that feeling attached to confinement is accentuated when an accused has some heightened vulnerability.[178] In *Skinner*, the accused was a drug addict who suffered from schizoaffective disorder.[179] After his arrest, he was not brought to court, where he might have encountered counsel, family, or supporters.[180] Instead, two undercover officers (UCH and UCB) were Skinner's main point of face-to-face contact and were placed in adjacent cells on either side of his cell.[181] The court considered the impact of this situation on Skinner, positing:[182]

> [I]n the immediate wake of unexpectedly being arrested and charged with second degree murder, (a situation that inherently would be very stressful), and apart from his brief telephone conversations with lawyers, (whom he had not seen), Mr Skinner had been and would continue to be figuratively "on his own" *vis-à-vis* the authorities for a considerable period of time, generally confined to a relatively small space with nothing to occupy his attention but his own thoughts and possible

174 *Ibid* at para 33.
175 *Whynder*, *supra* note 112 at para 24.
176 *Ibid* at para 26.
177 *Ibid* at para 29 [emphasis added].
178 The relevance of an accused's vulnerabilities has been considered in other *Charter* cases. See e.g., *Lafrance SCC*, *supra* note 2 at para 79.
179 *Skinner*, *supra* note 112 at para 21.
180 *Ibid* at para 40.
181 *Ibid*.
182 *Ibid*.

> conversation with those in adjacent cells. Apart from the police, U.C.H. and U.C.B., (who already were exhibiting friendship *vis-à-vis* each other), were and would be the only available points of human contact available to Mr Skinner.

Ultimately, the court concluded that the cell-plants forged a temporary and situational relationship with Skinner and exploited his various vulnerabilities.[183] Skinner's vulnerabilities included his social isolation, lack of employment, homelessness, and his serious and formally diagnosed mental illness.[184]

As one can perceive from the foregoing discussion, the nature of the relationship can have a marked impact within the active elicitation analysis, even when the accused and cell-plant(s) are only meeting for the first time in detention.[185] The court decisions set out above have developed the nature of the relationship jurisprudence significantly since *Broyles* and *Brown*. An accused need not demonstrate a pre-existing relationship, as was the case in *Broyles*. Cell-plants may develop sufficiently impactful relationships, providing important contextual information that shapes the actual exchanges between the accused and cell-plant(s). Drawing considerable attention to these relationships may play a significant role in resisting the prosecution's attempt to include cell-plant statements as part of the active elicitation analysis. Of course, crucial to the overall analysis of active elicitation is the nature of the exchange between the cell-plant and the accused. I turn to the nature of the exchange next.

## D. Nature of the Exchange

The SCC's trilogy, but particularly *Broyles* and *Liew*, provides some modest guidance on what it means when undercover state agents engage (or do not engage) in active elicitation and infringe on the accused's right to silence. The *Hebert* court revealed very little about the exchange that transpired in that case. One simply learns that the cell-plant engaged the accused in conversation and, in doing so, actively elicited incriminating statements.[186] In *Broyles*, the Court went further. It provided brief excerpts from the recorded transcript of the exchange illustrating the ways in which the undercover state agent – the accused's friend – engaged in questioning that the Court determined was the functional equivalent of an interrogation.[187] Specifically, it identified how the agent did not follow the

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183 *Ibid* at para 41.

184 *Ibid*.

185 This is set out in Justice Harradence's dissent in *Brown ABCA*. *Brown ABCA*, *supra* note 90 at 501.

186 *Hebert*, *supra* note 5 at 159, 186–187, 189.

187 *Broyles*, *supra* note 8 at 613–614.

natural flow of conversation but instead directed or re-directed the topic of conversation to Broyles's crime.[188] Furthermore, in seeking to elicit incriminating statements, the agent sought to undermine the advice of Broyles's lawyer to remain silent.[189] Notably, the short excerpts that the SCC provided did not include Broyles's incriminating statement. Rather they were illustrations of how the undercover state actor actively elicited incriminating statements from Broyles. In *Liew*, the Court furnished a longer excerpt from the exchange between the undercover police officer and the accused to contextualize and illustrate how the officer followed the natural flow of the conversation and did not actively elicit incriminating information.

If the trilogy was intended, in part, to provide guidance on how undercover officers were not to engage in active elicitation, not all cell-plants have internalized these lessons. This is striking since many trial court judges have observed that the state agents in the cases before them were experienced in undercover police interrogations. In at least two reported cases in particular, readers learn that in preparing for the undercover operations, the cell-plants revisited the jurisprudence governing the right to silence and cell-plant operations.[190] Namely, they reviewed relevant case law, including the *Broyles* and *Liew* decisions. Nevertheless, what is apparent from several decisions, trial courts have concluded that undercover officers actively elicited incriminating statements by failing to follow the natural flow of the conversation and by engaging in the functional equivalent of an interrogation. For instance, in *Whynder*, the court noted that after the accused spoke about incidents unrelated to the crime for which he was arrested (e.g., his cousin being shot along with another incident where Whynder himself sustained a gunshot wound), the cell-plant brought the conversation back to the evidence which police might have against the accused.[191] In another flagrant example, following Whynder's conversations about relationships with women and when he might be returned to Halifax, the cell-plant brought the conversation back to evidence regarding Whynder's alleged crime.[192] In describing the active nature of the elicitation found in some cases, a few judges employed terms such as "prompting," "coaxing," and/or "cajoling" (drawing from *Liew*[193]) to characterize the undercover officers' conduct.[194] While not every judge used these same

188 *Ibid.*
189 *Ibid* at 614–615.
190 *Connors*, *supra* note 112 at para 29; *Skinner*, *supra* note 112 at para 21.
191 *Whynder*, *supra* note 112 at para 38.
192 *Ibid* at para 39.
193 *Liew*, *supra* note 9 at para 51.
194 *Quigley*, *supra* note 16 at para 13; *Skinner*, *supra* note 112 at para 40; *Garnier*, *supra* note

terms, it is evident from various decisions that these descriptors would correctly describe the conduct of many cell-plants. I provide examples below to illustrate such active elicitation and that this practice has continued well beyond *Broyles* and *Brown*.

As noted earlier, cell-plant interrogations often occur in a small cell that may be constantly lit and where the accused and undercover police officer are double-bunked. This may make an accused more susceptible to speaking, especially when there is nothing else to do but converse in order to pass the time.[195] This also makes an accused more vulnerable to a wide range of interrogation techniques that a cell-plant may employ against them. For instance, in *Whynder*, the court posited:

> In police interviews there are a number of techniques used which are designed to encourage the subject to provide information. These include making factual assertions, suggesting evidence which the police may have, offering excuses or explanations which might diminish the accused's moral culpability, and suggesting that providing a present explanation might be more beneficial than waiting until trial. Cst. M utilized all of these in his interactions with Mr. Whynder.[196]

The court in *Whynder* concluded that the cell-plant ("Cst. M") "subtly and skilfully moved the conversation into areas that might be of interest to them."[197] Using the tactics noted above, the cell-plant directed the conversation[198] toward the motive of the alleged murder for which Whynder was accused, whether there was hard evidence that might tie Whynder to the crime, and what techniques were used to minimize evidence such as DNA or fingerprints.[199] While some accused may be wary of non-undercover police officers using such techniques in an interrogation room, the accused are more vulnerable in the context of a detention cell. An accused is unaware of a cell-plant's true identity, and their defences are lowered.

The context of confinement is stress-inducing, and while some accused may seek to relieve their anxiety through conversation,[200] others may be more reluctant to speak to cellmates regardless. Thus, an undercover

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154 at para 35.

195 *Whynder*, *supra* note 112 at paras 27–28 (Observing, "...Mr. Whynder was becoming concerned about having no contact with family members and the lack of activities which might help pass the time. His only option seemed to be talking with Cst. M, who was more than happy to oblige" at para 57).

196 *Ibid* at para 57.

197 *Ibid* at para 58.

198 *Connors*, *supra* note 112 at para 58 (The court posited that such conversations were choreographed with the cell-plant directing the flow of conversation).

199 *Whynder*, *supra* note 112 at para 58.

200 *Henry*, *supra* note 4 at 274; *Perkins*, *supra* note 58 at 307 (Marshall J dissenting).

officer's prompting and coaxing may prove to be more pronounced with accused who are parsimonious in their communications. Cell-plants in those situations may turn to active forms of elicitation. As discussed previously regarding *Leung*, the accused was reticent and did not engage with the undercover officer despite the latter's initial efforts.[201] The cell-plant was removed from the cell to discuss how to stimulate conversation with the accused. In consultation with her handler, the cell-plant altered her cover story to present herself as someone involved in a tragedy (i.e., the death of her niece) because of a mistake she made. Such stims are both icebreakers to build rapport and inject new life into the conversation. The cell-plant returned to the cell feigning distress about this news. In tandem with other considerations noted previously, this had a high level of success in fostering Leung's willingness to speak. However, her incriminating admissions did not emerge without active prompting from the undercover officer.[202] The court observed that the officer was "talkative, nosey and inquisitive, continually breaking the silence, and even when the conversation flowed in a general fashion about other topics, she inevitably brought it back to the reason Ms. Leung was in the cell, or to her relationship with her boyfriend or with her parents."[203] The court also posited that "[w]hile many of the questions the cell plant asked might naturally come from an inquisitive and sympathetic stranger, the cell-plant is a police officer who was playing a strictly controlled role. She was not free to steer the conversation, prompt answers, and repeatedly bring the topic back to Ms. Leung's predicament."[204]

In addition to peppering a suspect with questions, some cell-plants will also try to emphasize the moral benefits of confessing to wear down an accused's resolve not to speak. This is not dissimilar to standard police questioning outside the cell-plant context.[205] *R v Quigley* illustrates another instance of how an undercover officer sought to draw out an initially unresponsive accused. Similar to *Leung*, the cell-plant in *Quigley* was removed to initiate a "stim," which involved having another officer remove the cell-plant and arrest him for domestic assault.[206] In *Quigley*, the Court observed that following the stim, "the undercover officer did commence actively coaxing, cajoling, and prompting Mr. Quigley to speak about the offence and he repeatedly directed or redirected the conversation with that

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201 *Leung*, *supra* note 124 at para 8.

202 One can observe this from a reading of transcripts furnished by the court. See *ibid* at paras 9–48.

203 *Ibid* at para 64.

204 *Ibid* at para 69.

205 *Oickle*, *supra* note 42 at para 56.

206 *Quigley*, *supra* note 16 at para 9.

goal."[207] The cell-plant's briefing sheet revealed that Quigley was suspected of killing his estranged girlfriend/fiancée. The connection with domestic violence was used as a subject matter to build a rapport with the accused and leverage this connection, as noted above. In addition to turning the subject matter back to Quigley's circumstances, the cell-plant used statements that suggested a moral justification for the violent conduct. Very shortly after the arresting officer left the cell, the cell-plant stated to Quigley: "Bet you your shit is not as deep as mine, man," and then, "She pushed me… I'm allowed to defend myself, right?"[208] The cell-plant followed by mentioning his own lawyer and then asking questions about Quigley's lawyer and their privileged communications.[209] After noting his lawyer admonishing him not to speak to the police, Quigley admitted that after interrogators showed him crime scene photographs, "[y]ou can't really hold anything back so …."[210] The cell-plant then stressed the value of getting the truth off his chest: "Yeah, it doesn't (indiscernible), man, I'm tellin' ya, I just, good to get it out. I told you 'cause it's nice to get it off my chest, right. I know (indiscernible). Cops knew about it. So it felt good when I told you my story, you know."[211] In reiterating the value of "getting thing things off his chest," the cell-plant then asserted, "… buddy, if you wanna start unloading anything off your chest, I'm (indiscernible) I'm just a listening post, you know. (Indiscernible). It was great when I put it off my chest. It felt good. Yeah, I was tired. I was tired of running an' all that, you know, hiding."[212] The court held that the cell-plant's various statements and questions amounted to active elicitation.[213]

In some instances, the elicitation may venture impermissibly into the realm of intimidation, even if the questions the undercover officer poses might not qualify as the functional equivalent of an interrogation. In *Garnier*, the accused had no prior experience with the criminal justice system or being in jail. As illustrated above, the undercover officer built a rapport with the accused. However, part of this rapport-building was predicated on inducing the accused to be fearful about his impending transfer to another facility. The cell-plant conveyed to the accused that he would incur the

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207 *Ibid* at para 10.
208 *Ibid* at para 11.
209 *Ibid* at para 12.
210 *Ibid*.
211 *Ibid*.
212 *Ibid* at para 13.
213 *Ibid* at para 14.

wrath of the inmates due to his arrival late at night.[214] The following is a portion of the transcript illustrating this instilling of fear:[215]

> MR. GARNIER: So are they supposed to move me tonight?
> U/C OPERATOR: Yeah, yeah, that's what they fucking told me. I'm fucking waiting here ever fucking since, right? I want to get down there and lie down. Fuck, you get there at night, the lights are out, right?
> MR. GARNIER: Oh, really?
> U/C OPERATOR: Yeah, the lights – and fucking everyone's gone down for the night, and the next – the last thing you want to do is come there, right, fucking making a fucking racket, waking the fucking boys up, pissing everyone fucking off, right?
> MR. GARNIER: Yeah.
> U/C OPERATOR: So that's why I'm fucking asking, being a half prick to buddy there, because, you know, I don't want to be that fucking guy going in there, right?
> MR. GARNIER: Yeah, really.
> U/C OPERATOR: You know what I mean?
> MR. GARNIER: Yeah.
> U/C OPERATOR: You're in there fucking ten minutes and fucking people fucking hating you already.
> MR. GARNIER: Yeah.
> U/C OPERATOR: You know what I mean?
> MR. GARNIER: Shit. Yeah, that's the last thing I'd want to be doing down there.

However, the cell-plant, posing as a hardened and experienced criminal, encouraged Garnier to make friends with other Newfoundlanders and Cape Bretoners to keep safe.[216] He then offered, "I'll tell you, man, what I'll do, you go first and I'll see if I can – when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking – we want the fucking same block."[217]

Regarding these efforts, the *Garnier* court concluded: "The undercover operator was clearly trying to scare Mr. Garnier into quickly bonding with him. He was trying to use this fear tactic to intimidate Mr. Garnier into speaking with him."[218] The court posited that Garnier would not have made certain potentially inculpatory comments. Indeed "Mr. Garnier's comments were caused by the cell plant's prompting, coaxing and insidiously intimidating him."[219] After finding a breach of Garnier's right to silence, the court concluded that the evidence should be excluded under section 24(2). In making this determination, the court asserted that the cell-plant's

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214 *Garnier*, *supra* note 154 at para 22.
215 *Ibid* at para 23.
216 *Ibid* at paras 31–32.
217 *Ibid* at para 32.
218 *Ibid* at para 33.
219 *Ibid* at para 35.

conduct was serious and had a serious impact on Garnier's *Charter*-protected rights: "The Crown and the police cannot be permitted to use fear to prey on a vulnerable individual who is under state control, in order to force him to supply self-incriminating evidence."[220]

Does active elicitation only occur when an accused is, at least initially, uncommunicative? Unlike the situations in *Leung*, *Quigley*, or *Garnier*, there will be circumstances where an accused is not necessarily quiet at the outset who then has to be cajoled and/or intimidated into speaking by a cell plant. Indeed, an accused can be loquacious themselves, and yet a court may nevertheless find that a cell-plant engaged in active elicitation. For instance, in *Kumar*, the SCNZ observed that the accused "was a talkative young man and that he spoke freely throughout the conversation [with the cell-plants]," as the trial court judge found.[221] In addition, Kumar appeared relaxed throughout the conversation and eager to talk.[222] While acknowledging Kumar's talkative nature, the SCNZ determined that the two undercover officers planted in the cell with Kumar both "guided the conversation and were direct and/or persistent in their questioning on key points."[223] The cell-plants' questioning was "both systematic and comprehensive. The officers steered the conversation to matters that interested them in terms of the police investigation in a way that other detainees would have had no particular interest in doing, and they were persistent."[224] In particular, the SCNZ noted how the cell-plants inquired how much the deceased owed the accused and sought clarifications on the amount.[225]After concluding a violation of his right to silence, the SCNZ determined that the exclusion of the incriminating statements was proportionate, considering the seriousness of the offence balanced against the fundamental importance of the right to refrain from making a statement and the need for an effective and credible justice system.[226]

When contemplating what constitutes the functional equivalent of an interrogation, cell-plants may of course be friendly and non-adversarial.[227] Naturally, this could be important for establishing some rapport with an

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220 *Ibid* at para 39.

221 *Kumar*, *supra* note 19 at para 61.

222 *Ibid*.

223 *Ibid*.

224 *Ibid* at para 63.

225 *Ibid* at paras 61–63.

226 *Ibid* at para 70.

227 *Liew*, *supra* note 9 (the SCC affirmed this stating that "We respectfully disagree with the majority of the Court of Appeal that an atmosphere of oppression [typically but not exclusively thought of as persistent questioning, a harsh tone of voice, or explicit psychological pressure on the part of the state agent] is required to ground a finding that a detainee's right to silence was violated" at para 37).

accused, even one that is temporary and situational. An amicable tone is also significant with respect to questioning and in determining whether a cell-plant actively elicited incriminating statements. For example, in *Skinner*, two cell-plants engaged the accused in conversation.[228] Sporting a friendly demeanour, the cell-plants "effectively encouraged Mr Skinner to keep talking through pervasive and almost constant comments of agreement, praise, or other forms of positive reinforcement."[229] Importantly, as in other cases, the cell-plants re-directed the conversations to critical areas of inquiry, straying from the natural flow. For instance, following a discussion between Skinner and the cell-plants regarding his prior interview with the police detective about allegations of physical injury by the alleged murder victim, Skinner shifted the conversation "in a significantly different direction[.]"[230] Specifically, Skinner directed the conversation toward "prior unrelated encounters with the police."[231] Rather than continue with the natural flow of the conversation, one of the cell-plants returned to the subject of the alleged murder victim's physical injuries. The cell-plant stated: "Fucking lacerated liver. How the fuck did that even happen without you fucking stabbing him? That's fucked."[232] Assessing this particular exchange, the court concluded, "I found it difficult to view such questioning as something other than functional interrogation relating to the murder charge against Mr Skinner."[233] This was not an isolated moment as the court identified numerous other instances where the cell-plants re-directed the subject to incriminating subject matters.[234]

Of course, an amicable demeanour can be a useful strategy when engaging with an accused who is similarly not suffering from a mental illness too. In *Deboo*, an experienced undercover officer partook in a "friendly and congenial" conversation with the accused.[235] Despite Deboo asserting with some irritation that he did not wish to share a cell with anyone and indicating that he did not wish to speak to the police, the cell-plant persisted with his friendly demeanor. As the court observed, the undercover officer conducted "the functional equivalent of a subtle interrogation."[236] Furthermore, although "the atmosphere was congenial and questioning

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228 It is worth recalling, as noted above, that Skinner had a formally diagnosed mental illness.

229 *Skinner*, *supra* note 112 at para 40.

230 *Ibid* at para 89.

231 *Ibid.*

232 *Ibid.*

233 *Ibid.*

234 *Ibid.*

235 *Deboo*, *supra* note 16 at para 18.

236 *Ibid* at para 63.

gentle, on several occasions, [the cell-plant] actively encouraged Mr. Deboo to speak with him about the murder charge. When he did so, he often met with success."[237] The court posited that the success of this approach was unsurprising: "Interrogators often use honey, not vinegar, in pursuit of the truth."[238] In the court's view, this was permissible in the context of a formal police interview and did not breach an accused's right to silence because the accused was aware of whom they were speaking to.[239] Such persuasion was fair and effective since the detainee made an informed choice about whether to speak.[240] However, "when the context changes, the permissible parameters of police persuasion also change."[241] The court found that while Deboo was talkative, he was in the state's control and this impacted on his ability to exercise his right to choose whether to speak to the police. It stated:

> Mr. Deboo was a garrulous individual held in the state's superior power. Facing a charge of murder, he had a constitutionally protected right to make an informed choice about whether or not to speak to police about his version of events. After consulting with counsel, he repeatedly stated his intention not to do so. However, when [the cell-plant] engaged him he unwittingly produced evidence against himself at the instance of police.[242]

After holding that the state infringed Deboo's right to silence, the court elected to exclude all the incriminating statements under section 24(2). It concluded that Deboo's entire statement was tainted by the active elicitation, finding that the "prompting, coaxing and cajoling is sprinkled and interwoven throughout."[243]

Despite the lessons that *Broyles* and *Liew* provide regarding parameters of the nature of the exchange (as part of active elicitation), it is striking how far even highly trained police officers will go to actively elicit incriminating statements in breach of an accused's right to silence. Some of the examples set out previously clearly illustrate that many cell-plants do not follow the natural flow of their conversations but redirect the colloquies to obviously incriminating subject matters. In the language of *Liew*, which was adopted in several trial decisions, undercover officers have prompted, coaxed, and cajoled their targets into making incriminating statements. As the cases above illustrate, there is of course no single way to accomplish these feats. It is also important to recognize the other considerations that shape the

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237 *Ibid.*
238 *Ibid* at para 64.
239 *Ibid.*
240 *Ibid.*
241 *Ibid.*
242 *Ibid* at para 61.
243 *Ibid* at para 71.

context of these elicitations – the spaces in which the questioning occurs, the power disparities between the cell-plants and accused in tandem with the relationships that are developed and engineered to foster these elicitations. Together, all of these considerations work to undermine an accused's ability to remain silent. By placing limits on the state's ability to harvest incriminating statements in breach of an accused's right to remain silent, courts legitimize an individual's resistance to the Crown's intended use of cell-plant statements at trial.

## VI. CONCLUSION

Following the SCC's decisions in the 1990s regarding the right to silence and its application in the context of cell-plant operations, Canadian trial courts and the Supreme Court of New Zealand have made striking contributions to this jurisprudence. Through this article, I have sought to draw attention to the salient features of this case law and what it reveals about the nature of cell-plant operations. First, many decisions demonstrate that courts have steadfastly ruled against the admission of incriminating statements procured by undercover officers who have actively elicited such evidence from the accused in detention. When Crown prosecutors have sought to use the cell-plant statements at trial, various accused, with the assistance of their counsel, have resisted these efforts by mounting legal challenges that have been upheld in various cases discussed in this article.

Second, this jurisprudence offers important insights into the methods employed by trained police officers to actively elicit incriminating statements and provides tools to those seeking to challenge the admission of cell-plant statements going forward. Such methods include techniques to forge temporary and situational relationships with individuals whom they are meeting for the first time in detention. Authorities manufacture any number of commonalities to foster these relationships. Furthermore, such rapport-building transpires in very confined spaces where accused persons are already vulnerable and may be seeking to speak with another individual to lessen their anxiety and/or may be fearful about the consequences of not socializing. These short-lived and seemingly tenuous interactions can nevertheless create sufficiently momentous relationships between the cell-plants and the accused. Courts and lawyers must be attentive to the development of these relationships and their impact on the active elicitation analysis. The absence of a pre-existing relationship between the cell-plant and an accused should not foreclose a more penetrating analysis of the temporary and situational relationships that undercover police officers may develop with detainees.

In turn, these relationships soften up and make the accused susceptible to questioning that may often, and in several cases, easily be qualified as the functional equivalent of an interrogation. The jurisprudence also reveals that despite the guidance provided in the SCC's decisions in *Broyles* and *Liew* regarding the nature of the exchange analysis, many undercover police officers have failed to follow the natural flow of the conversations they engage in and have blatantly re-directed the conversations to elicit incriminating evidence. The lack of discipline and the degree to which some officers failed to abide by the SCC's jurisprudence is so striking that one might think that the officers assigned to be cell-plants were actually untrained civilians, not dissimilar to Todd Ritter, the state agent and friend of the accused in *Broyles*. However, another theory might very well be that rather than being undisciplined attempts at eliciting incriminating statements, these were conscious attempts to test the boundaries of the existing jurisprudence and push the interpretation of "active elicitation" in new directions. If that is truly the case, from the numerous decisions discussed, it appears that many courts are not taking up these invitations to weaken the right to silence. Indeed, I would argue that courts should resist such attempts.

When police actors undermine the right to silence by surreptitiously engaging in active elicitation, it is up to the judiciary to uphold the accused's right not to cooperate with the state. By developing the jurisprudence in the manner discussed above, many Canadian trial court judges and the SCNZ have fortified the right to silence as an entitlement that permits the accused to resist cooperation with the state through constitutional challenges. However, because some jurisprudential developments, particularly at the trial court level, may not attract the attention they deserve, this article has sought to shine a light on them. In addition, highly relevant judgments by another country's highest appellate court, such as the SCNZ, may not always come to the attention of courts in another country. The SCNZ's application of the legal tests set out in the SCC's jurisprudence may offer some persuasive guidance here in Canada.

Although the decisions discussed in this article highlight the ways that courts may fortify an accused's ability to resist the state's intended use of cell-plant statements by accounting for, among other things, space, context, and the ways that officers may develop relationships with accused in detention, there may be other ways to consider how the right to silence and ability to resist may be fortified. Perhaps, it is time to consider whether to limit the ability of state actors to engage in cell-plant operations. Rather than setting the threshold for elicitation at the "active" side of the spectrum – a threshold by which many officers seem incapable or unwilling to abide –

perhaps there needs to be greater legal restraints imposed on them. When considering the pressures of incarceration, and the relationships that can be developed as discussed earlier, it may be that one way to truly strengthen an individual's right to resist cooperation through silence is to reset the threshold for elicitation. Rather than requiring an accused to demonstrate that the cell-plant(s) engaged in active elicitation, an alternative formulation might be to simply show that the conduct of state agents went beyond a passive role akin to a listening post. Because the current elicitation standard connects to both the nature of the exchange and the nature of the relationship between the accused and the state agent, the existing inquiries would necessarily have to be revised.

For instance, consideration of the nature of the relationship would include asking whether the state agent formed a temporary and situational relationship with the accused that in some way impacted the exchange between them. As the cases discussed above suggest, relationships need not exploit special characteristics of the relationship, evidence of a relationship of trust, or one where the accused was obligated or vulnerable to the state agent. With respect to the nature of the exchange, a revised inquiry would shift away from the functional equivalent of an interrogation. Given the context of the detention environment and the possibility of a rapport between the accused and state agent, the nature of the exchange does not need to be active or qualify as the functional equivalent of an interrogation. As I have posited in an earlier writing, the nature of the exchange should be examined for signs that the agent went beyond acting as a listening post or its functional equivalent.[244] Such revised inquiries would be in keeping with the principle that an accused should have the freedom to choose whether to speak to the police. If a state agent acts in a manner that is passive and the accused reveals incriminating statements nevertheless, then their freedom to choose will not be subverted.

I shall close by stressing that the fortifying of the right to silence and the ability to resist the prosecution's intended use of cell-plant statements, does not mean that police investigators are left without other options. As noted earlier, in most of the cases discussed, the police acquired other incriminating evidence, and despite the exclusion of the cell-plant evidence, the accused have been found guilty. Indeed, for better or worse, police officers possess other constitutional or otherwise legal means to secure incriminating evidence as permitted by the SCC. Such means include the ability to interrogate an accused outside the presence of counsel and for lengthy periods of time, regardless of the accused's declaration(s) not to

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244 Khoday, *supra* note 18 at 89-93.

speak.[245] Provided that interrogators do not engage in the types of extreme behaviours prohibited under the confessions rule, they have a wide berth and range of action in formal non-undercover interrogations. Even within cell-plant contexts, it is possible to elicit incriminating statements without venturing into the prohibited zone of active elicitation.[246]

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245 *Sinclair*, *supra* note 29; *Singh*, *supra* note 44. I would note that these are not in my view, positive developments.

246 *Liew*, *supra* note 9.

# A Rush to Justice: The Institution of Presumptive Ceilings in *R v Jordan* and Their Potential Implications for Wrongful Convictions

DEVON MEDEIROS & MICHELLE I. BERTRAND*

## ABSTRACT

In 2016, the Supreme Court of Canada ("SCC") released its landmark decision in the case of *R v Jordan*. With the objective of addressing widespread delay within the Canadian justice system, the implications of the ruling were such that the Court set out definitive limits on the length of time in which accused persons must be brought to trial before a stay of proceedings is presumed to be entered. Since the decision, many scholars have emphasized the importance of resolving delay within the justice system to ensure that widespread stays of proceedings are not being entered, whereby the justice system may consequently fall into a state of disrepute. However, an equally important consideration that has not yet been explored concerns the risks that a failure to adequately remedy delay may result in police and Crown rushing to resolve cases within these strict time constraints. To explore this gap within the literature, this paper utilizes wrongful conviction concepts and available data to demonstrate that the current state of delay within the justice system has the potential to contribute to a "rush to justice" mentality among police and Crown. The development of such a mentality is problematic as it has the potential to lead to a wrongful conviction. Considering this elevated risk for wrongful

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convictions, this paper thus provides a new perspective in underscoring the importance of resolving delays within the justice system in the advent of *Jordan*.

***Keywords:*** Section 11(b); Charter; *R v Jordan*; Presumptive Ceilings; Delay; Wrongful Convictions; Cognitive Biases; Tunnel Vision; Noble-Cause Corruption; Crown; Prosecutors; Police; Decision-making.

## I. INTRODUCTION

On the evening of December 23rd, 1981, Barbara Stoppel's strangled and nearly lifeless body was found in the bathroom of a donut shop in Winnipeg, Manitoba.[1] Witnesses outside the store reported seeing Stoppel, who was working alone as a waitress, conversing with a man before he turned around, locked the storefront door, and led her toward the bathroom.[2] Shortly after, witnesses saw the man leave the store, cross a nearby bridge, and drop various items into the river below.[3] A description of the perpetrator was provided to the police, and a search of the riverbank resulted in the recovery of various items – the most significant of which was a nylon rope with fibers from Stoppel's sweater embedded within it.[4]

A visual inspection of the rope suggested that it may have been manufactured by a plant in Washington State – a major consumer of which was a British Columbian utility company.[5] As authorities began to search for a suspect with links to the west coast, they quickly turned their sights onto British Columbia resident Thomas Sophonow, who happened to have arrived in Winnipeg the same evening of the crime.[6] Having borne some resemblance to the composite drawing of the perpetrator, Sophonow agreed to cooperate with the police by being interviewed and was later subjected to an interrogation.[7] Although he never confessed to the crime, the police were

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1 Peter Cory, "The Inquiry Regarding Thomas Sophonow" (2001) at 43-44, online (pdf): *Government of Manitoba* <websites.godaddy.com/blob/6aaa6fc2-99d9-4af2-a3b4-51e9d74ea37a/downloads/Thomas%20Sophonow%20Inquiry.pdf?2bd500cf> [perma.cc/BZF5-9QMY] [Cory].

2 *Ibid*.

3 *Ibid*.

4 *Ibid* at 44.

5 *Ibid*.

6 *Ibid* at 45.

7 *Ibid* at 45, 50.

sure of his guilt.[8] As Stoppel would tragically go on to die from her injuries at a local hospital, Sophonow was charged with her murder.[9]

At this point in the investigation, evidence indicative of Sophonow's guilt appeared to mount quickly. For instance, as he was arrested, Sophonow would unknowingly demonstrate the "twisting motion of locking the door" – which eyewitnesses had reported – to an undercover police officer placed in his cell.[10] In addition, when eyewitnesses were called to view a police lineup (a.k.a. photo-pack), many identified Sophonow as the perpetrator.[11] Finally, while incarcerated, several jailhouse informants came forward alleging that Sohponow had confessed to them that he had committed the crime.[12] Given such evidence, Sophonow went on to be subjected to three trials, the first resulting in a hung jury, while the second and third trials resulted in a successful appeal of his conviction.[13] Rather than sending the matter back for a fourth trial, the Court went on to stay the charges, and Sophonow was released after having spent 45 months in prison.[14] In 2000, nearly 20 years after Stoppel's murder, the Winnipeg Police Service conducted a reinvestigation into the crime.[15] Their conclusion: Sophonow was, in fact, innocent.[16]

It is now known that several investigative and prosecutorial failures were responsible for Sophonow's wrongful conviction.[17] Among them are the facts that the rope had actually been manufactured in Manitoba, the police had likely inadvertently shown Sophonow the motion which the perpetrator used to lock the door during his interrogation, the eyewitness lineups resulting in his identification were highly suggestive and unfairly conducted, and that it was not disclosed to the defence that the jailhouse informants had unsavory backgrounds or were otherwise incentivized to testify.[18]

While it is difficult to ascertain exactly what was going through the mind of the police and Crown involved in Sophonow's case, it is unlikely to be the result of actors gone "rogue." Instead, the root cause of his wrongful conviction may be properly attributed to human nature's tendency

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8 *Ibid* at 51-54.
9 *Ibid* at 35.
10 *Ibid* at 53.
11 *Ibid* at 58-59.
12 *Ibid* at 102-108.
13 *Ibid* at 35.
14 *Ibid* at 35-36.
15 *Ibid* at 35.
16 *Ibid.*
17 Cory, *supra* note 1; Sarah Harland-Logan, "Thomas Sophonow" (last visited 27 April 2023), online: *Innocence Canada* <www.innocencecanada.com/exonerations/thomas-sophonow/> [perma.cc/7YT2-K355] [Harland-Logan].
18 Cory, *ibid*.

to overly focus on a particular theory, which consequently impedes one's ability to objectively evaluate present evidence – a psychological phenomenon known as tunnel vision.[19] This set of circumstances became especially evident when it came to light that the police had failed to follow up on another potential suspect who should have raised several red flags for investigators or when they discounted Sophnow's alibi after perceiving it as being late and incomplete.[20] Indeed, it is now known that during the time that Sophonow was accused of being at the donut shop and murdering Stoppel, he was, in fact, visiting local Winnipeg hospitals where he was handing out Christmas stockings to sick children.[21]

Among the environmental pressures that exacerbate the potential for the development of tunnel vision is the existence of intense pressure placed upon state actors – like that of the police and Crown – to quickly resolve a crime.[22] Such conditions were undoubtedly present in Sophonow's case, where the subsequent inquiry into his wrongful conviction noted that "[t]he City of Winnipeg was understandably outraged by the murder. The media reflected that sentiment. There was extensive media coverage, not only of the crime, but also of the investigation and all the proceedings that followed it."[23] Given the existence of such circumstances, the travesty of Thomas Sophonow's wrongful conviction serves as a case in point with respect to the risk that the presence of a "rush to justice" mentality among police and Crown may pose for the occurrence of a miscarriage of justice. Perhaps more abstractly, Sophonow's case also demonstrates the careful balance that must be struck between speed and delay in the justice system. Indeed, while section 11(b) of the *Canadian Charter of Rights and Freedoms* guarantees the right to a speedy trial,[24] wrongful conviction literature has simultaneously raised concerns that the presence of pressures demanding excessive speed to bring accused persons to justice may simultaneously increase the likelihood for the occurrence of a wrongful conviction.[25]

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19 Harland-Logan, *supra* note 17.

20 Cory, *supra* note 1 at 79-80, 99.

21 Cory, *supra* note 1 at 97-98.

22 Harland-Logan, *supra* note 17.

23 Cory, *supra* note 1 at 35.

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

25 Bruce A MacFarlane, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" (2008) at 7-16, online (pdf): *Ontario Ministry of Attorney General* <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf> [perma.cc/G9UM-XU6A] [MacFarlane]; FTP Heads of Prosecution Committee, "Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada" (2018) at 10-12, online (pdf): *Public*

In the summer of 2016, this careful balance between speed and delay came to the forefront following the release of the Supreme Court of Canada's decision in *R v Jordan*.[26] The implications of the decision were such that the SCC set out definitive limits (known as "presumptive ceilings") on the length of time that an accused person must be brought to trial before a judicial stay of proceedings[27] is presumed to be entered.[28] These ceilings were set at 18 months for provincial court cases and 30 months for superior court cases or provincial court cases with a preliminary inquiry.[29] According to the Court, the rationale behind such a dramatic change in the law lies in the alleged "culture of complacency" concerning delay, which has plagued the Canadian justice system in recent decades.[30] In Jordan's case, for instance, despite him being charged with drug-related offences of modest complexity, the delay was so significant that it would take more than four years before he would see the end of his trial.[31] Across the justice system, more broadly, it was reported that "between the fiscal years of 2006/2007 and 2015/2016 the median time between charging and disposition for a superior court case grew from 10.6-months to 14-months."[32] In view of these circumstances, the SCC, therefore, asserted that such ceilings were necessary:

> ...in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges.[33]

Given this dramatic shift towards the imposition of definitive time limits on criminal trials, it is perhaps unsurprising that *Jordan* has had a significant impact on the practice of criminal law in Canada. For instance, the Standing Senate Committee on Legal and Constitutional Affairs ("SSCLCA") suggested that *Jordan* "... has shaken up the status quo of the criminal justice system unlike any case in recent years."[34] In response, legal

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*Prosecution Service of Canada* <www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf> [perma.cc/PE72-9UFE].

26 *R v Jordan*, 2016 SCC 27 [*Jordan*].

27 A judicial stay of proceedings refers to the permanent halting of criminal proceedings against an accused.

28 *Jordan*, *supra* note 26.

29 *Ibid* at para 46.

30 *Ibid* at para 40.

31 *Ibid* at para 4.

32 Myles Anevich, "Fighting the Culture of Complacency: A Comparative Analysis of Pretrial Delay Remedies in Canada and the United States" (2019) 24:1 Can Crim L Rev 39 at 56 [Anevich].

33 *Jordan, supra* note 26 at para 50.

34 Standing Senate Committee on Legal and Constitutional Affairs, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada" (2017)

scholars and practitioners alike have emphasized the importance of adequate governmental and justice agency response to the demands of the SCC in *Jordan* with respect to remedying delay.[35] Such efforts are often suggested to be critical so as not only to ensure that the rights of accused persons are being respected but also to ensure that the reputation of the criminal justice system does not enter a state of disrepute due to widespread stays of proceedings being entered.[36]

Nevertheless, despite the longstanding concern raised within wrongful conviction literature concerning the development of a "rush to justice" mentality,[37] a perspective which has been largely absent from the discussion surrounding *Jordan* has been any consideration as to the risks that a failure to resolve delay within the justice system may pose for the occurrence of wrongful convictions. In this respect, if actors such as the police and Crown are struggling to meet the SCC's strict timelines in *Jordan* due to the existence of a continual delay in the justice system, it is reasonable to consider whether the resulting pressure to meet these deadlines has the potential to contribute to the development of "rush to justice" mentality among such actors. Therefore, to address such gap within the literature, in this paper, we answer the following two research questions:

1) Does the institution of presumptive ceilings in *R v Jordan* exacerbate the likelihood for wrongful convictions to occur?
2) To what extent have government and justice agencies responded to the demands of the Supreme Court of Canada in *R v Jordan* as it pertains to reducing delay and what implications may this have for the occurrence of wrongful convictions?

In answering these questions, we argue that in the advent of the institution of presumptive ceilings in *R v Jordan,* the current state of delay within the justice system has the potential to exacerbate the likelihood that wrongful convictions may occur.

To demonstrate this argument, this paper is divided into several distinct sections. First, we explore the case of *R v Jordan* and its subsequent impact on the justice system. Second, we identify the relevant "rush to justice" concepts that have been identified within wrongful conviction literature and consider their relevance to the *Jordan* framework. Third, we explore whether delay within the justice system has been appropriately addressed with respect to minimizing the risk of the development of a "rush to justice"

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at 15, online (pdf): Senate of Canada <sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf> [perma.cc/3QUH-6VU3] [SSCLCA].

35 SSCLCA, *ibid.*

36 *Ibid.*

37 MacFarlane, *supra* note 25 at 7-16; FTP Heads of Prosecution Committee, *supra* note 25 at 10-12.

mentality among actors such as the police and Crown. Finally, we conclude by considering several recommendations, which may be implemented to further reduce delay within the justice system and consequently reduce the likelihood of the development of a "rush to justice" mentality among such actors. Our recommendations include the need for technological improvement in courthouses, ensuring that the position vacancies of key criminal justice participants are quickly filled, reducing the number of cases entering the traditional criminal justice system, and the need for better data collection concerning *Jordan* applications to assess the frequency of, and reasons for, delay and to provide support for making evidence-based changes if warranted.

It must be stated from the outset that our position within this paper is not to be critical of the SCC's decision in *Jordan*. Rather, we intend to provide a new perspective on the importance of adequate governmental and justice agency responses to the demands of the SCC in *Jordan* through the exploration of wrongful conviction literature. While there exists no universal definition as to what a wrongful conviction may be defined as,[38] we nevertheless adopt the FTP Heads of Prosecution Committee's understanding of such occurrence, which asserted that it is "...the conviction of a person who is factually innocent of the crime for which he or she was convicted ... and whose conviction is not remedied through the ordinary court processes within a reasonable time."[39]

## II. THE CASE OF *R V JORDAN*

### A. Summary of *Jordan*

Section 11(b) of the *Canadian Charter of Rights and Freedoms* guarantees the right to a trial within a reasonable time.[40] For over two decades, the relevant case law for assessing section 11(b) *Charter* applications was set out in the 1992 case of *R v Morin*.[41] In *Morin*, the SCC previously held that to assess section11(b) *Charter* applications, judges are to balance four factors, including:

> ... (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interest in liberty, security of the person, and a fair trial.[42]

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38 FTP Heads of Prosecution Committee, *ibid*.
39 *Ibid*.
40 *Jordan, supra* note 26 at para 12.
41 *Ibid* at para 13.
42 *Ibid* at para 30.

The *Morin* framework would go on to define the boundaries of section 11(b) until a narrow majority in *R v Jordan* would overturn it and establish an entirely new framework to assess delay.

In *Jordan*, the accused was one of ten co-accused charged with several offences related to the possession and trafficking of narcotics following a dial-a-dope operation conducted by the Royal Canadian Mounted Police ("RCMP").[43] Mr. Jordan was arrested in December of 2008, where he remained in custody until he was eventually released on bail in February of 2009, with restrictive conditions, including house arrest.[44] While his preliminary inquiry was originally scheduled for May of 2009, the Crown and the defence sought continuances until eventually around 44 months had elapsed before the start of his trial.[45] As a result of this lengthy delay, Jordan brought forward an application to enter a stay of proceedings, alleging that his section 11(b) *Charter* right had been violated.[46]

In applying the *Morin* framework, the trial judge ultimately decided to dismiss the application.[47] In his analysis, the trial judge reasoned that while the delay was significant, an institutional delay should be given less weight than a delay caused by the Crown.[48] In this case, he ascribed four months of delay to Mr. Jordan when he had opted to change counsel at the start of the trial, while two months of delay were attributed to the Crown and 32.5 months were found to be the result of an institutional delay.[49] Around this same time, Mr. Jordan was also convicted of drug-related charges in relation to a separate incident, which resulted in him being placed under a conditional sentence order with similarly restrictive conditions as those which he was assigned while on bail.[50] The trial judge, therefore, also reasoned that because Mr. Jordan was subject to similar conditions under the conditional sentence order during a large portion of the delay, the prejudice which he experienced because of the delay was rather limited.[51] Consequently, the trial judge concluded that the delay was not unreasonable, and the trial resumed.[52] The trial would eventually go on to

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43 *Ibid* at para 7. As explained by the SCC in the case of *R v Ahmad*, a dial-a-dope operation is where the police pose as a prospective drug buyer by calling the phone of a drug trafficker with the objective of arranging a meeting to purchase illicit drugs. See *R v Ahmad*, 2020 SCC 11.

44 *Jordan*, *supra* note 26 at para 7.

45 *Ibid* at paras 7-12.

46 *Ibid* at para 12.

47 *Ibid* at para 13.

48 *Ibid* at para 15.

49 *Ibid* at paras 14-15.

50 *Ibid* at para 11.

51 *Ibid* at para 16.

52 *Ibid* at para 17.

conclude in February of 2013, with Mr. Jordan being convicted of five drug-related offences.[53]

Mr. Jordan later appealed his case to the British Columbia Court of Appeal ("BCCA") and argued that the trial judge erred in his finding that the delay was reasonable.[54] While the BCCA would ultimately agree with the trial judge and dismiss the appeal, Mr. Jordan would continue his argument up to the SCC, where the majority opinion would come to a very different conclusion by deciding to dramatically change the law with respect to section 11(b) of the *Charter*.[55] The justification for such dramatic shift in the law rested upon their recognition that the *Morin* framework was beset by "doctrinal and practical problems," which were incapable of being resolved through mere refinements.[56] In this respect, the SCC went on to identify several shortcomings of the *Morin* framework over its decades of authority, including the fact that it was too unpredictable, complex, confusing, hard to prove, and subjective.[57] These shortcomings would be demonstrated by the facts that judges had a particularly difficult time assessing the element of prejudice present within the *Morin* framework, the framework provided little to prevent delay or otherwise encourage substantive change within the justice system, it encouraged "micro-counting" to attribute each instance of delay to a particular party, and that judges were ultimately hesitant to find in the accused's favour and order a stay of proceedings in lieu of society's interest in continuing the trial.[58] Together, the SCC suggested these factors culminated into a "culture of complacency" with respect to delay in the justice system.[59]

In place of *Morin's* rather subjective analysis, the SCC opted to replace it with a more determinative framework by setting definitive limits on the length of time that a criminal trial is presumed to take, known as "presumptive ceilings."[60] Such ceilings apply from the date of charge to the "...actual or anticipated end of trial"[61] and were thus set at 18 months for provincial court cases and 30 months for superior court cases or provincial court cases with a preliminary inquiry.[62] In their written decision, the SCC

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53 *Ibid* at para 12.
54 *Ibid* at para 17.
55 *Jordan, supra* note 26.
56 *Ibid* at para 29.
57 *Ibid* at paras 33-39.
58 *Ibid.*
59 *Ibid* at para 40.
60 *Ibid* at para 5.
61 *Ibid* at para 47.
62 *Ibid* at para 46.

reportedly arrived at such specific ceilings by accounting for the time required to complete modern criminal investigations and prosecutions.[63]

When calculating delay with respect to such ceilings within a particular case, the trial judge is to subtract any delay attributable to the defence.[64] In recognizing an incentive for the defence to contribute to delay, the court noted that frivolous defence actions would count towards defence delay; however, on the other hand, legitimate defence actions such as preparation time and genuine applications or requests would ultimately count toward the total delay calculation.[65] If, after accounting for defence delay, the total remaining delay still exceeds the presumptive ceiling, the burden is then placed upon the Crown to justify that the delay was nevertheless reasonable.[66] The Crown may only justify delay beyond the ceilings if it was the result of "discrete events" that were reasonably unforeseeable – such as illness – or was otherwise the result of the case being particularly complex.[67] With respect to the latter exception, the SCC commented that a murder case by itself does not typically meet the threshold of a complex case.[68] However, it was suggested that a case may be more complex where charges of terrorism or organized crime are present.[69] Ultimately, if the Crown is unable to justify the delay based on either exception, a stay of proceedings must be entered.[70]

The SCC also noted that even if the delay is below the presumptive ceiling prescribed for a particular case, the defence may still argue that the delay was nevertheless unreasonable.[71] In such an event, the defence must show that it took the initiative by taking meaningful steps to expedite the proceedings and that the reasonable time requirements of the case were markedly exceeded.[72] Both qualifications must be demonstrated for a violation of section 11(b) to be found within such context.[73] In any event, the SCC suggested that successful applications below the presumptive ceilings will be rare, save for "clear" cases.[74]

Because judicial change in the law is presumed to operate retroactively, the Court in *Jordan* noted that these newly established presumptive ceilings

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63 *Ibid* at paras 52-53.
64 *Ibid* at para 60.
65 *Ibid* at para 63.
66 *Ibid* at para 68.
67 *Ibid* at paras 69-81.
68 *Ibid* at para 78.
69 *Ibid* at para 81.
70 *Ibid* at para 76.
71 *Ibid* at para 82.
72 *Ibid*.
73 *Ibid*.
74 *Ibid* at para 83.

were to apply immediately, even to cases already within the system – albeit with a few caveats.[75] In this respect, to avoid widespread stays of proceedings being entered, a contextual "transitional period" is to be applied in which the Crown may demonstrate that "… the time which the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed."[76] Because Mr. Jordan's case fell within the transitional period, this slightly modified the framework applied to him.[77] When embarking upon such analysis, the majority opinion accounted for a defence delay of four months and ascribed the Crown a remaining delay of 44 months, which well exceeded the case's prescribed ceiling of 30 months.[78] Despite the additional consideration of such "transitional circumstances," the SCC ultimately found the delay to be unreasonable.[79] Such a finding was aided by the fact that there were a lack of discrete events present and that the case itself was determined to be relatively absent of complexity.[80] As explained by the SCC:

> We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating.[81]

In conclusion, the court found that Mr. Jordan's section 11(b) *Charter* right had been infringed, and a stay of proceedings was ordered.[82]

## B. Post-*Jordan* Aftermath and its Implications on the Justice System

In the years following the release of the decision, the SCC took up several opportunities to clarify the nuances of the presumptive ceilings. For instance, in *R v KJM*,[83] the SCC held that the presumptive ceilings apply to youth matters. In *R v KGK*,[84] the SCC determined that the presumptive ceilings timeline does not include the time it takes for a trier of fact to reach their verdict. In other words, the timeline begins from the moment a charge

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75 *Ibid* at paras 93-95.
76 *Ibid* at para 96.
77 *Ibid* at para 128.
78 *Ibid* at para 124.
79 *Ibid* at para 128.
80 *Ibid* at paras 125-28.
81 *Ibid* at para 128.
82 *Ibid* at para 135.
83 *R v KJM*, 2019 SCC 55.
84 *R v KGK*, 2020 SCC 7.

is laid until the end of trial arguments.[85] In *R v JF*,[86] the SCC held that when a new trial is ordered, the presumptive ceilings apply only to the delay that occurred within the accused's new trial. As this new section11(b) jurisprudence continues to take hold in the coming years, it is inevitable that the courts will continue to clarify the framework's specificities.

In 2017, a standing committee established by the Senate of Canada and tasked with the objective of studying delay within the justice system released their comprehensive final report, which included over 50 recommendations about how such delay may be reduced across Canada.[87] The committee traveled to several provinces and heard testimony from over a hundred witnesses involved within the justice system in various capacities with the objective of understanding the differing challenges and perspectives as to the factors contributing to the delay.[88] In response to the findings of the committee, in March of 2018, the federal government introduced Bill C-75, which aimed to modernize the criminal justice system and reduce delay, most notably through changes such as streamlining the bail process, restricting the availability of preliminary inquiries to only specific serious offences, expanding the powers of the judiciary with respect to case management, and streamlining the classification of offences.[89] Further efforts have been taken by individual provinces, such as in Ontario, where the province has hired additional provincial judges and Crown prosecutors,[90] and in British Columbia, which has proposed a digitalization strategy aimed at reducing delay through the implementation of technology in courthouses.[91]

Given *Jordan's* notable changes to the practice of criminal law, it is perhaps unsurprising that the decision has been the subject of considerable controversy amongst legal scholars and practitioners. For instance, in a

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85 *Ibid*.

86 *R v JF*, 2022 SCC 17.

87 SSCLCA, *supra* note 34.

88 *Ibid* at 22.

89 "Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act, and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)" (last modified 26 August 2022), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html> [perma.cc/PX29-FYGH].

90 Andrew Pilla & Levi Vandersteen, "Re-Charting the Remedial Course for Section 11(b) Violations Post-Jordan" (2019) 56:2 Osgoode Hall LJ 436 at 439 n 12 [Pilla & Vandersteen].

91 "Court Digital Transformation Strategy" (2019), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf> [perma.cc/R5GN-59C5] [Court Digital Transformation Strategy].

survey of police investigators within the province of British Columbia, participants unanimously agreed that *Jordan* effectively requires that governments commit additional funding for more police, Crown counsel, courtrooms, and RCMP laboratories to meet the requirements of the decision and maintain the repute of the justice system.[92] Lundrigan has argued that the SCC's decision to set descriptive ceilings with respect to how long a criminal case must be completed within provides little incentive to address delay, whereby the Court should have instead provided prescriptive ceilings that tell the state how long a case should be completed by.[93] Maintaining a similar critical lens, Anevich has suggested that *Jordan*:

> ...Effectively reduces constitutional law to mathematics and rejects the underlying spirit of the law and combined weight of Canadian and American speedy trial jurisprudence. It turns judges and litigants into accountants, and except for determining what an exceptional circumstance is or the limits of the transitional framework, removes all weighing from the calculation.[94]

Other scholars, such as Pilla and Vandersteen, have argued that unlike the *Morin* framework, the *Jordan* framework is devoid of interest balancing and, therefore, requires a revision of the precedent that a stay of proceedings is the only remedy available to the judiciary following the finding of a section 11(b) breach.[95] Similarly, de Sa has argued that the availability of alternative remedies for judges other than a stay of proceedings is necessary to ensure that the administration of justice is not undermined.[96]

As evident from such commentary, a significant focus among academics and practitioners has narrowed in on the potential implications that *Jordan* may have for criminal trials or the justice system more broadly. Despite this, given the imposition of strict time constraints on police and Crown, a key consideration that has been absent from this discussion concerns the need to resolve delays within the justice system as a means of combatting the potential for wrongful convictions due to the development of a "rush to justice" mentality among such actors. In this respect, because the presumptive ceilings begin from the moment that an accused person is charged, the SCC's decision in *Jordan* necessarily implicates the role and responsibilities of both the police and the Crown. Indeed, upon laying a criminal charge, *Jordan* effectively places deadlines on the police's

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92 Irwin M Cohen et al, "An Examination of the Impact of Court Rulings on Police Investigation Time and Resources" (2021) at 3, online (pdf): *Center for Public Safety and Criminal Justice Research* <cjr.ufv.ca/wp-content/uploads/2021/08/Jordan-Study-Final-Report-in-Centre-Template.pdf> [perma.cc/ES7Y-YFJ3].

93 Keara Lundrigan, "R v Jordan: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 122.

94 Anevich, *supra* note 32 at 49.

95 Pilla & Vandersteen, *supra* note 90.

96 Chris de Sa, "Understanding *R. v. Jordan*: A New Era for s. 11(b)" (2018) 66:1-2 Crim LQ 92 at 106-107.

responsibility to conduct investigations and collect evidence. Because of this, police agencies must now ensure that their investigations are complete with adequate time to spare for subsequent Crown preparation. Once an investigation is completed, the Crown themselves must ensure that they have thoroughly evaluated all the evidence present within a particular case and, if needed, are able to bring the matter to trial within these strict time constraints.

Nevertheless, it is important to acknowledge that in most instances, the *Jordan* framework allows the police and Crown a substantial amount of time to resolve cases.[97] Indeed, it has been observed that many cases may be resolved well under the presumptive ceilings set out in *Jordan*.[98] Moreover, even if cases begin to show signs that they may fail to meet these ceilings, the Crown has several tools at its disposal that may be used to expedite such matters.[99] For example, de Sa has recognized that:

> (1) Working with police and organizing disclosure pre-charge builds in lead time; (2) Charge screening, diversion, and triage reduces volume; (3) Reducing the number of charges and reducing the number of accused simplifies the proceedings and shortens time estimates; (4) Case-management/disclosure teams allow the Crown to keep on top of files and set dates expeditiously; (5) Section 540 applications in preliminary hearings can expedite matters substantially; (6) Direct Indictments shorten otherwise protracted proceedings in Provincial Court; (7) Rolling lists for priority matters which place them as a priority week to week when courts are unavailable; and (9) Case management judges can assist with expediting motions.[100]

Furthermore, even where these additional efforts falter and the Crown still fails to meet the presumptive ceilings, they may nevertheless have the ability to rebut the presumption that the delay was unreasonable. However, such arguments may only be successful if the delay falls within the "discrete events" or "complex cases" category. It does not, for instance, allow for the Crown to justify continual delay within the justice system, which may have contributed to that case exceeding the ceilings. In addition, even if the Crown believes that some delay may be the result of discrete events or the case's complexity, there is no guarantee that the Court will see it the same way or otherwise attribute the entirety of the delay which the Crown had sought to justify. This reality is at the heart of our concern that a failure to resolve delay in the justice system may result in actors such as the police and Crown rushing to resolve cases. As previously mentioned, this "rush to justice" mentality is particularly problematic as it has been recognized to have the potential to contribute to the occurrence of a wrongful

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97 *Ibid* at 100.
98 *Ibid*.
99 *Ibid*.
100 *Ibid*.

conviction.[101] In the following section of this paper, we will consider several wrongful conviction concepts that are particularly relevant to such mentality, including cognitive biases, tunnel vision, and noble-cause corruption.

## III. "RUSH TO JUSTICE" WRONGFUL CONVICTION CONCEPTS AND THEIR RELEVANCE TO *JORDAN*

To make sense of the potential for *Jordan*-induced time pressures to increase the likelihood of a miscarriage of justice, we adopt a social science conceptual framework informed by the field of wrongful convictions. That is, should the factors contributing to delay within the justice system continue unabated, police and Crown who are tasked with meeting the presumptive ceilings set out in *Jordan* will effectively face time-related pressures in meeting these deadlines. Within the field of wrongful convictions, such time-related pressures have been understood to have the potential to negatively impact the decision-making processes of the police and Crown.[102] In turn, this can then influence the course of a criminal investigation or prosecution and potentially contribute to the occurrence of a wrongful conviction.[103] In this respect, we suggest that the concepts of cognitive biases, tunnel vision, and noble-cause corruption are of particular concern when considering the development of such a "rush to justice" mentality. Each of these concepts will be explored in detail throughout this section.

### A. Cognitive Biases and Tunnel Vision

To effectively process the copious amounts of information that individuals are confronted with during their day-to-day lives, human beings often unconsciously make use of mental shortcuts known as "cognitive biases."[104] Broadly defined, cognitive biases can be understood as an "...umbrella term that refers to a variety of inadvertent but predictable mental tendencies which can impact perception, memory, reasoning, and behaviour."[105] While cognitive biases may sound unflattering in these terms,

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101 MacFarlane, *supra* note 25 at 7-16; FTP Heads of Prosecution Committee, *supra* note 25 at 10-12.

102 *Ibid.*

103 *Ibid.*

104 MacFarlane, *supra* note 25 at 37.

105 Vanessa Meterko & Glinda Cooper, "Cognitive Biases in Criminal Case Evaluation: A Review of the Research" (2021) 37:1 J Police Crim Psychol 101 at 101 [Meterko & Cooper].

these predictable mental tendencies are essential to human cognition.[106] Indeed, as MacFarlane notes:

> On a practical level, cognitive biases may actually be seen as a natural means by which we can efficiently process the flood of information we are subjected to on a daily basis. Without some sort of filtration mechanism, information received may simply become a "blur."[107]

Although cognitive biases may be beneficial for everyday information processing, in the context of a criminal investigation or prosecution where the careful evaluation of all the existing evidence is critical to assessing the guilt or innocence of a suspect, these mental shortcuts can be detrimental to the need for objectivity.[108] This is especially the case as humans tend "... to categorize, interpret, and give attention only [on] a selective basis... ."[109]

When cognitive biases occur during a criminal investigation, it may result in police and/or prosecutors unconsciously engaging in a psychological phenomenon known as tunnel vision.[110] In the criminal justice context, tunnel vision may be understood as "...a tendency of participants in the system, such as police or prosecutors, to focus on a particular theory of a case and to dismiss or undervalue evidence which contradicts that theory."[111] Tunnel vision is the result of the formation of several cognitive biases – namely confirmation bias, hindsight bias, and outcome bias.[112] In defining each of these psychological phenomena,

> ... confirmation bias involves seeking out, interpreting, or recalling evidence or information that supports existing beliefs; hindsight bias is a means of projecting new knowledge, or outcomes into the past whereby the early stages of process connect casually to the end; and outcome bias reflects hindsight judgments about whether a decision was a good or bad one, a correct or incorrect one.[113]

Although tunnel vision may be thought to be somewhat synonymous with confirmation bias, the two concepts are notably distinct.[114] In this regard, while tunnel vision narrows an individual's focus on a particular suspect, confirmation bias results in an unconscious filtering of evidence.[115]

Given tunnel vision's roots in the concept of cognitive biases, it is important to note that its development does not necessarily indicate

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106 MacFarlane, *supra* note 25 at 37; Meterko & Cooper, *supra* note 105 at 101.
107 MacFarlane, *supra* note 25 at 37.
108 *Ibid* at 37-45.
109 *Ibid*.
110 FTP Heads of Prosecution Committee, *supra* note 25 at 7-10.
111 *Ibid* at 7.
112 Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) at 52 [Campbell].
113 *Ibid* at 52-53.
114 FTP Heads of Prosecution Committee, *supra* note 25 at 7.
115 *Ibid*.

malfeasance.[116] Indeed, "[t]unnel vision is not a judgmental concept. It says nothing about the ethics or character of the person involved. Properly understood, it involves a natural human tendency, and is not the result of maliciousness, much less corruption."[117] Moreover, because the development of tunnel vision is understood to be a natural human tendency, even the most experienced investigators or prosecutors are not immune to its development.[118] In fact, experienced Crown all succumbed to varying degrees of tunnel vision in the prominent Canadian wrongful convictions of David Milgaard, Guy-Paul Morin, Thomas Sophonow, and James Driskell.[119]

Much like cognitive biases, the development of tunnel vision poses a serious risk for criminal investigations and prosecutions.[120] In this respect, through the influence of confirmation bias, hindsight bias, and outcome bias,[121] tunnel vision may interfere with the objective assessment and collection of evidence.[122] As a result, the formation of tunnel vision has been understood to have the potential to inadvertently result in the distortion of truth or the displacement of the presumption of innocence.[123]

In providing an example of the implications of tunnel vision during the process of a criminal investigation, the work of Jerome Frank – who was an American judge of the U.S. Circuit of Appeals – provides an excellent illustration of the risks that may arise when actors stubbornly cling to their belief in the guilt of a suspect or accused during an investigation:

> A bank has been robbed, its cashier murdered. A bystander reports to the police that he saw Williams Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together those clues and jump to the conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones's guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed by prejudice against any other.[124]

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116 Bruce A MacFarlane, "Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors" (2016) 63:4 Crim LQ 439 [MacFarlane] at 453.

117 *Ibid.*

118 *Ibid* at 443-50.

119 *Ibid.*

120 *Ibid* at 453-54.

121 Campbell, *supra* note 112 at 52-53.

122 Dianne L Martin, "Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence" (2002) 70 UMKC L Rev 847 at 848 [Martin].

123 MacFarlane, *supra* note 116 at 454.

124 Judge Jerome Frank & Barbara Frank, Not Guilty (Garden City: Doubleday and Company Inc, 1957). Doubleday and Company, Inc (Garden City, NY: 1957) at 66, cited in MacFarlane, *supra* note 116 at 452.

## B. *Jordan*'s Implications for the Development of Cognitive Biases and Tunnel Vision

Importantly, it has been well-recognized that the likelihood for the development of tunnel vision may be exacerbated by the environment in which police and the Crown operate.[125] In particular, it has been found that police and Crown are more prone to developing tunnel vision when they operate within an environment that demands efficiency over thoroughness.[126] This type of environment is problematic as it has been understood to encourage a reduced depth of cognitive processing, which thereby may increase both the adoption and the effects of cognitive biases.[127] Put differently, such an environment is not conducive to the allowance of thorough and objective thought, which has been suggested to be the "true enemy" of tunnel vision.[128]

Should police and Crown struggle to meet the presumptive ceilings in *Jordan* due to the continued existence of delay within the justice system, this problematic environment may be conducive to the development of a 'rush to justice' mentality, which may then exacerbate factors that are known contributors to wrongful convictions.[129] Indeed, continual delay within the justice system will make these timelines unrealistic, and consequently, police and Crown may be unable to thoroughly evaluate all the evidence that is present within a particular case. These circumstances would effectively result in police and Crown rushing to resolve cases – which is problematic for preventing wrongful convictions. It has been suggested that "[m]ost cases of confirmed wrongful convictions are a product of pressure, generated either externally because of a high-profile crime or internally by resource and other institutional forces, to resolve a crime which fuels a bias dubbed 'tunnel vision.'"[130] This reality emphasizes the importance for police and the Crown to be able to thoroughly evaluate all evidence and potential leads within a particular case.

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125 MacFarlane, *supra* note 25 at 37-56; Meterko & Cooper, *supra* note 105 at 107-08.

126 Meterko & Cooper, *ibid*.

127 Karl Ask, Pär Anders Granhag & Anna Rebelius, "Investigators Under Influence: How Social Norms Activate Goal-Directed Processing of Criminal Evidence" (2011) 25:4 Appl Cogn Psychol 548.

128 FTP Heads of Prosecution Committee, *supra* note 25 at 11.

129 We acknowledge that tunnel vision may not always necessitate a rush to bring an accused to trial. There may be instances where tunnel vision could potentially extend the length of an investigation or prosecution due to a fixation on a particular individual. However, as *Jordan* effectively creates time limits for a criminal investigation and prosecution, the focus of this paper is primarily concerned with the opposing set of circumstances where such actors are in a rush due to the existence of continual delay.

130 Martin, *supra* note 122 at 848.

It has also been recognized that the need for careful case evaluation is especially salient given that the general process of a criminal investigation within Canada already creates a heightened risk for the development of tunnel vision.[131] In this respect, following the completion of an investigation by the police, the Crown typically receives a case file that already implicates a particular accused and is absent of evidence that may incriminate a different suspect.[132] In reviewing the case file, the separation of offices between the police and the Crown offers an opportunity for the Crown to evaluate such evidence with a "fresh set of eyes" and ensure that the evidence against an accused is sound. However, if the Crown does not have the luxury of evaluating the present evidence within a particular case given the existence of unrealistic time restraints, they too can perpetuate the tunnel vision that began at the investigatory stage.[133]

If, after receiving a case file from investigators, a trial is looking to conclude uncomfortably close to the presumptive ceilings, continual delay within the justice system may result in the Crown being unable to critically analyze all the present evidence. Alternatively, in such situations where the presumptive ceiling is approaching, and there are doubts as to the reliability of the police's investigation, the Crown may be left to make the difficult choice of deciding whether to continue with the trial as planned or risk encroaching upon the presumptive ceilings. This choice may be particularly difficult given that the risks of encroaching upon the ceiling are severe – namely that a stay of proceedings will occur should a section 11(b) breach be found.

It is also in this way that the existence of unrealistic timelines may have the potential to implicate the Crown's discretion with respect to charge screening and the decision of whether to proceed with a charge. For example, Manitoba's charge screening policy requires two criteria to be met, namely that there is a reasonable likelihood of conviction and that it is in the public interest to proceed with the charge.[134] Such policies – both in Manitoba and in other provinces – operate in part upon the recognition of the risk of wrongful convictions and that weak cases should not be prosecuted to avoid putting a potentially innocent accused in jeopardy of conviction.[135] The past wrongful convictions of Randy Druken and Gregory

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131 FTP Heads of Prosecution Committee, *supra* note 25 at 8.

132 *Ibid.*

133 *Ibid.*

134 Manitoba Department of Justice Prosecutions, "Laying, Staying and Proceeding on Charges" (2017), online (pdf): *Government of Manitoba* <www.gov.mb.ca/justice/crown/prosecutions/pubs/laying_and_staying_of_charges.pdf> [perma.cc/72LQ-GF4L].

135 Campbell, *supra* note 112 at 66.

Parsons in Newfoundland and Labrador demonstrate this risk well.[136] In those cases, it was found that the Crown accepted the police's belief in the guilt despite evident inconsistencies in both instances.[137]

The need for careful case evaluation on the part of the police and Crown is especially salient in cases where jailhouse informants are involved, and thus, special caution toward the present evidence is required. This fact was echoed by Justice Cory in the inquiry into Thomas Sophonow's wrongful conviction, where he noted:

> This case demonstrates that experienced police officers considered very unreliable informants to be credible and trustworthy. Crown counsel obviously thought they were credible witnesses who should be put forward. If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments.[138]

Fortunately, while provinces have become more attuned to the risks that jailhouse informants present and have implemented additional safeguards accordingly,[139] it is critical that these safeguards still require time for careful case evaluation when making such assessments.

In the advent of the presumptive ceilings, the existence of continual delay within the justice system may also be problematic in its ability to further heighten the pressures already faced by police and Crown, which have been understood to potentially contribute to the development of tunnel vision. Such pressures include those that arise from "...victims and their families, the public, colleagues, and supervisors..."[140] For police, such pressures have the potential to influence the course of an investigation as they work to identify a suspect.[141] For the Crown, such pressures can contribute to the development of a "conviction psychology," whereby a Crown's mentality may shift from one that is interested in obtaining justice to one that is interested in securing a conviction.[142] Importantly, the Crown is supposed to be arbiters of justice, which necessarily excludes notions of winning or losing.[143] Indeed, the role of the Crown was eloquently explained in the case of *Boucher v The Queen*,[144] where the SCC noted:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly

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136 *Ibid.*
137 *Ibid.*
138 Cory, *supra* note 1 at 109.
139 Campbell, *supra* note 112 at 118-130.
140 FTP Heads of Prosecution Committee, *supra* note 25 at 10.
141 *Ibid.*
142 *Ibid.*
143 *Ibid.*
144 *Boucher v The Queen*, [1955] SCR 16 at 23-24, 110 CCC 263.

> and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings.

Ultimately, if continual delay within the justice system remains a problem, police and Crown who are tasked with meeting the presumptive ceilings may face heightened pressures to not only obtain a conviction but also to do so within an unrealistic timeline. This heightened pressure may be particularly powerful given that if the police and Crown fail to meet such a timeline, a stay of proceedings will follow. This reality further speaks to the high-stakes nature of continual delay and the need to ensure that police and Crown are not being rushed to resolve cases in the advent of the presumptive ceilings.

Importantly, should continual delay within the justice system remain a problem given the presumptive ceilings, this can result in police and Crown rushing to resolve cases not only through trials but also through plea bargaining. Plea bargaining is a common practice within the justice system whereby the Crown offers the accused a lesser penalty in exchange for a guilty plea.[145] By engaging in such practice, plea bargaining is often considered to benefit all the parties involved where:

> ... the Crown can tidily close its case, the defence is spared a possibly long trial, and the accused is rewarded for saving court time and expense as well as for sparing victims and victims' families from having to relieve painful events.[146]

In comparison to criminal trials, plea bargaining is the far more common way in which criminal matters are resolved.[147] Indeed, it has been reported that around 90 percent of cases are resolved through the means of plea bargaining.[148] In this way, plea bargaining is often seen to be essential to the function of the criminal justice system.[149] In its absence, it has been suggested that the justice system would likely collapse under its weight due to the sheer volume of cases that would have to be accommodated through criminal trials.[150]

When offering a plea bargain, the Crown must believe that if the matter went to trial, there would be a reasonable likelihood of conviction.[151] However, as we have argued throughout this paper, should the police and Crown be rushing to resolve cases because of the existence of continual

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145 Campbell, *supra* note 112 at 69.
146 *Ibid* at 69.
147 FTP Heads of Prosecution Committee, *supra* note 25 at 173.
148 *Ibid.*
149 Campbell, *supra* note 112 at 69.
150 *Ibid.*
151 FTP Heads of Prosecution Committee, *supra* note 25 at 191-92.

delay, this can result in the development of tunnel vision. Once tunnel vision develops, this can then cause such actors to overly focus on a particular theory and to dismiss evidence that may point to an accused's innocence.[152] Consequently, this can interfere with the Crown's assessment of the prospect of conviction, and as a result, they may offer an innocent accused a plea bargain. While plea bargaining is essential to the function of the justice system, it has been well recognized that such practice may induce innocent persons into a guilty plea. This has been understood to occur for a variety of reasons, including that proceeding to trial may be perceived by an accused as too great a risk to take, that accepting a guilty plea would spare them a lengthy criminal trial, or the simple fact that an accused may actually be released sooner if they plead guilty.[153]

The pressure to accept a plea bargain despite one's innocence can also be dependent on one's identity and unique circumstances.[154] Indeed, it has been observed that various sub-populations, including young persons, Indigenous persons, those with cognitive deficits or mental health concerns, and other marginalized groups, may be at a heightened vulnerability to accept a plea bargain despite their innocence.[155] For instance, Amanda Carling observes that Indigenous peoples may be particularly vulnerable to pleading guilty to a crime that they did not commit for a wide variety of reasons, including – but not limited to – the fact that they are more likely to be denied bail, they may experience communication barriers with justice participants, or they may otherwise face difficulties in navigating and understanding a foreign system of justice which operates upon a different worldview.[156] Given these realities, it is perhaps unsurprising that of the 15 recognized wrongful convictions where an innocent accused entered a guilty plea, four (or 27%) of them were of Indigenous identity.[157] Such a number is greatly disproportionate to the 5% of the general Canadian population that Indigenous peoples make up – although it is a little less than the roughly 30% of the prison population that Indigenous peoples make up.[158]

It has also been recognized that there exists a gendered dimension to the pressure for an innocent person to plead guilty.[159] For example, because

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152 *Ibid* at 7.
153 *Ibid* at 175-81.
154 *Ibid* at 172, 227-28.
155 *Ibid* at 172.
156 Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3-4 Crim LQ 41.
157 Kent Roach, "Canada's False Guilty Pleas: Lessons from The Canadian Registry of Wrongful Convictions" (2023) 4:1 Wrongful Conviction LRev 16 at 22.
158 *Ibid*.
159 *Ibid* at 20-22; FTP Heads of Prosecution Committee, *supra* note 25 at 227-28.

most women charged with a crime are also mothers, their familial obligations may pressure them to plead guilty to a crime they did not commit for them to avoid a long criminal trial or to be released from custody sooner.[160]

All of this is not to suggest that one would necessarily expect to see a notable increase in the rate at which plea bargaining is used to resolve cases in a post-*Jordan* environment – especially considering that many cases would be resolved well below the presumptive ceiling and, therefore allow the Crown and police plenty of time to comfortably close their case. Nevertheless, in those cases where the police and Crown are struggling to meet the presumptive ceiling, tunnel vision may be at a heightened risk of developing. If such a stubborn belief in guilt does develop, this can result in the offering of a plea bargain to an innocent accused.

## C. Noble-cause Corruption

One potential byproduct of tunnel vision is that of noble-cause corruption.[161] Although noble-cause corruption may have a variety of definitions,[162] in general, it typically refers to "... an ends-based police and prosecutorial culture that masks misconduct as legitimate on the basis that the guilty must be brought successfully to justice."[163] In other words, noble-cause corruption may occur when actors such as the police and Crown become blinded as to the inappropriateness of their conduct and instead perceive their actions as legitimate in pursuit of the public interest.[164] Such actors may engage in this type of corruption because they find themselves "...emotionally invested in a case and driven by the need to protect the victim or society from the suspect or perpetrator."[165]

It has also been suggested that participants may engage in such corruption for non-moral reasons, including the fact that it may "... simply make one's job easier; it may conceal sloppy or inadequate police work; it may relieve one of social pressure and so on."[166] In practice, noble-cause corruption can take the shape of a variety of deceptive or non-deceptive conduct.[167] Deceptive tactics may include lying about or otherwise fabricating evidence, while non-deceptive conduct may include the use of

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160 FTP Heads of Prosecution Committee, *supra* note 25 at 227-28.
161 *Ibid* at 18; MacFarlane, *supra* note 25 at 23-24.
162 Campbell, *supra* note at 112 at 51.
163 MacFarlane, *supra* note 25 at 4.
164 *Ibid* at 20.
165 FTP Heads of Prosecution Committee, *supra* note 25 at 11.
166 John Kleinig, "Rethinking Noble Cause Corruption" (2002) 4:4 Intl J Police Sci & Manag 287 at 308, n 44.
167 *Ibid* at 290.

excessive force, illegal surveillance tactics, racial profiling, and a whole host of other forms of misconduct.[168]

## D. *Jordan*'s Implications for the Development of Noble-Cause Corruption

The significance of noble-cause corruption in relation to the institution of presumptive ceilings is closely aligned with the fact that a failure to meet such deadlines can result in a factually guilty person not being held accountable for their crimes and the concomitant impacts on victims and their families as well as public trust in the justice system. Indeed, on the one hand, the imposition of definitive ceilings upon which delay is presumptively unreasonable may be advantageous in its setting of clear expectations for police and the Crown.[169] In this respect, the institution of presumptive ceilings allows state actors to streamline proceedings and quickly remedy any problems that may be contributing to the delay of a particular case.[170] At the same time, however, the SCC has long set out that a violation of section 11(b) can only be remedied with a stay of proceedings. The necessity for such a remedy was clearly articulated in *R v Rahey*,[171] where the SCC noted:

> If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the *Charter*.

In other words, a trial that continues after the breach of an accused's section 11(b) *Charter* right has been found would only further worsen the violation.[172]

While such high stakes may act as a motivator for the state to ensure that concrete action is taken, they simultaneously may have the potential to act as a motivator for actors to engage in corruption to ensure that factually guilty persons are held to account. This is especially the case because the occurrence of a stay of proceedings is notoriously criticized by the Canadian public.[173] Indeed, it has been suggested that "[o]ne effect that rarely fails to escape public consciousness when serious charges are stayed for

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168 *Ibid*.
169 Pilla & Vandersteen, *supra* note 90 at 439.
170 *Ibid*.
171 *R v Rahey*, [1987] 1 SCR 588 at para 45, 39 DLR (4th) 481.
172 Pilla & Vandersteen, *supra* note 90.
173 *Ibid* at 444-45.

unreasonable delay is that the accused may receive a windfall."[174] A similar position was also recognized by the SSCLCA during their study, where it was noted that:

> Stays are of great concern to Canadians. They can have a harsh impact on victims and affect public confidence in the criminal justice system. When stays are granted in cases involving alleged child abuse or murder, it shocks the conscience of Canadian communities. They represent a failure to properly prosecute crimes and thereby protect society.[175]

Consequently, should the presumptive ceilings be at risk of being encroached upon within a particular case due to the continual existence of a delay in the justice system, actors such as police or Crown may feel pressure to engage in illegal or otherwise unethical conduct as a means of securing a conviction. For example, it is easy to imagine a scenario where a Crown may become aware of the existence of key disclosure halfway through a trial. While the trial may be on track to complete just under the presumptive ceiling, the Crown knows that if such evidence is disclosed to the defence, the proceedings will likely be adjourned so that the defence can have adequate time to prepare. Because legitimate defence preparation time would count towards the total calculation of delay, the Crown knows that disclosing such evidence would bring the trial beyond the presumptive ceiling for that case. While, as previously discussed, the Crown may argue that the delay was attributable to the defence or was otherwise the result of discrete events or the fact that the case was particularly complex, there is no guarantee that such an argument will be successful. Though they may still provide proper disclosure, in such a scenario, the Crown may be under significant pressure not to disclose such evidence. Similarly, should the police find themselves in a situation where they become aware of late disclosure of which the Crown is unaware, they too may be under significant pressure not to inform the Crown of its existence in worry that it would result in the case exceeding the presumptive ceilings. Though hypothetical, these are plausible scenarios demonstrating the importance of ensuring delay is properly addressed so that decisions made by justice system actors are not impacted by whether a case is unduly close to the presumptive ceiling. Doing so would ensure that should unexpected events arise – like that of late disclosure – state actors are not placed in such an uncomfortable position.

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174 *Ibid* at 444.

175 SSCLCA, *supra* note 34 at 1.

## IV. Are Actors Being "Rushed to Justice" at the Current State of Delay?

Given the potential for the institution of presumptive ceilings to interact with extant delay issues in contributing to the development of a "rush to justice" mentality among police and Crown, it is important to consider whether delay within the justice system has appropriately been reduced to minimize such risk. One way in which this may be evaluated is through the consideration of the number of successful section 11(b) applications since the release of the SCC's decision in *Jordan*. As previously mentioned, the SCC in *Jordan* asserted that the presumptive ceilings were established by accounting for the time required to complete modern criminal investigations and prosecutions.[176] Therefore, should the police and Crown have difficulty in meeting the presumptive ceilings due to continual delay within the justice system, one would expect that a significant number of section 11(b) applications would be successful.

Upon evaluating such data, it does indeed appear a significant number of stays are in fact occurring. For instance, one year following the SCC's decision in *Jordan*, it was reported that a total of 204 cases were stayed across Canada because of unreasonable delay.[177] In 2019, it was reported that this number had grown to a total of 789 cases over three years.[178] Obtaining more recent statistics poses a challenge as many provinces and territories – apart from Alberta – do not publicly report the number of cases that have been stayed because of a *Jordan* application.[179] Nevertheless, the statistics collected by the Government of Alberta do not neatly provide the number of stays that occurred within each calendar year. Instead, the province simply reported that between the period of October 25, 2016, and March 31, 2023 (presumably the portion of the fiscal year during which *Jordan* applied), a total of 114 cases were stayed within the province because of *Jordan*.[180]

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176 *Jordan*, *supra* note 26 at 52-53.

177 Laura Kane, "'Failing everyone': 204 cases tossed over delays since Supreme Court's Jordan Decision" (6 July 2017), online: *CBC News* <www.cbc.ca/news/politics/jordan-cases-stayed-1.4192823> [perma.cc/NX36-AWD4].

178 Andrew Russel, "'It's a travesty': Nearly 800 criminal cases thrown out over delays since 2016 Jordan decision" (10 June 2019), online: *Global News* <globalnews.ca/news/5351012/criminal-cases-thrown-out-r-v-jordan-decision/> [perma.cc/AV6U-Q2L8] [Russel].

179 *Ibid*.

180 "Jordan applications" (last visited 27 April 2023), online: *Government of Alberta* <www.alberta.ca/jordan-applications.aspx> [perma.cc/2DLQ-X5G9].

With respect to other available data, within the province of Manitoba, a more recent article reported that between 2021-2022, a total of 18 cases were stayed or otherwise had their charges preemptively dropped in response to a *Jordan* application.[181] In 2021, Statistics Canada reported that 6.7% of completed adult criminal court cases during the first three quarters of 2020/2021 had exceeded the presumptive ceiling, with 42% of those cases being stayed or withdrawn[182] – although it was unclear whether the charges were stayed or withdrawn directly in response to a section 11(b) application.[183]

While these statistics may suggest a cause for concern with respect to the current state of delay and the risk of developing a "rush to justice" mentality, they are nevertheless of limited utility because they provide little insight into why the *Jordan* applications have been successful. In this respect, it may be the case that many *Jordan* applications have been successful for reasons unrelated to the presence of continual delay within the justice system. For instance, it is possible that many applications have been successful simply because the Crown had made a genuine mistake in failing to keep up with the *Jordan* timelines within a particular case. In such a scenario, a successful *Jordan* application would say little about the presence of continual delay within the justice system. Considering this, a perhaps more valuable way of examining if delay within the justice system has been appropriately resolved may be through the analysis of the written decisions of recent cases where a *Jordan* application had been successful. Doing so would allow for the evaluation of how the presiding judge may have attributed the source of delay within a particular case. Narrowing this analysis in on the most recently decided cases would be particularly helpful in providing insight into the most current state of delay within the justice system.

Although the source of delay within an individual case may be multifaceted, it does indeed appear that delay within the justice system continues to contribute to instances where stays have been ordered pursuant to a *Jordan* application. For instance, in *R v Brereton*,[184] the accused

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181 "18 court cases tossed in Manitoba over last 2 years due to delays, prosecution services says" (17 March 2023), online: *CBC News* <www.cbc.ca/news/canada/manitoba/annual-provincial-court-report-manitoba-2022-1.6783335> [perma.cc/6UBA-7NFK].

182 Importantly however, this statistic excluded data from Manitoba, Prince Edward Island, and the Newfoundland and Labrador Superior Court as it was unavailable at the time.

183 "Fewer adult criminal court cases were completed during the first three quarters of 2020/2021" (16 June 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210616/dq210616d-eng.htm> [perma.cc/PA6C-NUJW].

184 *R v Brereton*, 2023 ONCJ 137 at para 1 [*Brereton*].

was charged with sexual assault and the careless storage of a firearm. In *Brereton*, the trial judge attributed the delay to several causes, including an 11-week delay from the accused's date of charge to their first appearance in court, a nine-month delay from the trial readiness of the parties to the trial dates which were available, and the frequent use of one-month adjournments.[185]

In *R v MK*,[186] the accused was charged with two counts of assault, assault with a weapon, and sexual assault, all of which were related to domestic violence. While the source of delay within *MK* may have been attributable to several sources, the trial judge ultimately found that it was primarily the fault of the justice system's limited resources and its inability to expeditiously accommodate a new trial date after the previous trial date had fallen through.[187] As explained in the trial judge's written decision:

> In the end it was the lack of institutional resources that weighs prominently as a cause for delay. The first trial dates in this matter were scheduled in January 2021, almost 11 months after the parties were prepared to proceed to trial in March 2020. When the matter did not proceed as scheduled, it would have been apparent to all of the criminal justice participants that this case was in jeopardy due to excessive delay. The Trial Coordinator was only able to identify one – two-day block of trial dates before the May 30 and 31 dates. It demonstrates limited institutional flexibility to accommodate cases that are at risk.[188]

In *R v Jakovac*,[189] the accused was one of two co-accused charged with assaulting their sister. In *Jakovac*, the defence successfully argued that despite the case being below the 18-month presumptive ceiling, the delay within the case was nevertheless unreasonable.[190] Here, the trial judge similarly found that the unreasonable delay was also largely the fault of the justice system.[191] In particular, the trial judge noted: "… I am satisfied that it is more probable than not that this factually simple and straightforward 2-day case took markedly longer than it should because of institutional delay due to insufficient judicial resources."[192]

Another recurring theme observed within various past cases is that delay may occasionally materialize on the part of the police. For instance, this can be seen in the case of *R v McCann*,[193] where a significant delay occurred in

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185 *Ibid* at paras 18-22.
186 *R v MK*, 2022 ONCJ 392 at para 6 [*MK*].
187 *Ibid* at para 24.
188 *Ibid.*
189 *R v Jakovac*, 2023 ONCJ 27 at para 1 [*Jakovac*].
190 *Ibid* at paras 25-35.
191 *Ibid* at para 32.
192 *Ibid.*
193 *R v McCann*, 2022 ONCJ 336 [*McCann*].

executing the forensic analysis of the accused's seized electronic devices. As the Court recounted:

> The Crown provided evidence on this application that the police cyber crime unit with responsibility for this analysis was significantly over-loaded with work. There were, for most of the time, only two qualified full-time analysts handling all the cyber crime investigative work in the area. A third part-time analyst was available at some points in time. This acknowledged heavy workload and the limited resources available, was put forward as the reason why the forensic analysis of the devices in this case had to be deferred for 11 months following their seizure.[194]

Once analysis on the devices began at the 11-month mark, another three months was required for the forensic report to be finalized and submitted to the Crown.[195] Given this lengthy delay, it is perhaps unsurprising that the case would be scheduled to conclude beyond the prescribed 18-month presumptive ceiling, and consequently, a stay of proceedings was entered.[196]

Importantly, when a delay such as that which occurred in *McCann* arises on the part of the police, it has the potential to implicate the Crown as they are then responsible for expediting (or attempting to expedite) the proceedings to make up for such lost time. As previously discussed, this occurrence is problematic as it places significant time pressure on the Crown, which may contribute to the development of a "rush to justice" mentality among such actors. This pressure is especially well-demonstrated in the case of *R v MacMillan*,[197] which centered around an accused who was charged with multiple firearm-related offences. In this case, problems began to arise when the Crown made several follow-up requests with the police to receive a key piece of evidence which were necessary for its disclosure obligations and the setting of a trial date.[198] As found by the court:

> What is clear from the evidentiary record, including set date transcripts filed in this matter, is that the Crown consistently over the course of these proceedings made concerted efforts to follow-up with the Toronto Police Service. When asked about the delay in providing the complainant's video statement for example, a crucial piece of disclosure, Mr. Giovinazzo stated that he followed up with the Officer-in-Charge at least once [a] month if not more often. A frequent police response to these inquiries was that it had been ordered but was not yet available. The Crown further advised that despite multiple requests, he did not always get a response from the Officer-in-Charge and escalated his concerns to a superior officer at 54 Division.[199]

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194 *Ibid* at para 62.
195 *Ibid* at para 63.
196 *Ibid* at paras 2, 72.
197 *R v MacMillan*, 2022 ONCJ 594 at para 9.
198 *Ibid* at paras 82-95.
199 *Ibid* at para 87.

When the Crown received the crucial video, it noted that minor redactions were required and subsequently sent the video back to the police to make such edits.[200] Despite the requirement for relatively minimal changes, it would take around a month for the video to be returned to the Crown.[201] At this point, when the Crown found that a second statement from the complainant, in addition to a 9-1-1 call, also required further redactions, the Crown took it upon themselves to redact the materials in an effort to avoid further delay – despite it being against Crown policy.[202] Indeed, as the *Jordan* ceilings began to approach, the Crown involved in the case explained:

> I'm not going to risk sending it back, given the situation I'm in. I redacted it myself, which is, I will note, contrary to Crown policy. But I did anyway, in order to try and alleviate the situation here. I can say explicitly that that's not going to happen again, given – given the Crown's policy, but it was such dire straits that I literally did the redactions myself.[203]

In the end, despite these desperate efforts from the Crown, the Court ultimately found that the net delay still exceeded the prescribed 18-month presumptive ceiling for the case, and a stay of proceedings was ordered.[204]

Ultimately, these decisions indicate that the current state of delay within the justice system continues to be problematic by creating an environment conducive to the development of a "rush to justice" mentality among actors such as police and Crown. However, this is not to suggest that delay is equally problematic in every jurisdiction, as some may have better addressed delay than others. In addition, while these cases demonstrate that delay within the justice system continues to be problematic, they still provide limited insight into the extent of the problem. This is partly because judges are not always explicitly identifying the source of delay within a particular case, given that the source of delay within a particular case is not always easily identifiable from a judge's vantage point.[205] Nevertheless, these cases show that more work needs to be done with respect to addressing delays within the justice system. Considering this, in the next section of the paper, we will explore several potential recommendations that may be implemented to further reduce delay.

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200 *Ibid* at para 88.

201 *Ibid.*

202 *Ibid.*

203 *Ibid* at para 89.

204 *Ibid* at paras 96-98.

205 See e.g., *R v Dhillon*, 2023 ONCJ 101 at para 38. In *Dhillon*, the trial judge was unable to determine if the long delay between the trial readiness of the parties and the available trial dates was the result of court shutdowns related to the COVID-19 pandemic or a lack of judicial resources due judicial position vacancies – or both.

## V. RECOMMENDATIONS FOR THE PATH FORWARD

As argued throughout this paper, taking meaningful steps to resolve the delay in the advent of the presumptive ceilings is necessary to reduce the risk of the occurrence of wrongful convictions. Since the release of the SCC's decision in *Jordan*, a significant number of recommendations have been put forth by scholars and committees alike, which aim at reducing delay through efficiency improvements. This section of the paper revisits several of these recommendations, including the need to increase the adoption of technology in courthouses, ensure that the job vacancies of key justice participants are quickly filled, and reduce the number of cases entering the criminal justice system. By implementing these recommendations, actors such as the police and Crown may be able to dispose of matters more quickly, reduce ongoing caseloads, and dedicate less time to administrative matters. Within this section, we also conclude by proposing our recommendation, namely that there is a need for fulsome and systematic data collection on *Jordan* applications which, as we suggest, would assist in providing a more complete picture as to where efforts to resolve delay should be targeted. By reducing delay through the implementation of such recommendations, we suggest that police and Crown may then be able to designate more time for careful case evaluation, which in the presence of *Jordan*'s strict timelines is essential to reducing the risk of the development of a "rush to justice" mentality, and thus by extension, ultimately reducing the risk for the occurrence of wrongful convictions.

We do not intend to suggest that the recommendations advanced within this section are the only methods by which delay may be reduced. Indeed, it must be underscored that delay within the justice system is not the sole fault of the issues we have identified here. Instead, we reiterate the claim advanced by the SSCLCA that delay within the justice system is a multifaceted problem with a large variation of causes and effects.[206] Put differently, as the committee has suggested, there is no single "quick fix" to solve delay in the justice system.[207] Nevertheless, we suggest that the recommendations advanced within this section may be good places to start when attempting to address the problem of delay in the justice system. While some may purport that delay could be easily remedied by simply injecting more resources into the criminal justice system, the SSCLCA has noted that "...increasing resources alone will not fix the problems. If

206 SSCLCA, *supra* note 34 at 1.
207 *Ibid.*

resources are increased without being accompanied by broader institutional changes, it is likely that the delays will continue."[208]

## A. Technological Improvement in Courthouses

A prominent recommendation that has been put forth following *Jordan* narrows in on the need to adopt more technology[209] within courthouses across Canada.[210] Indeed, the justice system – and the court system in particular – has been well-criticized for its failure to keep up with technological change.[211] It has also been suggested that "… the justice systems of Canada and the United States are rooted in the 18th and 19th century but are facing 21st-century problems. The mechanisms used for scheduling, and the system of evidence are archaic."[212] A similar finding was made during the SSCLCA's study after witnesses frequently "…described how within the legal community there is often a reluctance to adopt computer-based systems and a continued reliance on traditional and paper-based practices."[213]

Nevertheless, the suggestion to implement more technology in courthouses is not necessarily new. Indeed, some provinces have previously attempted to modernize their court systems with rather disappointing outcomes.[214] For instance, Ontario spent $10 million on the development of an online court management system before it was eventually abandoned.[215] Similarly, Quebec had a comparable experience where $60 million was invested in a similar system over several years with apparently "…little to show for it."[216] While evidently, some provinces may have been unsuccessful in implementing such a recommendation in the past, the reality of the SCC's decision in *Jordan* and its risk for wrongful convictions may nevertheless require that the implementation of technology be a necessary feature of modern courthouses.

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208 *Ibid* at 2.

209 In the context of this recommendation, technology may be understood to refer to the digitization of court processes, proceedings, and documents.

210 *Ibid* at 93-95.

211 Anevich, *supra* note 32 at 76; "Court Digital Transformation Strategy," *supra* note 91 at 5; SSCLCA, *supra* note 34 at 12, 94.

212 Anevich, *supra* note 32 at 76.

213 SSCLCA, *supra* note 34 at 94.

214 Paul Gallant, "How Technology Can Help Create a Better Justice System"(13 February 2018), online: *The Walrus* <thewalrus.ca/how-technology-can-help-create-a-better-justice-system/> [perma.cc/28MR-9DLL].

215 *Ibid.*

216 *Ibid.*

In relation to reducing the risk of wrongful convictions, the adoption of technology in courthouses may allow for the streamlining of criminal proceedings and, depending on the degree of such implementation, may result in the ability to reduce the number of court appearances required altogether. Consequently, police and Crown may be able to spend less time in courtrooms or otherwise dealing with matters that could be more efficiently resolved with the assistance of technology. This would allow the police and Crown to spend more time on careful case evaluation, which is critical in combating the development of a "rush to justice" mentality.

A recent digitization strategy put forward by the Government of British Columbia demonstrates how such measures can be effective in helping the police and Crown save valuable time in their everyday work. In this respect, among the province's many proposed technological additions is the adoption of a digital case management system.[217] Such a system would reportedly give justice participants the ability to quickly and remotely access or file documents and disclosure, allow court staff the ability to spend less time on data entry and more time assisting judges and litigants while also remedying the inundation of paper, which is currently plaguing courtrooms and requiring valuable resources to produce.[218]

Another significant proposal put forward by the Government of British Columbia includes increasing the adoption of connectivity in courtrooms and encouraging the use of digital proceedings wherever possible.[219] The province suggests that such implementation may have considerable benefits, including the fact that participants, witnesses, and defendants may be able to attend earlier court dates because of less disruption and conflict in their employment and other obligations.[220] This is especially true for those who live in rural locations or those who may live on a reserve far from courthouses where the proceedings are scheduled to take place.[221]

While there is certainly room for improvement, all of this is not to suggest that Canadian courthouses are entirely absent of technology. Indeed, some technological advancements aimed at increasing efficiency in court proceedings have already been made in the city of Calgary, where lawyers are able to schedule their appearances remotely through their computers.[222] Furthermore, at the time of writing this paper, the province of Ontario has recently opened a state-of-the-art courthouse in the city of

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217 "Court Digital Transformation Strategy", *supra* note 91.
218 *Ibid.*
219 *Ibid.*
220 *Ibid* at 9-10.
221 *Ibid* at 10.
222 SSCLCA, *supra* note 34 at 82.

Toronto.[223] Among its many features, this newly constructed courthouse "...boasts 73 judicial hearing rooms equipped with modern technology, including video capabilities, to ensure the efficient and effective process of criminal cases."[224]

With respect to such recommendations, it is also helpful to look at the implementations of other countries and jurisdictions outside of Canada. For instance, the SSCLCA pointed to England and Wales, where a computerized system for managing court proceedings has recently been implemented.[225] Such a system allows counsel the ability to make digital submissions of filings to be reviewed by a judge without requiring physical appearances.[226] Ultimately, in view of the presumptive ceilings, embracing technology within courthouses in this manner may be critical for ensuring trial efficiency and reducing the risk of wrongful convictions.

## B. Ensuring that the Position Vacancies of Key Justice Participants are Quickly Filled

Another recommendation that has been advanced in the advent of *Jordan* and the need to reduce delay narrows in on the importance of ensuring that position vacancies of key justice participants are quickly filled.[227] The implementation of such a recommendation is necessary to ensure that court cases are moving along as quickly as possible. Related to this, a concern raised by SSCLCA focused on the significant number of federal judicial vacancies that existed over the course of their year-long study on delay within Canada.[228] As a result, the SSCLCA advanced the recommendation that "...superior court judges be appointed on the day of a known retirement of a judge and the only exception to this immediate replacement would be an unexpected death or unexpected early retirement of a sitting judge."[229] In this respect, the committee observed as of June 1st, 2017, the federal judiciary had a total of 849 federally appointed judges and 285 supernumerary judges; however, there were between 27 to as high as 62 total vacant positions between February 2016 and June 2017.[230] According

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223 Angelica Dino, "New courthouse opens in Toronto to modernize and improve access to justice" (6 March 2023), online: *Law Times* <www.lawtimesnews.com/practice-areas/litigation/new-courthouse-opens-in-toronto-to-modernize-and-improve-access-to-justice/374165> [perma.cc/4VRJ-QRLX].

224 *Ibid.*

225 SSCLCA, *supra* note 34 at 93.

226 *Ibid.*

227 See e.g., SSCLCA, *supra* note 34 at 86-92.

228 SSCLCA, *ibid* at 86-92.

229 *Ibid* at 5.

230 *Ibid* at 87-88.

to more recent numbers, it appears that such vacancies are not getting much better given that recently, as of April 3rd, 2023, there remained 86 positions to be filled out of a total of 908 federally appointed judges and 272 supernumerary judges.[231] The situation has gotten so dire that in May of 2023, Chief Justice Richard Wagner of the SCC wrote a letter to the federal government expressing his serious concern about the number of judicial vacancies that currently exist.[232] The Chief Justice explained that judicial appointments are taking an inordinate amount of time, consequently leading to delays with respect to the *Jordan* timeline.[233]

Such circumstances are problematic in relation to wrongful convictions and the need to reduce the "rush to justice" pressures that may be caused by delay. With dozens of judicial vacancies present at any given month, police and Crown are unable to resolve matters as quickly as they otherwise should[234] and are thus left with larger revolving caseloads. By quickly filling such judicial vacancies, police and Crown would be able to dispose of matters quicker and dedicate more of their time to the most pressing cases. In addition, should this problem be resolved, trials would presumably be able to be scheduled within shorter timeframes, taking up less of the presumptive ceiling timeline and thus allowing more time for careful case evaluation.

Although the SSCLCA's study focused almost exclusively on federal judiciary vacancies, equally important is the need to ensure that position vacancies for other criminal justice actors are also quickly being filled. At the time of writing this paper, a particularly concerning situation has emerged in Alberta concerning a significant number of vacant positions in their provincial Crown office.[235] As suggested by the president of the

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231 "Number of Federally Appointed Judges in Canada" (last modified 3 April 2023), online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx> [perma.cc/ZCH6-KBQJ]. It is important to note that at the beginning of 2023, 22 new judicial positions were added due to incoming legislation on the part of the federal government. Nevertheless, even without the addition of such positions, the number of judicial vacancies does not appear to be improving.

232 Daniel Leblanc, "Chief justice warns Trudeau that judicial vacancies are putting criminal trials at risk" (9 May 2023), online: *CBC News* <www.cbc.ca/news/politics/supreme-court-wagner-trudeau-judicial-vacancies-1.6836145> [perma.cc/9EYF-E8P8].

233 *Ibid.*

234 SSCLCA, *supra* note 34 at 86.

235 Emily Mertz, "'It's a crisis': Shortage of Alberta Crown prosecutors means 1,200 serious files at risk of being stayed" (23 November 2021), online: *Global News* <globalnews.ca/news/8395629/alberta-crown-prosecutors-shortage-charges-stayed/> [perma.cc/RM9F-TJZP].

Alberta Crown Attorney's Association, "The best numbers we have, suggest that we're 47 Crown prosecutors short."[236] As a consequence, in relation to *Jordan*, the president suggested that they "...do not have the resources necessary to prosecute all the files coming through court and as a result, there are about 1,200 serious and violent cases that are at risk of being stayed due to delay."[237] Given this set of circumstances, it is perhaps unsurprising that it is further reported that the "[t]he workload is crushing, morale is low, and most prosecutors report feeling completely burned out."[238] Problematically, according to the Alberta Crown Attorney's Association, this has been an issue for many years and is suggested to be particularly bad in rural areas.[239] Fortunately, this situation appears to be slowly resolving, with a recent announcement that the Alberta Crown Attorneys' Association has reached an agreement with the province to guarantee a certain amount of preparation time per case.[240] Nevertheless, it remains unclear as to whether the significant number of prosecutorial vacancies within the province are being filled.

Similar situations with the staffing of Crown attorneys have also been reported in the provinces of Manitoba and New Brunswick.[241] For instance, in the spring of 2023, the Manitoba Association of Crown Attorneys filed a grievance with the province due to their Crown becoming overstrained and experiencing a high burnout rate.[242] This has allegedly been brought on by several factors, including a high crime rate leading to more arrests, increasing complexity, and the strict timelines imposed by *Jordan*.[243] Problematically, this has reportedly led to the Crown having inadequate case preparation time,[244] which, as we have argued, may create conditions conducive to wrongful convictions. Similarly, the New Brunswick Crown

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236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 *Ibid.*

240 Paula Tran, "Alberta Crown prosecutors reach agreement with government" (27 October 2022), online: *Global News* <globalnews.ca/news/9230732/alberta-crown-prosecutor-collective-agreement/> [perma.cc/BS7D-JYFS].

241 See e.g., Sam Thompson, "Overworked Manitoba Crown attorneys file grievance with province" (26 April 2023), online: *Global News* <globalnews.ca/news/9651978/manitoba-crowns-grievance/> [perma.cc/SQG9-S5WK] [Thompson]; Vanessa Moreau, "Delays prompt judge to stay charges against man accused of sexual assault" (24 February 2023), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/case-thrown-nb-prosecution-delays-1.6759545> [perma.cc/HV8A-9AU3] [Moreau].

242 Thompson, *supra* note 241.

243 *Ibid.*

244 *Ibid.*

Prosecutors Association has said that they "...have been experiencing staffing problems for the last 10 to 15 years and over the last few years the shortage has become a crisis."[245] While they have been attempting to raise this issue with the provincial government, the shortage has reportedly become so bad that they are on the "brink of collapse."[246]

It is unclear whether similarly dire situations in Crown attorney staffing exist in other provinces, but it is clearly not an issue isolated to one jurisdiction. From a wrongful convictions perspective, this is a grave cause for concern with respect to the risk of the development of a "rush to justice" mentality. In this respect, such an environment is conducive to one which prioritizes efficiency over thoroughness and thereby creates a heightened risk for the development of cognitive biases and tunnel vision.[247] Ultimately, the *Jordan* timeline is static, and thus, it does not allow for exceptions based on local resource constraints or considerations such as a shortage of prosecutors, police, or judges within a particular jurisdiction. Given this inflexibility, it is critical that when governments and their respective criminal justice agencies are attempting to resolve delay, all jurisdictions must be equally prioritized.

## C. Reducing the Number of Cases Entering the Traditional Criminal Justice System

Considering the institution of presumptive ceilings and the risks that continual delay may pose for wrongful convictions, another recommendation aimed at reducing the workload of police and Crown concerns the need to reduce the sheer volume of cases that are entering the traditional criminal justice system.[248] This position was similarly shared by the SCC in *Jordan*, where it suggested that among the many obligations for Crown counsel following the establishment of presumptive ceilings is the need for "...enhanced crown discretion for resolving individual cases."[249]

Many participants in the SSCLCA's study also reiterated this need where the committee found that "one of the more pressing causes of delays presented by many witnesses lies in the fact that the criminal law system is attempting to deal with too many cases that it is not suited to handle."[250] Recently retired SCC justice Michael Moldaver has renewed such claims by suggesting that lower-level prosecutions such as minor drug cases, thefts,

245 Moreau, *supra* note 241.
246 *Ibid.*
247 Meterko & Cooper, *supra* note 105 at 107.
248 SSCLCA, *supra* note 34 at 56.
249 *Jordan*, *supra* note 26 at 138.
250 SSCLCA, *supra* note 34 at 12.

assaults, and administration of justice offences could be resolved more efficiently through means such as ticketing and diversion while still maintaining principles of fairness.[251] As suggested by the retired justice, "I think we have to come to grips with the fact that the criminal justice system is not a panacea – it's not a cure for the ills of society."[252]

In line with such recommendation, in the advent of *Jordan*, the province of Manitoba has recently taken the initiative by instituting new Crown policies which require the Crown to make quicker decisions with respect to whether a particular case would be better handled through diversion programming.[253] As a result of such changes, the province reports that they are now "… making more effective use of alternative measures including diversion to restorative justice programs than in the past."[254] Indeed, the utilization of diversion programming is not new.[255] In this respect, the SSCLCA observed that section 717 of the *Criminal Code* has long stated that alternative measures outside the use of judicial proceedings may be utilized.[256] However, for diversion to be possible under such provision, several strict conditions must be met – as explicitly set out within the *Code* – including the requirement that such diversion is not "…inconsistent with the protection of society."[257] Provinces and territories around the country can take lessons from Manitoba by ensuring that diversion programming is being appropriately utilized.

There is, however, an additional question concerning whether more can be done with respect to diverting low-level offenders away from the system. This suggestion was brought forth within SSCLCA's study, where it was suggested that the objective should be "…to divert suitable matters away from the courts before they get there, perhaps even before charges have been laid."[258] One example of a somewhat recent initiative in this regard can be found in the implementation of the Immediate Roadside Prohibition ("IRP") program within many western provinces, including that of British

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251 Cristin Schmitz, "Cull of 'huge mass' of less-serious criminal cases could unclog Canada's justice system: Moldaver" (19 September 2022), online: *Law360 Canada* <www.law360.ca/articles/39774> [perma.cc/JX8A-5KBE].

252 *Ibid*.

253 "Criminal Justice System Modernization Strategy" (2019) at 4, online (pdf): *Government of Manitoba* <www.gov.mb.ca/justice/cjsm/pubs/criminaljusticereform.pdf> [perma.cc/7QQ2-RRV8].

254 *Ibid* at 5.

255 SSCLCA, *supra* note 34 at 142-44.

256 *Ibid* at 143.

257 *Ibid*.

258 *Ibid* at 144.

Columbia, Alberta, Saskatchewan, and Manitoba.[259] Such a program aims to reduce the influx of impaired driving charges within the court system by diverting low-level impairment cases away from the need to lay criminal charges through immediate sanctions that can be administered on the roadside.[260] While the IRP program has been undoubtedly controversial since its inception,[261] it nevertheless provides one creative example of how other provinces may divert cases from the courts entirely.

With respect to wrongful convictions, reducing the number of cases within the traditional criminal justice system by making greater use of diversion programming may allow police and Crown the ability to dedicate more time and resources to investigating and prosecuting more serious cases. By being able to dedicate additional time to these more serious matters, the police and Crown may consequently feel less pressure from *Jordan*'s strict timelines and be able to spend more time conducting careful case evaluation. At the same time, diverting cases from the traditional criminal justice system will also reduce the number of cases moving through the courts, thereby reducing backlog and presumably allowing courts to schedule matters faster and in shorter timeframes. In turn, Crown may be able to resolve matters more quickly. This is especially important when mid-trial applications may be brought forward, which may require additional trial dates and thus further delay the anticipated end date of the trial. Ultimately, it must be acknowledged that the criminal justice system has a finite number of resources available for its operation. While diverting offenders away from the criminal justice system may be considered a controversial issue among Canadians, these are nevertheless the difficult conversations that the public must engage in following the release of the SCC's decision in *Jordan*.

## D. The Need for Better Data Collection Concerning *Jordan* Applications

A recommendation that has perhaps received less attention following *Jordan* surrounds the need for better data collection concerning *Jordan* applications. As previously discussed, as it currently stands, there exists no requirement for provinces and territories to publicly report the number of successful *Jordan* applications which have occurred or what the causes of

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259 Robert Solomon, Lauren MacLeod & Eric Dumschat, "The increasing role of provincial administrative sanctions in Canadian impaired driving enforcement" (2020) 21:5 Traffic In Prev 298 at 299.

260 SSCLCA, *supra* note 34 at 58-59.

261 *Ibid* at 58-60.

delay within such cases may be attributed to.[262] Consequently, obtaining an accurate picture of the current state of delay within the justice system remains a challenge. The collection of such data is critical to assessing the most pressing causes of delay within the justice system, whether the causes differ between jurisdictions, and where efforts should be focused with respect to tackling the issue of delay. When it comes to avoiding wrongful convictions, understanding the nature of delay in the justice system will allow governments and justice agencies to quickly identify and respond to the contributors to delay within individual jurisdictions. Indeed, as found by the SSCLCA, jurisdictions often face unique contributors to delay, which may differ from others.[263] Ultimately, addressing delay in this manner may most effectively help reduce the potential contributors to the development of a "rush to justice" mentality among police and Crown.

We note that if, per one of our previous recommendations, technological improvements were adopted within the courts, the means to easily report and record this and other types of valuable data electronically could be built into any system and compiled centrally, whether at the provincial or federal level.

With respect to the collection of data on the cause of delay within a particular case, it is important to qualify this recommendation by acknowledging that, in some cases, it may be difficult for actors such as judges to identify the source of delay within a particular case so that it may later be recorded. However, at the same time, judges may also find themselves with unique expertise of the jurisdiction in which they operate and may consequently be able to identify sources of delay that may not be apparent to those without such insight. Nevertheless, even if limiting the collection of such data to only those cases where the cause of delay is clear, such data would still provide valuable insight into the current state of delay within the justice system and its consequential risks for the occurrence of wrongful convictions.

It is also important to note that the existence of more fulsome data collection may be very helpful when making future assessments as to whether the presumptive ceilings should be changed. Indeed, as the majority in *Jordan* stated:

> There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

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262 Russel, *supra* note 178.

263 SSCLCA, *supra* note 34.

Having access to comprehensive data regarding the number of, and reasons for, *Jordan*-related stays would also provide decision-makers with a more complete and nuanced picture of the current state of delay, especially as the investigative and prosecutorial landscape continues to change in the future. Comprehensive data on these issues would also enable decision-makers to enact evidence-based changes to presumptive ceilings if needed. For example, Parliament could increase the presumptive ceilings through legislation.

## VI. CONCLUSION

In conclusion, considering the imposition of presumptive ceilings in *R v Jordan*, the current state of delay within the justice system has the potential to exacerbate the likelihood that a wrongful conviction may occur. In this respect, continual delay within the justice system may create an elevated risk for the development of cognitive biases, tunnel vision, and noble-cause corruption – all of which have been understood to increase the likelihood that a wrongful conviction may occur.[264] While governments and justice agencies have taken some steps to resolve delay and consequently reduce "rush to justice" pressures among justice participants, evidence nevertheless suggests that police and Crown may continue to experience pressures to meet the presumptive ceilings. Accordingly, further efforts need to be taken to better address delay within the justice system, given the SCC's decision in *Jordan*.

This argument has been demonstrated throughout this paper in four distinct sections. First, we explored the case of *R v Jordan* and relevant commentary on its potential impacts on the criminal justice system. Second, we identified the relevant "rush to justice" concepts within wrongful conviction literature and considered their relevance to the *Jordan* framework. Third, we explored whether the current state of delay within the justice system risks the development of a "rush to justice" mentality among actors such as the police and Crown. Finally, we concluded by considering several recommendations that may be adopted to further reduce delay and, by extension, reduce the risk of the development of a "rush to justice" mentality among such actors. Such recommendations include the need for technological improvement in courthouses, ensuring that the position vacancies of key justice participants are quickly filled, reducing the number of cases entering the traditional criminal justice system, and the need for better data collection concerning *Jordan* applications.

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264 FTP Heads of Prosecution Committee, *supra* note 25.

It must be reiterated that the objective of this paper is not to be critical of the SCC's decision in *Jordan.* Rather, considering the decision, we have sought to demonstrate the importance of adequate government and justice agency response to the decision to reduce the potential for wrongful convictions. Indeed, to date, nearly all the discussion surrounding the decision has focused primarily on the need to address delay as a means of preventing the occurrence of stays being entered and thereby maintaining the repute of the justice system. Such concern is of particular importance considering recent cases such as *R v Hanan*,[265] where the SCC set aside the accused's conviction for a variety of serious offences – including manslaughter – and entered a stay of proceedings after the case had exceeded the 30-month presumptive ceiling. However, as this paper makes evident, an equally important perspective that has been largely absent from the discussion surrounding *Jordan* concerns the increased potential for wrongful convictions within an environment that can exacerbate a "rush to justice" mentality among actors such as police and Crown if the delay is not appropriately addressed.

In their report on wrongful convictions within Canada, the FTP Heads of the Prosecution Committee expressed the concern that "…wrongful convictions may receive less priority and attention as other issues – notably trial delay following the Supreme Court of Canada's landmark ruling in *Jordan* – come to the fore."[266] Quite the contrary, in the wake of *Jordan* and its potential to create a "rush to justice" mentality among justice participants, we are of the position that wrongful convictions should be at the forefront of discussion surrounding the need to reduce delay. Given the lack of discussion concerning this position to date, perhaps there is some truth to the Committee's concern that the issue of wrongful convictions has become overlooked in recent years.

Ultimately, it is imperative to prevent wrongful convictions before they occur in the first place. Once a wrongful conviction has occurred, the current process that individuals must undertake to remedy it has been criticized as being inaccessible, time-consuming, costly, and inadequate.[267] Once a wrongfully convicted individual has exhausted their appeals and subsequently applies for a ministerial review of their conviction, this review process alone can take anywhere from two to six years to complete.[268]

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265 *R v Hanan*, 2016 SCC 27 [*Hanan*].

266 FTP Heads of Prosecution Committee, *supra* note 25 at 5.

267 Campbell, *supra* note 112 at 191, 198-204.

268 "Liberals introduce 'Milgaard's Law' to create review process for wrongful convictions" (16 February 2023), online: *CTV News* <www.ctvnews.ca/politics/liberals-introduce-milgaard-s-law-to-create-review-process-for-wrongful-convictions-1.6276740>

Particularly problematic is the fact that this process has been identified as a barrier for members of marginalized communities.[269] Indeed, as the then-Justice Minister David Lametti explained, many of those who are requesting a ministerial review of their case are overwhelmingly white men and are therefore not representative of the prison population.[270]

At the time of writing this paper, the federal government has recently proposed legislation that aims to revise this ministerial review process by establishing a new and independent commission to review wrongful convictions.[271] The new bill aims to address some of these criticisms by making the review process faster and more accessible.[272] Nevertheless, while these changes appear promising should they come to fruition, it is perhaps too early to determine if this new process would truly address these problems in practice. In addition, much like the process that it aims to replace, no system will be able to identify or remedy all wrongful convictions. This reality further underscores the importance of preventing wrongful convictions before they occur in the first place.

While the focus of this paper has primarily centered on *Jordan* and its potential impacts on the decision-making responsibilities of police and Crown prosecutors, further research is needed to explore the implications that justice system delay and the risk of developing a "rush to justice" mentality may have on other justice participants such as forensic analysts. Ultimately, this concern of developing a "rush to justice" mentality is by no means remote. Indeed, wrongful conviction literature has long identified that an environment that prioritizes efficiency over thoroughness is problematic for the development of cognitive biases, tunnel vision, and, consequently, noble-cause corruption.[273] Each of these concepts has been understood to contribute to miscarriages of justice,[274] and therefore Canadian justice participants must continue to be vigilant regarding the continually pressing risk of wrongful convictions.

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[perma.cc/C3BX-K4BU].

269 *Ibid.*

270 *Ibid.*

271 *Ibid.*

272 *Ibid.*

273 Campbell, *supra* note 112; MacFarlane, "Distorted Decision-Making", *supra* note 117; MacFarlane, "The Effect of Tunnel Vision", *supra* note 25.

274 See e.g. FTP Heads of Prosecution Committee, *supra* note 25; MacFarlane, "The Effect of Tunnel Vision", *supra* note 25; Meterko & Cooper, *supra* note 106.

# Criminal Wealth Law: From Maple Syrup to Hells Angels and Unexplained Wealth Orders

MICHELLE GALLANT

## I. INTRODUCTION

A significant dimension of modern crime management focuses on property, wealth, money, and financial activity. The organizing theme of late twentieth-century products such as anti-money laundering laws, criminal confiscation, criminal forfeiture, and civil forfeiture is detecting and capturing wealth associated with criminal activity. Such products, which have proliferated since the inception of modern management in the late 1980s, might be described as criminal wealth law.[1]

An area of acute contemporary interest, a trilogy of recent developments, might be said to mark a certain sharpening of the edges of Canadian criminal wealth law. The first, a Supreme Court of Canada decision involving the theft of maple syrup, hones federal criminal forfeiture machinery, the principal anti-criminal wealth device. The second, a British Columbia Court of Appeal decision about clubhouses owned by the Hells Angels, sharpens a provincial criminal wealth device, civil forfeiture law. The third, arguably the most substantively significant of the trilogy, introduces a new tool to a province's wealth-focused toolkit, an unexplained wealth order regime. This essay examines this trilogy of contributions to criminal wealth law.

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1 The central origins of the focus on money lie in an international treaty designed to deal with drug proceeds and drug money laundering. A series of subsequent global instruments developed the strategy and continue to influence the direction of Canadian, and provincial, wealth-centered laws: see generally, *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (which introduced the criminalization of drug money laundering and the confiscation of the proceeds of drugs offences); *International Standards on Combating Money Laundering and the Financing of Terrorist and Proliferation*, the Financial Action Task Force Recommendations (which constitute the global money laundering and criminal finance standards).

## II. THE SUPREME COURT CONTRIBUTION: MAPLE SYRUP AND THE PROCEEDS OF CRIME

Canada's primary criminal wealth, or anti-criminal wealth, mechanisms consist of federal criminal forfeiture law and federal anti-money laundering law. Federal anti-money laundering law is designed to enable the prevention and detection of money laundering and the collection of financial intelligence in relation to the financial aspects of crime.[2] Federal criminal forfeiture law attaches forfeiture – the divestiture of assets – to criminal convictions.

A 2022 Supreme Court of Canada case confirmed the sting of a piece of the federal forfeiture apparatus. In *R v Vallieres*, the defendant was convicted of fraud, trafficking, and theft in connection with maple syrup.[3]He was part of a well-planned enterprise that pilfered maple syrup from a warehouse, loaded it onto tractor-trailers, re-packaged, and sold the amber liquid. From this venture, the defendant admitted that the sale of the trafficked merchandise garnered slightly under $10,000,000. Having had to pay various accomplices and absorb other costs, the defendant professed that his personal profit was just shy of $1,000,000.

Upon his conviction, the Crown sought, among other consequences, a fine instead of forfeiture pursuant to section 462.37 (3) of the criminal code.[4] The section is part of the package of proceeds of crime provisions introduced to spoil criminal prosperity.[5] A part of this sequence - section 462.37 (1) - mandates that, upon conviction for a designated offence, if the court is satisfied, on a balance of probabilities, that any property is the proceeds of crime obtained through the designated offence, the court must order its forfeiture. The term, proceeds of crime, means "...any property, benefit or advantage...obtained or derived directly or indirectly as a result of... an offence."[6] Property is defined as "..property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange."[7] Section 462.37 (3), the relevant section in *Vallieres,* provides that where an order of forfeiture of the proceeds of crime cannot be made – where the property has been transferred, diminished in value, or is otherwise unavailable – a court can

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2 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000,* c 17.
3 *R v Vallières,* 2022 SCC 10 [*Vallières*].
4 *Criminal Code,* RSC 1985, c C-46 [*Code*].
5 *Ibid,* being Part XII.2, Proceeds of Crime.
6 *Ibid*, s 462.3(1).
7 *Ibid*, s 2.

impose a fine in lieu of an amount equal to the value of the property that would otherwise have been liable to forfeiture. In this instance, the forfeitable property – the rewards of the trafficked maple syrup - was gone. That property not being amenable to forfeiture, the Crown sought a fine in lieu.

Applying section 462.37 (3), the trial court imposed a fine of just under $10 million.[8] The Quebec Court of Appeal overruled with respect to the amount of the fine, imposing a fine equivalent to the defendant's profits of crime.[9] The Supreme Court of Canada restored the lower court order.

The sting the Supreme Court delivered was the confirmation that Parliament had clearly and expressly defined the amount of the fine in lieu of forfeiture to the equivalent of the proceeds of crime, not the personal profits of crime.[10] The fine replaces the actual forfeiture of the proceeds of crime where the forfeiture of that property has been rendered impossible. The proceeds generated from the sale of goods neared $10 million, which, had it been available, would have been subject to forfeiture. The defendant's personal profit was irrelevant. The Supreme Court held there was no discretion to limit a fine to the profits of crime.[11] An element of discretion lay in the decision to impose a fine, but once that decision was made, the amount was determined by reference to the statutory definition.[12] The defendant had acknowledged that the maple syrup sold for over $10,000,000. That value was the correct value for the fine in lieu. While the court admitted the severity of the result, it held that that precisely was what Parliament intended in delivering a blow to "profit-driven" criminal activity.[13]

The Supreme Court also declined to exercise its discretion to apportion the amount of the fine amongst any co-accused or accomplices to avoid the risk of double recovery. While complicated by the fact that this issue was not raised at trial nor entertained by the Court of Appeal, the Supreme Court held that the defendant had not proven the risk of double recovery. Significantly, the Court held that the "possibility of double recovery was non-existent," in part because the evidence disclosed that the defendant –a critical figure in the enterprise - had had "at least $10,000,000" within his possession or control.[14] There could be no risk that any failure to apportion the fine would occasion a risk of double recovery.

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8 *R v Vallières*, 2017 QCCS 1687.
9 *R v Vallières*, 2020 QCCA 372.
10 *Vallières, supra* note 3 at para 26.
11 *Ibid at* para 35.
12 *Ibid.*
13 *Ibid at* para 34.
14 *Ibid at* para 64.

The confirmation that the fine in lieu attaches to the proceeds of crime, not the profits, is an important one. In some discourses, these terms might be interchangeable. The word profit is common, typically connoting the simple mathematical calculation of revenues, sometimes called gross revenues, minus expenses, or the costs incurred to produce those revenues. The word "proceeds" tends to be more unique to criminal wealth law. For instance, it is rare to talk about the proceeds of a business endeavour but more common to speak of the profits. The term "proceeds" does not tend to have any similarly generic or common meaning. Attempts to shrink the scope of proceeds of crime to the profits – the net revenues – of crime have, in some settings, proven persuasive.[15] However, as the Supreme Court notes in *Vallieres*, to take into account merely of the profits of crime would tend to legitimize criminal activity.[16] In this case, the decision confirms the sharpness of a tool used to tackle criminal wealth. The criminal entrepreneur, under federal proceeds of crime law, risks more than the mere forfeiture of the profits of crime. A harsh result for the defendant in *Vallieres,* but nonetheless one dictated by Parliament.

## III. THE BC COURT OF APPEAL CONTRIBUTION: HELLS ANGELS CLUBHOUSES AND CIVIL FORFEITURE

*R v Vallieres* decision dealt with forfeiture under federal criminal law – forfeiture that attaches upon conviction for a criminal offence. A 2023 decision of the British Columbia Court of Appeal considered forfeiture under British Columbia's provincial criminal wealth regime and affirmed the bite of provincial civil forfeiture law.

At issue in *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd* (hereinafter *Angel Acres*) was the constitutionality of a part of British Columbia's civil forfeiture regime.[17] The BC *Civil Forfeiture Act* permits the forfeiture of the proceeds of unlawful activity and the instruments of unlawful activity.[18] Unlike its federal cousin,

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15 In *US v Santos*, the US Supreme Court held that, in relation to a particular money laundering offence, the regime anticipated the profits of crime. This victory was short-lived. United States legislators immediately clarified that the regime contemplated the proceeds of crime, not the profits of crime: see, *United States v Santos*, 553 US 507 (2008); Public Law 111-21, 123 Stat 1618 (2009) (s 396) (111th Cong) (refining the definition of 'proceeds' as property obtained or retained as a consequence of a predicate offence, including gross receipts).

16 *Vallières, supra* note 3 at para 29.

17 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2023 BCCA 70.

18 *Civil Forfeiture Act*, SBC 2005, c 29 [*Civil Forfeiture Act*].

in which access to forfeiture is triggered by a prior conviction, provincial forfeiture law is non-conviction based. Many provinces have enacted non-conviction-based forfeiture mechanisms.[19] The province of BC sought the forfeiture of three clubhouses on the basis that these constituted the instruments of unlawful activity. Under the BC forfeiture regime, unlawful activity means an act or omission that is an offence under federal or provincial law.[20] An instrument of unlawful activity is defined as:

> (a) property that has been used to engage in unlawful activity that, in turn, (i) resulted in or was likely to result in the acquisition of property or an interest in property or (ii) caused or was likely to cause serious bodily harm to a person; (b) property that is likely to be used to engage in unlawful activity that may (i) result in the acquisition of property or an interest in property, or (ii) cause serious bodily harm to a person.....'[21]

Two distinct provisions of the BC *Civil Forfeiture Act* countenance the forfeiture of instruments used in unlawful activity and the forfeiture of instruments likely to be used in unlawful activity.

In *Angel Acres*, the province sought to forfeit three clubhouses on the basis that these constituted instruments likely to be used in unlawful activity. The case formed part of a decades-long battle that spawned multiple court decisions.[22] Under the BC regime, as in its provincial counterparts, a forfeiture action is *in rem*, against the property, the instrument. Property owners are notified and named as parties to the action.[23] In resisting the forfeiture, the defendants, owners of the clubhouses, contended that both of the instrument provisions – the used in and the likely to be used - were exercises of criminal law and outside of provincial jurisdiction. The trial court characterized these as the present and future use provisions, holding that the first fell within provincial competence, but the second did not.[24] With respect to the future use - or likely to be used - prong, the trial court found that the provision was based on a propensity to commit a crime, in part because any forfeiture was necessarily based on the past use of property in connection with the crime.[25] That was the substantive equivalent of criminalizing a propensity to engage in crime, effectively creating a new

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19 See, for example, *Criminal Forfeiture of Property Act*, SM 2004, c 1 (Manitoba); *Civil Forfeiture Act*, SNB 2010, c C-4.5 (New Brunswick).

20 *Civil Forfeiture Act, supra* note 18, s 1.

21 *Ibid.*

22 Since 2007, when the saga began, there were 18 decisions by the Supreme Court of British Columbia, 5 by the Court of the Appeal of British Columbia, and one – an application for leave to appeal – by the Supreme Court of Canada.

23 *Civil Forfeiture Act, supra* note 18, ss 15.01 (2), 4.

24 *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2020 BCSC 880.

25 *Ibid* at para 1468.

criminal offence.[26] For the trial court, that put the provision within federal jurisdiction over criminal law.

On this point, the Court of Appeal disagreed. Both the lower court and the Court of Appeal drew heavily upon the Supreme Court of Canada's 2009 ruling of *Chatterjee*.[27] *Chatterjee* dealt with the constitutionality of Ontario's civil forfeiture regime in relation to the forfeiture of the proceeds of unlawful activity. It held that the forfeiture of the proceeds lay within provincial competence. The tension, in *Chatterjee* and the present case, was between federal jurisdiction over criminal law and provincial jurisdiction over property and civil rights. Following *Chatterjee,* the Court of Appeal noted that it was within provincial jurisdiction to attend to the consequences of criminal activity, to enact measures to deter crime, and that the regime operated in a civil context.[28] The pith and substance of the provincial law was to create "a civil scheme that will prevent and 'suppress' the use of property to acquire wealth or to cause bodily injury."[29] While there was undoubtedly a federal aspect – the link to crime – that was not fatal. The Court of Appeal found fault with the lower court's heavy reliance on the propensity analysis, an analysis that displaced the fundamental pith and substance investigation, a method used to discern the proper constitutional category of a particular measure.[30] The future prong – likely to be used in - like the past prong and the proceeds of crime provisions, lay within provincial jurisdiction over property and civil rights.

Of course, this piece of the criminal wealth story may be transient: an appeal to the Supreme Court of Canada has been filed.[31] But given the Supreme Court decision in *Chatterjee,* is there much room to re-negotiate and re-interpret civil forfeiture law's constitutional character?

There is certainly some. *Chatterjee* dealt solely with the proceeds of unlawful activity provision of Ontario's civil forfeiture mechanism, not the instruments part. Long ago, the Supreme Court of Canada held that the imposition of penal consequences attracted rights applicable in criminal proceedings.[32] There is little penal consequence in taking the proceeds of crime, the fruits of unlawful activity. There are strong penal leanings in the forfeiture of instruments. On its face, the BC civil regime would permit the

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26 *Ibid* at para 1471.

27 *Chatterjee v Ontario (Attorney General),* 2009 SCC 19.

28 *Ibid* at paras 82-85.

29 *Ibid* at para 86.

30 *Ibid* at paras 90, 91.

31 Supreme Court of Canada, Docket 40688, *Angel Acres Recreation and Festival Property Ltd and all Others Interested in the Property, et al v Director of Civil Forfeiture, et al*, April 17, 2023.

32 *R v Wigglesworth,* [1987] 2 SCR 541.

forfeiture of any instrument of unlawful activity regardless of that instrument's substantive relationship to any underlying offence. Proportionality does not factor into any analysis of the civil forfeiture of the proceeds of unlawful activity because the forfeiture is inherently proportionate: the taking is the taking of the unlawful proceeds. A grossly disproportionate relationship between unlawful activity and the value of the property liable to forfeiture would tend towards the imposition of a penal consequence or might make the provision look more criminal than civil. A piece of the BC regime appears to mitigate against grossly disproportionate forfeitures: the court has the power, under civil forfeiture law, to refuse to make an order when it is not "in the interests of justice."[33] That may not be sufficient to displace any inherently potential punitive outcomes.

Second, there is considerable persuasive content in the idea that it is wrong to forfeit property on the basis that it is likely to be used in unlawful activity. It is presumptive and speculative. Even classically, civil proceedings tend to deal with what did happen rather than anticipate what might happen. To forfeit property because it had proven instrumental in facilitating unlawful activity differs starkly from forfeiting property because it is likely to be used in unlawful activity. The law does not ordinarily impose consequences today – even civil consequences - on the basis of a possible tomorrow.

## IV. The BC Provincial Legislative Contribution: Unexplained Wealth Orders

The first two developments sharpen existent criminal wealth law. The third of the recent trilogy consists of a new tool known as an unexplained wealth regime or the use of unexplained wealth orders. Such a device arrived in British Columbia in April 2023 through a series of amendments to BC's *Civil Forfeiture Act*.[34] Rather than a stand-alone regime, unexplained wealth orders nestle within the provincial civil forfeiture apparatus, the apparatus upon which entitlement to the Hells Angels Clubhouses hinged.

Unlawful wealth regimes, or unexplained wealth orders, have assumed a certain prominence in several foreign jurisdictions.[35] To an extent, they

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33 *Civil Forfeiture Act*, *supra* note 18, s 8.

34 Honourable Mike Farnworth, "Bill 21 Civil Forfeiture Amendment Act, 2023" (2023), online (pdf): *Legislative Assembly of British Columbia* <www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd4th/1st_read/PDF/gov21-1.pdf> [perma.cc/J7L4-P3T3] [*Bill 21*].

35 For examples, see Peter Sproat, "Unexplained Wealth Orders: An Explanation, Assessment and Set of Predictions" (2018) 82 J Crim L 232; Marcus Smith & Russell Smith, "Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in

have a tighter affiliation to the crime of corruption and the proceeds of corruption than to the wider annals of criminal wealth law.[36] A distillation of existing foreign models describes unexplained wealth law as regimes that commonly possess two features: they do not require that a state prove the commission of crime (through a criminal proceeding) or that a state first prove that certain proceeds, or certain instruments, are the proceeds, or the instruments of crime prior to forfeiture; and they shift the burden of proof onto property owners to prove a legitimate source of wealth in relation to property.[37]

On Canadian terrain, references to unexplained wealth law entered the provincial lexicon through a 2018 report on money laundering in the British Columbia real estate sector that recommended, amongst other matters, the use of unexplained wealth orders to combat provincial money laundering.[38] Subsequently, the 2022 Cullen Commission Report, a compendious inquiry into all manner of money laundering in BC, similarly recommended that the province develop an unexplained wealth order regime.[39] From an exploration of foreign models, the Cullen Report set out certain broad architectural themes.[40] Modelled partly on that blueprint, in April 2023, British Columbia unveiled an unexplained wealth order regime.

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Australia" (2016), online (pdf): *Criminology Research Grants* <www.aic.gov.au/sites/default/files/2020-05/unexplained-wealth.pdf>.

36 See generally, Jean-Pierre Brun, et al, *Unexplained Wealth Orders: Towards a New Frontier in Asset Recovery*, Stolen Asset Recovery Initiative, World Bank, June 26, 2023.

37 Boon, Allen and Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, Final Report, October 31, 2011, a Report Prepared for the US Department of Justice, National Institute of Justice at 2.

38 Maureen Maloney, T Somerville & B Unger, "Combatting Money Laundering in BC Real Estate" (2018) at 81, online (pdf): *Expert Panel on Money Laundering in BC Real Estate* <www2.gov.bc.ca/assets/gov/housing-and-tenancy/real-estate-in-bc/combatting-money-laundering-report.pdf>.

39 Commission of Inquiry into Money Laundering in British Columbia, Commissioner Austin Cullen (Cullen Commission) Part XII, Recommendation 101, at 1618.

40 *Ibid* at 1615-1620. Broadly, the Commission recommended that an unexplained wealth regime, integrated into existing civil forfeiture law, would permit an order requiring that an individual identify the nature and extent of their ownership in provide and provide information on the source of resources used to acquire that property. If an individual failed to provide the information requested by the order, a rebuttable presumption would arise that the property was obtained by, or derived from, unlawful activity. In speaking to the standard governing the issuance of such an order, the Commission generally recommended the reasonable suspicion standard although it suggested that the standard might differ dependent upon the nature of the alleged underlying unlawful activity. It suggested that the regime operate above a defined threshold amount, that the regime only apply to assets that exceed a value of $75,000 or more.

BC's unexplained wealth regime is vexingly elaborate. Much of its content prescribes relationships between property and those who own, control, or have an interest in it.[41] This content echoes a persistent theme of criminal wealth law. Since assets derived from or connected to crime are often held or controlled through complex layers of legal ownership and control structures, anti-criminal wealth apparatuses regularly specifically attend to these complexities. The central core of the regime, however, is built on the common attributes noted above.

First, the mechanism provides that if there are reasonable grounds to suspect that a person engaged in unlawful activity owns property of a value in excess of $75,000 and the owner's known sources of lawful income would be insufficient to enable the acquisition of that property, the province can apply to the court for an unexplained wealth order.[42] If the court is satisfied that reasonable grounds exist, unless it is clearly not in the interests of justice, the court must make an explained wealth order.[43] The regime prescribes the contents of that order, central to which is the requirement that the owner discloses records and information in relation to that property.[44] Succinctly, an unexplained wealth order is an order to disclose information in relation to the acquisition of a particular property.

Second, the mechanism provides that if an owner does not provide the information required by the unexplained wealth order, or otherwise fails to comply, it is presumed that the property is the proceeds of unlawful activity.[45] Further, if an owner fails to comply with an order, and a statement made by a property owner is determined to be untrue or a record inauthentic, an adverse inference may be drawn against the owner.[46] In this, the mechanism works in conjunction with a civil forfeiture action: the presumption, and any adverse interference, apply to a related forfeiture action.

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41 *Bill 21*, *supra* note 34, s 10. The bulk of the regime consists of the addition of sections 11.05 -11.13 of the BC Civil Forfeiture Act. Sections 11.05 -11.08 define and capture the complex financial ownership and control world that can underpin entitlements to property such as beneficial owners, relatives and legal entities such as trusts and corporations.

42 *Ibid*, ss 10,11.09-11.11. The term 'owner' is used here in the interests of simplicity. The regime speaks of respondents, and of responsible officers, the latter a reference to ownership in the context of a legal entity.

43 *Ibid*.

44 *Ibid*.

45 *Ibid*, s 19.07.

46 *Ibid*, s 19.09.

Newly minted, the unexplained wealth order regime has yet to be tested for compliance with the rule of law. Many point out that such a scheme invites profound questions of constitutional congruence.[47]

Of the trilogy of developments, unexplained wealth orders stand as the most significant contribution to modern criminal wealth law. That significance derives from the relationship between unexplained wealth orders, presumptions and adverse inferences, and civil forfeiture. An explained wealth order is obtained on the basis of reasonable grounds. A failure to comply with an order creates a presumption that the acquisition of property derives from unlawful or unexplained sources of income. This combination means that a property owner bears the initial legal burden in a civil forfeiture action of proving lawful entitlement to the property. Through reliance on unexplained wealth orders obtained on the basis of reasonable grounds, at no point does the province bear the initial burden of proving, to the civil standard of a balance of probabilities, that some crime has occurred and that that crime has resulted in some acquisition of property. In building effective criminal wealth laws, or anti-criminal wealth regimes, the BC unexplained wealth regime would appear to mandate that property owners prove that their property entitlements are lawful, derive from lawful sources of income, or otherwise risk the forfeiture of property.

In species, the mechanics of unexplained wealth orders distort or invert a fundamental element of the law. In criminal and civil proceedings, ordinarily, he who asserts some allegation of wrongdoing bears the initial burden of proof. In criminal proceedings, the state alleges - bears the initial burden of proof – and must satisfy the criminal evidential standard of beyond reasonable doubt. In a civil action, to disrupt the status quo or to disturb the existing allocation of property entitlements, the plaintiff bears the initial burden of proof, and the applicable standard is the balance of probabilities standard. The mechanics of BC's unexplained wealth order regime alter this stance. Once an order is made according to the low evidential standard of reasonable grounds – a failure to comply with that order results in the shifting – in the context of a civil forfeiture action – of the initial burden of proof onto property owners.

This inversion, achieved through the interaction of unexplained wealth orders and the presumptions or adverse inferences that may be drawn in a related civil forfeiture action, certainly boosts the efficacy of criminal wealth

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47 Cosmin Dzsurdzsa, 'Civil liberty groups blast proposed BC "unexplained wealth" seizure law,' (23 November 2022), online: *Truth North* <tnc.news/2022/11/23/civil-liberty-groups-bc/> [perma.cc/PFP7-J3NM].

law. Whether it will escape collisions with constitutional norms remains to be determined.

## V. Conclusion

Of this trilogy of contributions to Canadian criminal wealth law, only the first stands as formally settled since it benefits from the authority of the Supreme Court of Canada. With respect to the second, a vindication of the BC civil forfeiture apparatus, the "future use prong," there is some space within which a Supreme Court of Canada interpretation might disagree. The third, unexplained wealth orders, clearly sharpens criminal wealth law, yet its consonance with the rule of law remains to be assessed.

# *Zora*, the *Charter*, and the *Youth Criminal Justice Act*: Defending the Rights of Youths is the Responsibility of all Court Participants

HILLARIE TASCHE*

## ABSTRACT

In *R v Zora*, the Supreme Court of Canada underscored the responsibility of all participants—the defence, the Crown, and the presiding judge—to uphold section 11(e) of the *Charter*. While the discussion in *Zora* was within the context of the bail system, there is no reason that the notion that all court actors bear a responsibility to uphold the *Charter* does not apply more broadly throughout criminal law. This essay posits that, like in *Zora*, the same broad, multi-actor responsibility extends to all *Charter* rights and that these shared responsibilities are especially critical when dealing with the rights of youth.

For more than a century, Canada has dealt with youth criminal matters separately from adults. This is partly due to the inherent and heightened vulnerability of young people that come before the court. The enhanced procedural protections of the *Youth Criminal Justice Act* ("*YCJA*") and the careful attention to the *Charter* rights of young people are central to the proper functioning of youth court system in Canada.

The purpose of this essay is to embark on a broad exploration of common *Charter* considerations in the practice of youth criminal justice and to tie these *Charter* considerations to the SCC's message in *Zora*—that all court participants bear a responsibility to uphold the rights of youths. The topics covered herein represent a non-exhaustive list of *Charter* issues that arise within youth proceedings. The focus is on issues unique to youth criminal justice, to the extent that that is possible.

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While this essay primarily addresses sections 7, 9, 11, 12 and 15, it is important to note that youths regularly face the same issues as adults that fall under other sections of the *Charter*, particularly section 8. However, given that the focus of this work is on the unique rights or interpretations of rights afforded to youths, *Charter* issues that apply equally to all accused, regardless of age, are not covered in this essay. While section 8 concerns are routinely raised in youth criminal proceedings, their substance is not sufficiently distinct from adult matters to be addressed herein.

Ultimately, this essay seeks to convey the urgent message that the defence of the *Charter* rights of youth is crucial to the healthy functioning of a youth criminal justice system, and that all *participants* are obligated to work towards that purpose.

***Keywords***: *Youth Criminal Justice Act*; *Charter*; Rights; Procedural Protections; Section 7; Section 9; Section 11(b); Section 11(c); Section 11(d); Section 11(e); Section 12; Section 15; *United Nations Convention on the Rights of the Child*; Presumption of Diminished Moral Blameworthiness of Young Persons; Enhanced Protections for Rights of Youths.

## I. INTRODUCTION

### A. *R v Zora*: Who is responsible for upholding the Charter rights of a young accused?

In *R v Zora*, the Supreme Court of Canada ("SCC") underscored the responsibility of all participants—the defence, the Crown, and the presiding judge—to uphold section 11(e) of the *Charter*.[1] While the discussion in *Zora* was within the context of the bail system, the notion that all court participants bear a responsibility to uphold the *Charter* ought to apply more broadly.

This essay posits that, like in *Zora*, a multi-actor responsibility extends to all *Charter* rights and that these shared responsibilities are especially critical when dealing with the rights of youth. This essay presents a broad exploration of common *Charter* considerations in the practice of youth criminal justice and ties those considerations to the SCC's message in *Zora*—that all court participants should work together to build a court system that upholds the rights of accused persons.

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1 *R v Zora*, 2020 SCC 14 at paras 101-103 [*Zora*].

## B. *Charter* Considerations Unique to Youth Criminal Justice Proceedings

In light of the unique position of young people in Canadian society, Parliament has enacted a separate mechanism for criminal proceedings for youth by way of the *Youth Criminal Justice Act*.[2] The SCC has attributed this separation as a recognition of "the heightened vulnerability and reduced maturity of young persons."[3]

Furthermore, by enacting a criminal justice for youth that is separate and apart from adults, Parliament has extended enhanced procedural protections to youth, in keeping with its international obligations, in particular the *United Nations Convention on the Rights of the Child*, 20 November 1989, Treaty Series 1577, 3 (entered into force 2 September 1990) [*UNCRC*], which is referenced in the Preamble of the *YCJA*.[4]

While the *Canadian Charter of Rights and Freedoms* ("*Charter*") is applicable in both adult and youth criminal proceedings, there are several areas in which the interpretation and/or implementation of the *Charter* differs.[5] Furthermore, many provisions within the *YCJA* provide enhanced procedural protections to young people. While these enhanced statutory protections do not always lead to greater *Charter* protections for young people, they are often significant in the interpretation of the *Charter* on a case-by-case basis.

In *R v KJM*, Justice Abella, writing for the dissent (the passage was later adopted on this point by the majority opinion in *R v CP* at paragraph 147), identifies several of the unique and wide-ranging procedural safeguards afforded to youth in the *YCJA*:

> Such enhanced procedural rights in the *YCJA* include: extrajudicial measures (ss. 4 to 12); notice to parents (s. 26); the possibility of compelling parents to attend court (s. 27); an enhanced right to counsel (ss. 10(2)(d), 25 and 32); specific obligations for youth justice court judges to ensure that young persons are treated fairly (s. 32); reducing the possibility of bail (s. 29); creating the option of releasing young persons who would otherwise be denied bail (s. 31); *de novo* bail reviews (s. 33); the right of young persons to be separated from adults in temporary detention (s. 30); enhanced procedural safeguards surrounding the admissibility of

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2 *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

3 *R v RC*, 2005 SCC 61 at para 41 [*RC*].

4 *Ibid; United Nations Convention on the Rights of the Child*, 20 November 1989, Treaty Series 1577, 3 (entered into force 2 September 1990) [*UNCRC*]; *YCJA*, *supra* note 2 Preamble.

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

statements made by young persons to authorities (s. 146); and a distinct sentencing regime (ss. 38 to 82).[6]

## C. Relevant Legislation: *Youth Criminal Justice Act, Canadian Charter of Rights and Freedoms* and the *United Nations Convention on the Rights of the Child*

When evaluating the *Charter* rights of young people, various pieces of legislation are relevant, primarily the *Charter*, the *YCJA*, and the *Criminal Code*.[7] However, as indicated above, the *YCJA* contains a reference to Canada's international obligations within the Preamble of the *YCJA*, the relevant portion stating:

> WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms[8]

Although what appears in the Preamble of any legislation is not binding, Parliament's inclusion of both the *UNCRC* and the *Charter* within the Preamble of the *YCJA* provides guidance as to the rights-based approach that was intended for the *YCJA*. Beyond the *YCJA*'s Preamble, Parliament has included a robust Declaration of Principles outlining the various and, at times, competing principles that are balanced within the *YCJA*.[9]

## D. Scope and Purpose of Essay: An Exploration of a Non-exhaustive List of *Charter* Considerations Common in Youth Criminal Justice System

Much of the practical aspects of *Charter* advocacy tend to fall on the shoulders of defence counsel, however, the aim of this essay is to show that all participants must play a role in upholding and defending the *Charter* rights of young people. Precedent for an 'all participant' approach can be found in *Zora*, where the SCC applies such an approach to the right to reasonable bail.[10] This approach is arguably applicable to any and all *Charter* rights, particularly those of young people, given the purposes and principles espoused by the *YCJA*.

Although this essay explores a broad array of *Charter* considerations unique to youth criminal proceedings, it is in no way an exhaustive list of

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6 *R v KJM*, 2019 SCC 55 at para 142 [*KJM*]; *R v CP*, 2021 SCC 19 at para 147 [*CP*].
7 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
8 *YCJA*, *supra* note 2.
9 *Ibid*, s 3.
10 *Zora*, *supra* note 1 at paras 101-103 [*Zora*].

all *Charter* concerns for young people. It is important to note that the jurisprudence referenced in this essay is not intended to be a comprehensive review of all pertinent case law but instead is intended to offer leading and/or illustrative cases within each respective heading.

## II. *YCJA* PROTECTIONS AND COMMON *CHARTER* CONCERNS

### A. SECTION 7: Life, Liberty and Security of the Person

"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."[11]

#### *1. Constitutional Recognition of the Diminished Moral Blameworthiness of Young People*

Upon the *YCJA*'s implementation in 2003 and prior to the significant amendments in 2012, the *YCJA* contained provisions that governed when a young person may be sentenced as an adult. These provisions applied where a young person (over the age of 14 in some provinces and 16 in others) was charged with an enumerated set of offences. These enumerated offences were referred to as 'presumptive offences', all of which were very serious offences (e.g. murder, manslaughter among others).[12]

If an accused was charged with a presumptive offence, that accused would be presumed to have adult moral culpability and would be sentenced as an adult, unless the accused could show why they should be sentenced as a youth—thereby creating a reverse onus.[13]

In *R v DB*, the SCC struck down the presumptive offence provisions and, in doing so, gave constitutional recognition to the diminished moral blameworthiness of young people.[14]

In *DB*, the SCC considered section 7 of the *Charter*, in particular, the accused's liberty interest in relation to the presumptive offences sentencing scheme of the *YCJA* at the time. Justice Abella put the question before the court as follows at para 45:

> "[…T]he approach to the sentencing of young persons is animated by the principle that there is a presumption of diminished moral culpability to which they are entitled. Like all presumptions, it is rebuttable. Under the presumptive offences sentencing scheme, it is the young person himself or herself who is required to prove that the presumption should not be rebutted, rather than the Crown who

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11 *Charter*, *supra* note 5, s 7.
12 *R v DB*, 2008 SCC 25 at paras 2, 5 [*DB*].
13 *Ibid.*
14 *Ibid* at para 95.

> is required to show why it should be. The constitutional implications of this reversal of the onus create the knot we are asked to untie."[15]

The SCC then considered the proper method of determining what constitutes a principle of fundamental justice, ultimately concluding that the presumption of diminished moral blameworthiness for young people is one such principle.[16] In doing so, the SCC came to the conclusion that the impugned provisions engaged the accused liberty interests (this was conceded by the Crown), and that that deprivation of liberty was not in accordance with the principles of fundamental justice. Therefore, the provisions were struck down.[17]

In their 2018 decision, the Alberta Court of Appeal (ABCA) commented on the presumption of diminished moral blameworthiness and its connection to an accused's Indigenous heritage in *R v AWB*.[18] This *AWB* decision built upon the framework for considering the intersection between moral blameworthiness and *Gladue* considerations set out by the Manitoba Court of Appeal (MBCA) in *R v Anderson*.[19]

Following the approach taken in *Zora*, the presumption of diminished moral blameworthiness of young people should be respected by all participants in youth criminal courts as it is a principle of fundamental justice and a central tenant of youth law. While *DB* dealt specifically with section 72 of the *YCJA*, the declaration by the court that the presumption of diminished moral blameworthiness of young people as a principle of fundamental justice had far- reaching effects in youth law, far beyond adult sentence applications alone. Much like the impugned presumptive offence provisions, should other provisions and/or future amendments to the *YCJA* run counter to the presumption of diminished moral blameworthiness of young people, the precedent set in *DB* should be embraced by all court participants and employed to bring a constitutional challenge pursuant to section 7 of the *Charter*.

### *2. Special Protections for Young People During Police Interrogations*

The right to remain silent is a core tenant of criminal law. The right to remain silent is closely tied to sections 10, 11(c) and 13 of the *Charter* and is enshrined in section 7 of the *Charter* as a principle of fundamental justice.[20]

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15 *Ibid* at para 45.
16 *Ibid* at paras 46-69.
17 *Ibid* at paras 38, 70.
18 *R v AWB*, 2018 ABCA 159 at paras 31,32 [*AWB*].
19 *R v Anderson*, 2018 MBCA 42 at para 58 [*Anderson*].
20 See generally: *R v Hebert*, [1990] 2 SCR 151 [*Hebert*].

The right to remain silent, as a principle of fundamental justice, applies to adults and youth alike. However, Parliament has included enhanced protections within the *YCJA* for youth and, in doing so, has "underscored the generally accepted proposition that procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators."[21]

Section 3(b)(iii) of the *YCJA*'s declaration of principles states that the youth criminal justice system must emphasize, among other things, enhanced procedural protections to ensure that young persons are treated fairly and that their rights are protected.[22]

In relation to the right to remain silent, the enhanced and statutorily-derived procedural protections for young persons work in conjunction with section 7 of the *Charter* and are codified in section 146(2) of the *YCJA*.[23]

In 2008, the SCC considered a young person's right to remain silent and the admissibility of statements made by young persons to police in *R v LTH*. In *LTH,* the SCC found that for a young person's statement to be admitted into evidence, the Crown must prove beyond a reasonable doubt that the preconditions set out in section 146(2) have been met.[24]

In regards to *Charter* considerations, the dissent in *LTH* raised concerns that to require the Crown to prove the criteria in section 146(2) beyond a reasonable doubt created a higher threshold than other waivers of rights made under the *Charter*, which are proven on a balance of probabilities.[25] However, the majority's analysis of the requirement that the criteria for a young person's waiver of right to remain silent pursuant to section 146(2) be proven beyond a reasonable doubt is an example of a statutorily-derived right afforded to a young person that is higher than the general *Charter* protection afforded to adults in similar circumstances.

From a practical perspective, in order to properly uphold the rights of young persons, it is important for all actors within youth court proceedings to be aware of such statutorily enhanced protections, as opposed to the more general *Charter* standard that would apply in adult criminal proceedings. All participants, Crown and defence alike, should present their respective positions firmly within the *YCJA* framework.

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21 *R v LTH*, 2008 SCC 49 at para 3 [*LTH*].
22 *YCJA, supra* note 2, s 3(b)(iii).
23 *Ibid,* s 146(2); *LTH, supra* note 21 at para 18.
24 *YCJA, ibid* at s 146(2).
25 *LTH, supra* note 21 at 82.

### *3. Operation of Section 743.5(1) of Criminal Code: Unintended and Harsh Consequences*

Section 743.5(1) of the *Criminal Code* is a little-known but incredibly important aspect of criminal law where subsequent adult criminal proceedings have a profound impact on the operation of a prior youth sentence.[26]

If a young adult, having attained the age of 18, is subsequently sentenced to a custodial disposition on an adult criminal offence while still serving the custodial (including the community supervision portion) youth sentence, section 743.5(1) requires that the remaining portion of the youth sentence "be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this act."[27]

The wording of section 743.5(1), specifically "[...] or any other Act of Parliament[..]" activates section 139(1) of the *Corrections and Conditional Release Act*.[28]

Section 139(1) of the *Corrections and Conditional Release Act* triggers a sentence recalculation of the initial youth sentence, thereby significantly altering the young adult's statutory release date. If an adult custodial sentence is imposed during the community supervision portion (the final 1/3rd of a custodial youth sentence served in the community on conditions set by corrections), the accused will be brought back into custody in an adult facility to serve their youth sentence until their new statutory release date.

The constitutionality of the provision was adjudicated by the Federal Court of Appeal (FCA) in *Erasmo v the Attorney General of Canada*. In *Erasmo*, the FCA outlined the reasoning behind Parliament's intentions in enacting the merging provisions and found that these provisions do not offend section 7 of the *Charter*.[29]

While appeals pursuant to section 743.5(1) of the *Criminal Code* are rarely adjudicated within a *Charter* framework (if not at all since the FCA's decision in *Erasmo*), a discussion of section 743.5(1) is still warranted as the somewhat unexpected lack of *Charter* protection in relation to this provision is important from a practical perspective.

In two reported cases, *R v LS* and *R v Fisher*, it was clear that the operation of section 743.5(1) and its unintended consequences were not known or understood by counsel or the courts. In both *LS* and *Fisher*, all participants in the hearings that triggered section 743.5(1), including the

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26 *Criminal Code*, *supra* note 7, s 743.5(1).

27 *Ibid.*

28 *Corrections and Conditional Release Act*, SC 1992, c 20, s 139(1).

29 *Erasmo v the Attorney General of Canada*, 2015 FCA 129 at para 3 [*Erasmo*].

presiding judges, were unaware of the impact the imposition of custodial sentences would have on LS and Fisher's youth sentences.[30]

In *Fisher,* the accused, who was 20 years old but still bound by a youth sentence, was sentenced to a two-month custodial disposition for being unlawfully at large for a period of time during his incarceration at the Manitoba Youth Centre. Unbeknownst to the judge, Crown, and defence, this adult custodial sentence triggered section 743.5(1) of the *Criminal Code* as Fisher was still serving a youth sentence. It was clear from the sentencing transcripts that all parties involved expected that the accused would, upon sentencing, be able to return to the Manitoba Youth Centre and continue serving his sentence in that place. However, with the triggering of section 743.5(1), the accused's sentence was recalculated, resulting in a total sentence of four years, two months and two days custody going forward and a transfer to an adult penitentiary.[31]

On appeal, the Crown conceded that what took place was an unintended consequence, and that section 743.5(1) was not considered by the sentencing judge.[32] This being a material error, the MBCA was asked whether the operation of section 743.5(1) resulted in a sentence that was harsh and excessive in the circumstances. The MBCA concluded it was and re-sentenced the accused to a non-custodial disposition for the adult charges, thereby avoiding the effects of section 743.51(1) and returning Fisher to the Manitoba Youth Centre.

In *LS,* the ONCA dealt with a similar unintended engagement of section 743.5(1) of the *Criminal Code*. In that case, with the agreement of the Crown, LS asked the ONCA to re-sentence him to a non-custodial disposition "to give effect to the intention of the parties and overcome the effect of section 743.5(1) of the *Criminal Code* that was not within their contemplation." The ONCA agreed and varied LS's sentence.[33]

Given the FCA's finding in *Erasmo* that section 743.5(1) does *not* offend the *Charter*, it is incredibly important that judges, Crowns, and Defence Counsel be aware of its operation when imposing a sentence on an adult offender who is still bound by a custodial youth sentence.

## B. SECTION 9: Arbitrary Detention

"Everyone has the right not to be arbitrarily detained or imprisoned."[34]

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30 *R v LS*, 2009 ONCA 762 at para 9 [*LS*]; *R v Fisher*, 2019 MBCA 82 at para 6 [*Fisher*].
31 *Fisher, ibid* at para 2.
32 *Ibid* at para 6.
33 *LS, supra* note 30 at para 8.
34 *Charter, supra* note 5, s 9.

### *1. The YCJA's Statutory Limitations on the use of Pre-trial Detention and Custodial Sentences: Potential for Arbitrary Detention when YCJA Misapplied*

The *YCJA* places limits on when a young person may be denied judicial interim release and when they may be sentenced to custody.[35]

When such limitations are not adhered to in regard to judicial interim release, an accused young person may bring a bail review pursuant to section 520 of the *Criminal Code*. Similarly, when the limitations on the use of custody are not followed at sentencing (such sentences are generally referred to as an "illegal sentence"), a young person may appeal the custodial sentence to a higher court.

However, in the interim, the ongoing detention of that young person while counsel takes appropriate measures on their behalf, could be a violation of the young person's *Charter* right not to be arbitrarily detained. Should such a violation be found, a young person may seek a remedy pursuant to section 24(1) of the *Charter,* which could range from a stay of proceedings to an award of costs.[36]

Such an argument was raised (in the context of bail) by a young person in *R v NM*. Section 29 of the *YCJA* sets out parameters for the court's ability to detain a young person pending trial. The *YCJA* is clear that unless specific criteria are met, a young person may not be detained pre-trial. Determining whether such criteria have been met is a complex and fact-specific analysis governed by subsections 29(2)(a)-(c) of the *YCJA*, the full scope of which will not be explored here.[37]

In *NM*, the Ontario Court of Justice (ONCJ) ultimately held that *NM* was denied bail despite the fact that his particular set of circumstances made him ineligible for such a detention. Given that the law set out in section 29 of the *YCJA* was not properly applied, the detention was found to be arbitrary in nature. Not surprisingly, the ONCJ also found a violation of *NM*'s section 11(e) rights.[38]

The same reasoning in *NM* would likely apply in a situation where a young person was given an "illegal sentence" through the misapplication of *YCJA* sentencing provisions found in section 39(1).[39]

From a practical perspective, judges, Crowns, and defence attorneys must be intimately familiar with these provisions to ensure a young person is not committed to custody when such a sentence is not legally available.

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35 *YCJA*, *supra* note 2, ss 29, 39.
36 *Charter*, *supra* note 5, ss 9, 24(1).
37 See generally: *R v NM*, 2005 ONCJ 348 [*NM*]; *YCJA*, *supra* note 2, s 29.
38 *NM*, *ibid* at para 21.
39 *YCJA*, *supra* note 2, s 39(1).

Where a young person is illegally sentenced to custodial time going forward, it is imperative that defence counsel bring an application for bail pending appeal as soon as practicable and communicate that intention with the Crown. Rules regarding illegal sentences are very clear, and in the rare circumstance that an error is made by the court, the Crown may agree to release the accused pending appeal. This is an example of the potential for all court participants to show vigilance in upholding the rights of young people, as was called for in *Zora* in the context of the right to reasonable bail.

## C. SECTION 11: Procedural Rights

### *1. Section 11(b): Trial Delay in Youth Courts*

"Any person charged with an offence has the right to be tried within a reasonable time."

Amid significant disagreement at the provincial level surrounding whether the presumptive ceiling as set out in *Jordan* should apply to youth criminal matters, the SCC took the opportunity in *R v KJM*, to resolve the differing approaches to section 11(b) rights for youth criminal proceedings.[40]

While the SCC ultimately held that the *Jordan* ceiling should apply in youth criminal proceedings, the Court took a slightly different approach where defence raises unreasonable delay that falls below the *Jordan* ceiling. A 'below-ceiling' *Charter* application is governed by a two steps test that requires defence to establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite proceedings, and (2) the case took markedly longer than it reasonably should have.[41] In *KJM*, the SCC indicates that in youth matters, the court must take into account the youthfulness of the accused in the second branch of that test.[42]

In reaching their conclusion in *KJM*, the SCC set out five reasons why section 11(b) requires special consideration for young persons. These reasons are that (1) young people experience and perceive time differently than adults, and that a young person's connection between action and consequence becomes more tenuous over time; (2) trial delay may cause greater stress and psychological harm to a young person; (3) the ability to recall events over time is not as strong in young people as in adults, which affects a young person's ability to make full answer and defence; (4) during adolescence, young people experience rapid cognitive and psychosocial

40 *KJM*, *supra* note 6.
41 *R v Jordan*, 2016 SCC 27 at paras 48, 87 [*Jordan*].
42 *KJM*, *supra* note 6 at paras 70,71.

development and, should they be subjected to a significant period of delay in criminal proceedings, they may be left with a sense that the system has operated unfairly as they may have matured and changed significantly since their offending behaviour; and that (5) society has an interest in intervening and assisting young offenders as swiftly as possible.[43]

Ultimately, the SCC found that these youth-specific considerations can be reconciled with the *Jordan* ceilings, and a separate constitutional standard is not required. The SCC's approach to trial delay in *Jordan* and *KJM* is an example of a *Charter* right being relatively uniform as between youths and adults, but where there will be added considerations for youth when adjudicating the *Charter* right in question.

Flowing naturally from the *KJM* decision is the reality that below-ceiling applications ought to be more common in youth court than in adult court. In addressing the added consideration of youthfulness in the second prong of the below-ceiling test, the SCC signaled that such applications may be more appropriate in youth court as a result of the *YCJA*'s emphasis on timeliness of proceedings and the youthfulness of an accused, although the weight youthfulness will ultimately be given "will vary depending on the circumstances."[44] This slightly modified approach to delay in youth court is something all participants should be aware of and uphold during the trial scheduling process.

### *2. Section 11(c): The Right of Non-Incrimination and the Charter Implications of Pre-Trial Interventions Available within YCJA*

"Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence."

Section 11(c) of the *Charter* protects an accused's right of non-incrimination and is closely tied to sections 7 and 11(d) of the *Charter*. In the context of youth criminal proceedings, there are several provisions unique to the *YCJA* that allow the Court to take an active role in youth proceedings pre-trial, including the Court's ability to order psychological reports pursuant to section 34 or to convene conferences pursuant to section 19 of the *YCJA*.[45]

From a *Charter* perspective, sections19 and 34 of the *YCJA* pose a potential risk to a young person's right of non-incrimination, as both psychological reports and conference reports become part of the Court record. Should a young person be questioned about the specifics of the offences alleged against them during the preparation of a psychological

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43 *Ibid* at paras 51-55.

44 *Ibid* at para 72.

45 *YCJA*, *supra* note 2, ss 19, 34.

report or during a conference, there is a very real danger that their section 11(c) rights could be compromised.

It is imperative that if a young person's 11(c) rights have been compromised during the course of a pre-trial report or conference all parties uphold the accused's 11(c) rights by redacting the offending portions of the reports or documents before they are submitted to the court.

### *3. Section 11(d): Presumption of Innocence and Right to Fair Trial: Additional Statutory Protections for Young People who Plead Guilty to Charges*

"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

For an accused to plead guilty to charges against them, several criteria must be met. These criteria are set out in section 606 of the *Criminal Code*. The court may only accept a guilty plea if the accused is making the plea voluntarily, if the accused understands that the plea is an admission of the essential elements of the offence, the nature, and consequences of the plea, and if the accused understands that the court is not bound by any agreements made between the accused and prosecutor.[46]

In the context of adult criminal proceedings, a plea is not invalidated if the inquiry is addressed in a cursory manner or if the court fails to fully inquire whether the criteria are actually met, especially when an accused is represented by counsel.[47] Significant trust is placed on defence counsel to ensure that guilty pleas are not offered when they ought not to be.

However, in youth court, section 36 of the *YCJA* dictates the opposite must occur. Should a youth court judge not explicitly satisfy themselves that the criteria of section 606 of the *Criminal Code* have been met, and should they not inquire into the details and facts of the allegations, a guilty plea may not be entered pursuant to section 36(2) of the *YCJA*.[48]

Despite being decided before the inception of the *YCJA*, the SCC's decision in *R v T(V)* remains the leading case regarding the additional protections afforded to young people who plead guilty to criminal charges. It is important to note that section 19 of the *Young Offenders Act* was identical to section 36 of the *YCJA* in its wording and operation.[49]

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46 *Criminal Code*, *supra* note 7, s 606.

47 *Ibid*, s 606(1.2).

48 *YCJA*, *supra* note, 2 s 36.

49 *R v T(V)*, [1992] 1 SCR 749, at paras 5, 33, 34 [*T(V)*]; *Young Offenders Act*, SC 1985, c Y-1, s 19 [YOA]; *ibid.*

The impetus behind this added procedural protection is tied to the increased vulnerability of young people navigating the justice system. As stated in *T(V)* by the Honourable Supreme Court Justice L'Heureux-Dubé, "I am of the view that s.19 simply seeks to protect the young person against the consequences of an ill-informed plea of guilty. Section 19(1) requires that the court be satisfied that the facts support the charge before accepting a guilty plea."[50]

The *T(V)* decision has been applied since the inception of the *YCJA* and has consistently been viewed as an added safeguard given the vulnerability and diminished capacity of young people.[51] The value of these protections was best summarized by the Saskatchewan Court of Appeal (SKCA) in *R v TL:*

> Young persons, because of their age, maturity and limited life experience, are often vulnerable to pressure from their parents, defence and Crown counsel when it comes to how the legal system should be navigated and what plea should be entered to an alleged offence. It is for this reason the YCJA provides special safeguards for them—one of which is section 36(1) of the YCJA.[52]

The statutory protections of the *YCJA* are tied to the *Charter*'s procedural protections in section 11, including the right to a fair trial as well as the right to be presumed innocent. Failing to adhere to these special provisions may not only trigger a potential remedy pursuant to the *YCJA* (e.g., the guilty plea may be quashed) but may also trigger section 11(d) of the *Charter.*

### *4. Section 11(e): Right to Reasonable Bail: Antic, Zora and the Right to Reasonable Bail for Young People*

"Any person charged with an offence has the right not to be denied reasonable bail without just cause."

While much of Part XVI of the *Criminal Code* is relevant for youth bail, the *YCJA* contains its own provisions for judicial interim release that modify and/or create additional considerations for youth bail matters. These provisions are primarily found in sections 28 through 29 of the *YCJA.*[53]

It is important to comment on the function of sections 28 and 140 of the *YCJA*, which address the application of *Criminal Code* provisions in youth matters. Both sections 28 and 140 set out that *Criminal Code*

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50 *T(V), ibid* at para 34.

51 *R v HJPN*, 2010 NBCA 31 at paras 8, 9, 12, 13, 14 [*HJPN*]; *R v TL*, 2016 SKCA 160 at paras 13, 14, 15, 20, 27, 36 [*TL*].

52 *TL, ibid* at para 20.

53 *YCJA, supra* note 2, ss 28-29.

provisions apply to youth matters, except to the extent that they are inconsistent with or excluded by the *YCJA*.[54]

Section 11(e) of the *Charter* provides that any person charged with an offence has the right not to be denied bail without just cause.[55] The SCC has adjudicated this right on many occasions in the context of adult bail court. While the SCC has not addressed the youth specific provisions of bail, their decisions in *R v Zora* and *R v Antic* are particularly helpful and equally applicable to youths.[56]

One area of particular concern in youth court from a *Charter* perspective is the potential that youths will be given overly stringent bail conditions that are disproportionate to the charges they face, as was contemplated in *Zora*.[57] In bail court, young people often present with a host of pressing social issues. While it is tempting for the youth court to use judicial interim release proceedings as a way to ameliorate the social situation of a young person, unless the court's interventions are tied directly to the alleged offending behaviour, section 28.1 of the *YCJA* cautions against the use of conditions to address the social circumstances of youth. Section 28.1 of the *YCJA* states that a youth court judge "shall not detain a young person in custody, or impose a condition in respect to a young person's release by including it in an undertaking or release order, as a substitute for appropriate child protection, mental health or other social measures."[58] This provision echoes much of the SCC's rulings in *Zora* and *Antic* on the principle of restraint.

In *Antic* and again in *Zora*, the SCC stated that in order to comply with section 11(e) of the *Charter*, terms of judicial interim release may only be imposed to the extent that they are necessary to address the statutory criteria for detention.[59] For young people, these statutory criteria are found in the modified primary, secondary, and tertiary grounds of section 29 of the *YCJA*. Like their adult counterparts, bail conditions must not be imposed on young people in an attempt to change their behaviour or serve as punishment.[60] Given young people's unique place in society and society's often paternalistic role in the lives of young people, this restraint is arguably the hardest to exercise in youth court.

In *Zora*, the SCC made it clear that the obligation to uphold the rights conferred on the accused through section 11(e) is on all

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54 *Ibid*, s 140.
55 *Charter*, *supra* note 5, s 11(e).
56 See generally: *Zora*, *supra* note 1; *R v Antic*, 2017 SCC 27 [*Antic*].
57 *Zora*, *ibid* at para 85.
58 *YCJA*, *supra* note 2, s 28.1.
59 *Antic*, *supra* note 56 at para 67.
60 *Ibid* at para 67.

participants in the bail system.[61] As part of upholding a young person's right to reasonable bail, it is imperative for defence counsel, the Crown, and the court to be aware of the unique nature of youth bail provisions found in section 29 of the *YCJA* apply these provisions properly and in accordance with section 11(e) of the *Charter*.

## D. SECTION 12: Cruel and Unusual Treatment or Punishment

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

### *1. Harmful Effects of Solitary Confinement on Young People*

Section 12 of the *Charter* provides that everyone has the right not to be subjected to cruel and unusual treatment or punishment. The test for section 12 is whether the treatment or punishment is grossly disproportionate in the circumstances. To be grossly disproportionate, the SCC has indicated (on several occasions) that the treatment or punishment in question must be so excessive that it would outrage society's standards of decency and be disproportionate to the extent that Canadians would find the treatment or punishment abhorrent or intolerable.[62]

In *R v Morrisey*, the SCC stated that when considering section 12 of the *Charter*, the court must evaluate the entire context in which the violation of section 12 is said to have arisen.[63]

In the context of solitary confinement of young persons as a violation of the *Charter*, the courts have considered the individual facts of each case as well as expert evidence relating to adolescent development and the harms of solitary confinement on young people.

In *R v CCN*, the young person brought an application for *Charter* relief for violations of his sections 7, 9, 10(b) and 12 rights. The Judge, upon reviewing corrections records, found that *CCN* had spent a period of just under two years in solitary confinement.[64] Significant expert evidence was proffered regarding the brain development of adolescents and the impact of solitary confinement on young people.[65]

The court in *CCN* considered the SCC decision in *R v Babos*, wherein the SCC stated that entering a stay of proceedings as a remedy for a *Charter*

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61 *Zora, supra* note 1 at para 101.

62 *R v Smith*, [1987] 1 SCR 1045 at 1072 [*Smith*]; *R v Morrisey*, 2000 SCC 39 at para 26 [*Morrisey*]; *R v Wiles*, 2005 SCC 84 at para 4 [*Wiles*].

63 *Morrisey, ibid* at para 27.

64 *R v CCN*, 2018 ABPC 148 at paras 48, 85 [*CCN*].

65 *Ibid* at paras 17-21.

violation should be rare. The court in *CCN* found that a stay of proceedings was appropriate.[66]

Unfortunately, the ultimate decision in *CCN* was limited to section 9 of the *Charter*. However, the court heard evidence and commented (in obiter) on the harsh social and psychological effects of solitary confinement on CCN.[67] Although the court in *CCN* did not rule on the issue of cruel and unusual treatment, it did find the following in paragraph 85:

> "[T]he solitary confinement of CCN for approximately two years contravened the principles and purposes of the YCJA by failing to focus on rehabilitation and reintegration, and to address CCN's underlying circumstances. Furthermore, the likely result of CCN's solitary confinement for just under a two-year period was to make him a greater risk to the public than if he not been subject to solitary confinement and programs had been intensively employed to address his underlying circumstances."[68]

Notably, Manitoba's use of solitary confinement in youth correctional facilities has come under significant scrutiny since the 2019 release of the Manitoba Advocate for Children and Youth (MACY) report "Learning from Nelson Mandela: a Report on the Use of Solitary Confinement and Pepper Spray in Manitoba Youth Custody Facilities" and the 2020 follow-up report "Breaking the Cycle: An Update on the Use of Segregation and Solitary Confinement in Manitoba Youth Custody Facilities."[69]

In the 2019 MACY Report, it was found that Manitoba had the highest rate of incarceration for youth in Canada as well as the highest use of solitary confinement in youth correctional facilities.[70]

On the issue of solitary confinement of youth in Manitoba, currently before the Manitoba Court of King's Bench is a class action matter, *Virgil Charles Gamblin and Hawa Yussuf as Litigation Guardian of AM v The Government of Manitoba*.

The Statement of Claim *Gamblin/AM* alleges that the Government of Manitoba has, among other claims, breached the sections 7, 12 and 15 rights of the Class Members. The Class Members in *Gamblin/AM* fall under two categories and two representative plaintiffs: *Virgil Charles Gamblin* and *AM*. For the purposes of this essay, the focus will be on the

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66 *R v Babos*, 2014 SCC 16 at para 31 [*Babos*]; *CCN*, *supra* note 64 at paras 92, 98.

67 *CCN*, *ibid* at paras 13, 17, 19, 20, 45, 46, 81, 84, 85.

68 *Ibid* at para 85.

69 Man, The Manitoba Advocate for Children and Youth, *Learning from Nelson Mandela: A Report on the Use of Solitary Confinement and Pepper Spray in Manitoba Youth Custody Facilities*, (Special Report, 2019) [*2019 MACY Report*]; Man, The Manitoba Advocate for Children and Youth, *Breaking the Cycle: An Update on the Use of Segregation and Solitary Confinement in Manitoba Youth Custody Facilities*, (Special Report, 2021) [*2020 MACY Report*].

70 *2019 MACY Report*, *ibid* at 14, 45.

experiences of AM, who represents a class of young people who were subjected to solitary confinement while detained at the Manitoba Youth Centre.

AM's experience in solitary confinement is outlined in the Statement of Claim in *Gamblin/AM*, filed May 21, 2021, in paragraphs 54 through 61. The Statement of Claim alleges that AM is a 17-year-old inmate at the Manitoba Youth Centre and was first placed in solitary confinement at age 15. Between July 1, 2020 and April 20, 2021, AM was placed in solitary confinement on at least nine different occasions, the longest of which was approximately 40 days. The small, windowless cell in which AM spent that time had only a mat on the floor.[71]

The Statement of Claim alleges that AM's experiences in solitary confinement have had "devastating emotional and psychological consequences, including strong feelings of depression and anxiety. He has been driven to suicidal thoughts while in solitary confinement. These experiences have cause[d] him permanent psychological damages."[72]

Although the *Gamblin/AM* matter is in the early stages of proceedings as a Class Action, it will very likely build upon the momentum of the 2019 and 2020 MACY reports in bringing the issue of the solitary confinement of youths in Manitoba to the fore.

While the scope of this essay addresses the interplay between the *Charter* and *YCJA*, it is vitally important for all court participants to be aware of civil litigation, such as *Gamblin/AM*; governmental reports, such as the 2019 and 2020 MACY reports; as well as relevant international human rights instruments. These external documents and proceedings may have profound impacts on the youth criminal court's future interpretation of section 12 rights vis-a-vis solitary confinement. It is important to bear in mind that the Preamble of the *YCJA* itself incorporates the *United Nations Convention on the Right of the Child (UNCRC)*.[73] While the *UNCRC* is not binding in youth court proceedings, as it is not incorporated within the body of the legislation, it is nonetheless important as an interpretive tool for all matters falling within the purview of the *YCJA*.[74]

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71 *Virgil Charles Gamblin and Hawa Yussuf as Litigation Guardian of AM v The Government of Manitoba and John Doe and Jane Doe* (April 29, 2022), Winnipeg, MB QB CI 21-01-31242 (Certification Motion: Granted), Statement of Claim, at paras 54-59 [*Gamblin/AM*].

72 *Ibid* at para 60.

73 *YCJA*, *supra* note 2, Preamble; *UNCRC*, *supra* note 4.

74 *CCN*, *supra* note 64 at para 79.

## E. SECTION 15: Equality Rights - Age

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

### *1. Statutory Inequity between Youths and Adults vis-a-vis their Ability to Appeal Matters to the Supreme Court of Canada*

In *R v CP*, the SCC addressed the constitutionality of section 37(10) of the *YCJA*. Where adults have a codified path to the SCC by way of section 691(1) of the *Criminal Code*, its counterpart in section 37(10) of the *YCJA* expressly excludes such a mechanism for young persons. Pursuant to the rules in section 140 of the *YCJA* (discussed in earlier sections of this essay), section 691(1) of the *Criminal Code* is not applicable in youth matters as it is contradictory to the related *YCJA* provision. Therefore, section 37(10) of the *YCJA* represented a distinct approach from the *Criminal Code* and faced *Charter* scrutiny for seemingly creating inequality based on the age of an accused.

The majority in *CP* articulated the criteria for a violation of section 15 of the *Charter*: (1) if the provision created a distinction based on an enumerated or analogous ground, and (2) if the provision imposed a burden or denied a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage.[75]

All parties in *CP* agreed that the first step of the section 15 analysis was met, but the Court ultimately concluded that the second step of the analysis had not been made out. In reaching their conclusion, the majority in *CP* commented that age-based distinctions are common and necessary in society and are not always a discriminatory or arbitrary denial of rights.[76]

The majority in *CP* engaged in an in-depth analysis of the potential burdens of section 37(10) on an accused but also drew attention to the fact that not only does section 37(10) affect the accused's right to appeal as of right, it also shields a young person from the Crown's same path to the SCC. The automatic right to appeal available to adults is granted equally to the Crown where a dissenting opinion on a question of law is made supporting the Crown's argument. Such Crown appeals could significantly prolong litigation in youth matters, which runs contrary to aspects of the *YCJA*'s declaration of principles found in section 3, namely that youth matters must be dealt with in a timely fashion.[77]

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75 *CP*, *supra* note 6 at para 141.
76 *Ibid* at para 142.
77 *YCJA*, *supra* note 2, s 3.

Aside from the section 15 analysis, *CP* also raised section 7 of the *Charter*. The SCC considered whether the enhanced procedural protections afforded to young people should be considered a principle of fundamental justice pursuant to section 7. The majority in *CP* commented that the SCC has already established such a principle of fundamental justice in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, but that this principle mandates that all accused be accorded adequate procedural safeguards against wrongful convictions or other miscarriages of justice in the criminal process.[78]

The SCC commented that when considering what constitutes adequate procedural protections, the analysis will vary according to the context in which the principle is invoked. For youth matters, the "adequacy of procedural protections will necessarily be sensitive to the unique circumstances of young persons that have been identified by this Court, including their diminished moral culpability and their need for enhanced procedural protection in the criminal justice system."[79]

When considering the entirety of the *CP* decision, both majority and minority opinions illustrate the interesting interplay between general *Charter* protections that apply to all accused and the enhanced statutory protections of the *YCJA* that apply only to young people. From a practical perspective, it is not always clear when one or both are triggered. The divided nature of the SCC's decision in *CP*, which dealt with the potential inequity based solely on age contained in section 37(10), illustrated this point. In *CP*, 4 of 8 SCC Justices held that section 37(10) did not violate section 15 of the *Charter*; 3 of 8 Justices were of the opinion that the section violated section 15 and was not saved by section 1; and the final Justice found that section 37(10) constituted a limit on the equality rights of young persons but was justified under section 1 of the *Charter*. Ultimately, section 37(10) of the *YCJA* was upheld.[80]

## III. Conclusion

The SCC in *Zora* underscored the responsibility of all participants to uphold section 11(e) of the *Charter*. This responsibility arguably applies to the obligation of the justice system as a whole to uphold all rights enshrined in the *Charter*. This must be particularly so in the case of youths, as they come before the courts with significant disadvantages and vulnerabilities as

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78 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, at para 5; *CP, supra* note 6 at para 132.

79 *CP, ibid* at para 132; *DB, supra* note 12 para 41.

80 *CP, ibid* at paras 4, 163, 165, 167.

a result of their age. Careful consideration must be given to the defence of the rights of children. Ultimately, this is the responsibility of all court participants. This approach is evident, not only from the SCC's comments on the rights of young people as explored in this essay, but also from the enhanced procedural protections that have been enacted by Parliament throughout the *YCJA*.

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# *Charter*, Constitutionality and the Honour of the Crown: Considering an Additional Constraint

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ABSTRACT

The provincial governments of Ontario and Quebec recently deployed section 33 of the *Canadian Charter of Rights and Freedoms* to curtail labour rights and religious freedoms in ways that have surprised voters and lawyers alike. Many commentators argue that section 33 was intended to be used sparingly in only the direst of circumstances. This contention does not survive a plain reading of the Constitution Act, 1982. In this paper, we explore the common law doctrine of the honour of the Crown and its potential constraint on executive power that gives texture to elected leaders' and public officials' relationship to the Constitution and the state. We analyze the doctrine's development to argue that the honour of the Crown resonates with the popular sentiment shared by many: elected leaders cannot simply deploy section 33 at will. The feudal concept of honour owed to and from the Crown animates the

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Westminster system and *Canada's Charter of Rights and Freedoms* in ways that provide legal arguments that may constrain political leaders from tyranny and overreach.

## I. INTRODUCTION

In the context of constitutional sovereignty, legislators in Canada are constrained in law-making by the *Canadian Charter of Rights and Freedoms*. However, section 33, the "notwithstanding clause", of the *Charter,* provides an opportunity for provincial and federal lawmakers to promulgate laws that violate constitutionally enshrined rights. Justice Miller, writing for a majority of the Ontario Court of Appeal, framed the question in any challenge to legislation in binary terms: "the question before this court is not whether the legislation is good or bad policy, was fair or unfair."[1] On this view, section 33 may be used to roll back the promises made between the Crown and the subject when Queen Elizabeth II gave her assent to the *Canada Act*. Indeed, this power has recently been used by the Premiers of Quebec and Ontario to constrain religious freedoms and labour rights. Some have argued that section 33 should be deployed only in limited, emergency circumstances, but nothing in the *Charter* requires or implies such a limit.

This article explores the doctrine of the honour of the Crown as a potential protection against legislators' overuse and bad faith use of the notwithstanding clause. Put differently (and in terms of yore), the Crown's separation from politics as the dignified branch of government does not make it a neutral force in the machinery of government. The existence of the Crown's honour is a tool that has been—and can be—used by courts to balance executive, legislative, and judicial power. We argue that the doctrine of the honour of the Crown gives important texture to the relationship between the Crown, the state, and the state's political actors in the executive and Parliament. We suggest that the doctrine of the honour of the Crown may be developed to constrain the use of section 33 by governments. The relationship between the executive and other branches of government and the Crown is defined by service. Political failures become constitutional crises when service is not conducted in good faith, when it is sufficiently politically self-interested to deny the Sovereign's role altogether. This failure may be a "fatal defect to many of the fundamental constitutional rights in Canada"—a characterization of section 33 itself.[2] A court may intervene in this context, as the United Kingdom's

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1 *Toronto (City) v Ontario (Attorney General),* 2019 ONCA 732 at para 2.

2 Jeffrey B Meyers, "What We Talk About When We Talk About the Rule of Law"

Supreme Court did in *Miller v Prime Minister*, to preserve the dignified branch of government, the Crown.[3]

We take a long view of the honour of the Crown, which carefully hews to some courts' characterization of the honour of the Crown as a concept apart from the *sui generis* fiduciary duties to which it may give rise.[4] This view stands against the Supreme Court's recent uninflected proclamation that "the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing aboriginal societies, and from the unique relationship between the Crown and Indigenous peoples."[5] A historical perspective on the honour of the Crown shows not just how feudal concepts still animate the Westminster system and Canada's parliamentary democracy, but also how the feudal concept of honour could potentially assist in preventing politicians and lawmakers from abusing their powers as elected officials in overriding hard-won *Charter* rights. We hope to flesh out the unique way in which the honour of the Crown may invalidate legislation beyond the first-nations context to which it usually attaches. In so doing, we respond to the Supreme Court's suggestion that the honour of the Crown may be the "unique" unwritten constitutional principle that could invalidate legislation.[6] Invalidation of legislation, in brief, could flow from judicial review of the executive action that influences parliamentary proceedings. The United Kingdom Supreme Court broke new ground in *Miller v Prime Minister* when it reviewed the prime minister's advice given to Her late Majesty. We contend that a similar review of the Canadian the advice to grant Royal assent given to the Governor General could, in an appropriate case, be successfully judicially reviewed. That advice would have to undermine the Crown's honour for a court to intercede.

Provincial governments in Ontario and Quebec have now at least once relied upon section 33 to enact legislation that clearly would otherwise violate *Charter* rights. In 2022, the government of Ontario enacted Bill 28,

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(2021) 7 Canadian Journal of Comparative and Contemporary Law 405 at 428.

3 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent),* 2019 UKSC 41 [*Miller*].

4 See, for example, *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 406: "Our jurisprudence regards a treaty between Canada and a First Nation as a unique, sui generis agreement, which attracts special principles of interpretation, and possesses a unique nature in that the honour of the Crown is engaged through its relationship with Aboriginal people"; leave to appeal granted: *Attorney General of Ontario v Restoule et al*, 2022 CanLII 54122; *vide First Nation of Na-Cho Nyäk Dun v Yukon*, 2023 YKSC 5 at para 71: "the duty to consult arises from the honour of the Crown, a constitutional principle that informs the purposive interpretation of s. 35".

5 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 62.

6 *Ibid*.

*Keeping Students in Class Act, 2022*,[7] to render illegal a strike by education workers. It made clear reference to section 33 of the *Charter*. Notably, this legislation was put forward at least partly in response to constitutional jurisprudence about labour rights. Although some reasonable people may disagree, they should acknowledge this legislative act was a bold use of section 33. A law enacted in Quebec in 2019, Bill 21[8], precludes persons from wearing "conspicuous religious symbols" such as headscarves, while working in public sector jobs. The successful enactments by provincial governments of these laws have undermined the notion that Canadians possess constitutionally protected rights.

Uniquely amongst constitutions of constitutional democracies, section 33 of the *Charter of Rights and Freedoms* empowers elected governments to override rights otherwise guaranteed by a constitutional document. Section 33 allows Canada's Parliament or its provincial legislatures to derogate from certain sections of the *Charter*, those being:

- section 2 (fundamental freedoms);
- sections 7 to 14 (legal rights); and
- section 15 (equality rights).

Notably, section 33 does not apply to democratic rights (section 3, 4 and 5 — the right to vote, and the sitting of the House of Commons or other Canadian legislatures), mobility rights (section 6), and language rights (sections 16 to 23). The unavailability of section 33 in respect of these rights reflects the particular importance the unavailability of section 33 in respect of these rights reflects the particular importance placed on them by the framers of the Charter.[9]

Once invoked, section 33 precludes judicial scrutiny of provincial or federal legislation under the *Charter* sections to which it applies. A check governments' ability to rely upon section 33 is made by its limited duration: a declaration under section 33 is only valid for five years. After this period, it will cease to have effect unless it is re-enacted, providing the electorate with an opportunity to vote governments that use section 33 out of office.

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7 *Keeping Students in Class Act, 2022*, SO 2022, c 19.

8 *An Act respecting the laicity of the State,* SQ 2019, c 12.

9 *Bill No. 21, An Act Respecting the Laicity of the State*, June 16, 2019. See also *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 25; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 148. It remains unsettled whether section 33 applies to section 28 of the Charter (equality of men and women: *Hak c Procureure générale du Québec*, 2019 QCCA 2145 at 39–52, 93–4.

## II.

The honour of the Crown is a concept expressly applied by Canadian courts to the state's relationship with its Indigenous peoples: through Aboriginal law dealing with first nations, Métis, and Inuit communities. It has been principally applied in the context of land claims and, more recently, in the context of the imperative to effect reconciliation. This application gives rise to a doctrinal view of the honour of the Crown as a matter purely for first-nations law. It has been said that 'the doctrine's rationale is somewhat obscure'.[10] However, before the concept came to be applied in this settler context,[11] it created rules of more general application. Historical uses of the doctrine in contexts not relating to Indigenous law are illustrative of the doctrine's potential for a broader application in Canada. Notably, the doctrine has been extended to executive power, and its applicability to the legislative branch is a novel extension of the concept that we contend should be explored. The doctrine's importance is a form of constitutional equity, one that authorizes judges, who are officers of the Crown, to defend the Sovereign's honour from potential abuses. These abuses may include ministers recommending royal asset to legislation that renders constitutional protections meaningless.

The feudal Sovereign was immanent as a person possessed of legal powers, rights, and responsibilities. The Sovereign sustained personal bonds with subjects; its honour was a language used to define the relationship. In the centuries that followed the English Civil Wars (1640-49) and the Glorious Revolution (1688), this language lost ground to the idea of an impersonal, monolithic nation-state.[12] The state that represents Canada or the United Kingdom is, however, not monolithic.[13] The

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10 Patrick McCabe, "An Australian Indigenous common law right to participate in decision-making" (2020) 20:1 Oxford University Commonwealth Law Journal 52–85 at 66.

11 *viz.* Peter W Hogg & Laura Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 Supreme Court Law Review 291–318; Brian Slattery, "The Aboriginal Constitution" (2014) 67 Supreme Court Law Review 319–336; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 op 77 [*Manitoba Métis*]; *Province of Ontario v The Dominion of Canada and Province of Quebec In re Indian Claims*, [1895] 25 SCR 434; *Wewaykum Indian Band v Canada*, 2002 SCC 79.

12 Though this personal form of government endures: Cris Shore, "The Crown as Proxy for the State? Opening up the Black Box of Constitutional Monarchy" (2018) 107:4 The Round Table 401–416 at 412.

13 F W Maitland, "Crown as Corporation" (1901) 17:2 L Q Rev 131–146 at 132, 136; Martin Loughlin, "The State, the Crown and the Law" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999) 33 at 39–40 DOI: 10.1093/acprof:oso/9780198262732.003.0003.

Crown's honour is an expression of the personal stakes implicit in sustaining a democracy, and it is one that accords with Sir William Wade's appreciation of the Crown's historic immunity:

> I prefer to uphold the rules legitimated by history, unsatisfying as they may be to political theorists. The immunity of the Crown and the non-immunity of its servants represents a compromise, which is well suited to a state, which is both a monarchy and a democracy.[14]

Wade, unfortunately, did not completely follow through on this view (nor did he lump administrative lawyers in with political theorists),[15] for he ignored the Crown's honour entirely in a discussion of Crown immunity.[16] Such ignorance, though understandable, fails to detail the full meaning of the compromise in which the Crown governs solely on the advice of responsible ministers.

The present effort argues that the honour of the Crown is a legal tool that allows courts to hold the Crown's servants to their words.[17] Seventeenth-century English sources show the Crown's honour at work shaping what becomes the settlement between the Crown and its subjects during the Glorious Revolution. That tendency continues through the eighteenth and nineteenth centuries, with the caveat that royal power now more readily inheres in parliamentary institutions. This caveat proves especially important, for the Crown's increasing abstraction renders its honour less visible, yet more valuable. The honour of the Crown is invoked to prevent abuses of the royal prerogative and delegated executive

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14 William Wade, "The Crown, Ministers and Officials: Legal Status and Liability" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown* (Oxford University Press, 1999) 22 at 32 DOI: 10.1093/acprof:oso/9780198262732.003.0002; see also: Alexander Bolt & Philippe Lagassé, "Beyond Dicey: Executive Authorities in Canada" (2021) 3:1 Journal of Commonwealth Law, n. 107, where the authors say that "the Crown prerogative is not an arbitrary power, but must be sourced in historical precedent."

15 Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (London: Routledge, 2020) at 143–4.

16 Wade, *supra* note 14 at 24–5.

17 This principle is at work in *Baker v Waitangi Tribunal*, [2014] 3 NZLR 390, where the Court states that "although the relationship has on occasion been tested, it has consistently produced legislation giving effect to Treaty settlements. In this process, the honour of the Crown is at stake, and it is in order for Judges to take careful account of what an honourable Crown represents it will be able to do for others in the future. If that were not so, there could be no confidence in the Treaty settlement process at all" (para. 53). R v Badger, [1996] 1 SCR 771, 1996 CanLII 236: "Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises."

authority.[18] Canadian sources illustrate the reception of the honour of the Crown in Canadian political culture.

The ultimate view of this exploration, which many view as chivalric decadence, is to point up a standard of political conduct for which legal terms also exist. Those terms may influence courts' approach to establish a common-law constitution, for that constitution omits an important part of English legal history: the Crown's justices can dispense with general common law rules by ruling in equity.[19] Canadian lawyers are acquainted with these terms through Aboriginal law, where the honour of the Crown may give rise to fiduciary obligations.[20] They are, however, reticent to recognize a wider honour for our Crown that builds a check into the efficient branch of government – even if the Canadian Supreme Court opined that "a persistent pattern of inattention may [fail to implement an obligation in a manner demanded by the honour of the Crown] if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained".[21] Understanding this check on executive authority presents a means to check the Crown's authority, where that authority is narrowly construed as referring solely to the executive branch.[22] The Crown's honour may well enhance Canadian democracy by forcing the executive branch to more carefully consider the promises that it makes in the Sovereign's name.

## III.

Before casting back to the honour of yore, a modern instance in which the Crown's honour could have been invoked illustrates part of the concept's enduring importance. The United Kingdom Supreme Court's decision in *Miller v Prime Minister* (*Miller II*) results from an instance in which the honour of the Crown might have been invoked. Those facts have

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18 e.g. Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dalhousie Law Journal 443–478 at 475.

19 Mark D Walters, "The Common Law Constitution in Canada: Return of lex non scripta as Fundamental Law" (2001) 51:2 The University of Toronto Law Journal 91–141 at 92–3; Thomas Poole, "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23:3 Oxford Journal of Legal Studies 435–454 at 439.

20 *Manitoba Métis*, *supra* note 11 at paras 73–74.

21 *Ibid* at para 107.

22 McLean summarizes this argument in relation to New Zealand's relationship with the Māori: "The Many Faces of the Crown and the Implications for the Future of the New Zealand Constitution" (2018) 107:4 The Round Table 475–481 at 478.

on occasion almost obtained in Canada: applying the honour of the Crown to the facts presented in *Miller II* may thus speak more generally to Westminster systems over which the Crown continues to lord.

The case came on because the United Kingdom's prime minister advised the Queen to prorogue Parliament at a critical moment in a parliamentary debate on Brexit, which created a conflict between the executive and legislative branches. The Court set aside the Crown's prorogation of Parliament–a first in Westminster systems[23]–by answering a narrow question: was the effect of the advice resulting in a prorogation to frustrate or prevent, 'without reasonable justification, the ability of Parliament to carry out its constitutional functions'?[24] The Court found that the prime minister's advice created a situation in which Parliament's constitutional functions were curtailed. In so doing, however, the Court gave the Crown neither agency nor personality.[25] The technicalities of prime ministerial advice to his Sovereign require judicial recognition of the Crown's personal relationship with its subjects.[26] The ministry employs the Crown's 'motive power', to borrow from Walter Bagehot, who continues to say that the "Crown is, according to the saying, the 'fountain of honour;' but the Treasury is the spring of business."[27] The broader issue in *Miller II* seems to be calibrating that spring to still account for the Crown's honour.

The Supreme Court's decision affirms that ministers' advice is justiciable in matters of state; the Court's reasoning does not deduce or infer a rule that might afford Commonwealth subjects certainty about Parliament's constitutional position.[28] Critics of this decision have not searched for such a rule. They instead bemoan the Court's impinging on the political sphere without robust legal justification.[29] Conversely, another

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23 *Miller*, *supra* note 3.

24 *Ibid* at para 50.

25 Parties did not plead on this point; the Court did not adjudicate on it *ibid* at para 30.

26 *Contra* Cox, *supra* note 15 at 161–2.

27 Walter Bagehot, *The English Constitution*, Miles Taylor, ed (Oxford: Oxford University Press, 2001) at 7, 11–12.

28 *Miller*, *supra* note 3, para. 52, shows that courts can adjudicate the prerogative; para. 30 imposes a duty on the prime minister to account for all interests when giving advice.

29 John Finnis, "The unconstitutionality of the Supreme Court's prorogation judgment", (28 September 2019), online: *Policy Exchange* <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>; expanded upon in: *The Unconstitutionality of the Supreme Court's Prorogation Judgment, with Supplementary Notes*, Notre Dame Legal Studies Paper, by John Finnis, papers.ssrn.com, Notre Dame Legal Studies Paper No. 200304 (Oxford: Notre Dame, 2020); Martin Loughlin, "The Case of Prorogation", (15 October 2019), online: *Policy Exchange* <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf>; Sebastian Payne, "The

scholar argues that the United Kingdom's courts can enforce constitutional principles.[30] These positions evoke a debate that turns on the question raised (though unsatisfactorily answered)[31] by Leonid Sirota: can a court infer a legal rule from a convention if the convention resonates with constitutional text?[32] In the English case, of course, the Supreme Court relies on legal decisions to ground its view of constitutional principles.

Another approach to reviewing the decision to prorogue could instead ask: was the effect of the prime minister's advice to the Queen resulting in a prorogation to denigrate the Sovereign's honour? This question shifts focus from a formal analysis of the quality of a minister's advice and its legal standing in the Westminster system to a contextual discussion of the permissible standards of political behaviour in the Crown's name. The analysis focuses on the Crown's procedural role: ensuring that the machinery of government operates correctly.[33] Such an approach vests the Crown's agency in Her courts. The courts are empowered to explain the limits to which the efficient branch may go when relying on the dignified branch's image. That reliance depends on the quality of information that the Crown can (theoretically) cognize. In *Miller II*, the sufficiency of the advice tendered to the prime minister, who in turn counselled the Queen, makes the problem plain. The Queen only acts on cabinet's advice. "Advice" in this setting denotes the information that She receives from Her minister, which is the only information that She can officially cognize. If that information is tainted, the Queen's honour is diminished. She has acted on advise that does not serve Her interest as a benevolent head of state. Her obligation in *Miller II*, where the legislature was at odds with cabinet, was to receive information from the larger, more representative council.[34] Some similar dictum was laid down by Prince Albert, Queen Victoria's consort:

> The most patriotic Minister has to think of his party. His judgment therefore is often insensibly warped by party considerations. Not so the Constitutional

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Supreme Court and the Miller Case: More Reasons Why the UK Needs a Written Constitution" (2018) 107:4 The Round Table 441–450 at 448.

30 Paul P Craig, "The Supreme Court, Prorogation and Constitutional Principle" (2020) Public Law 248–277.

31 See "Immuring Dicey's Ghost: The Senate Reform Reference and Constitutional Conventions" (2020) 51:2 Ottawa Law Review 313–360 at 359, for his novel claim regarding an originalist interpretation of constitutional law.

32 *Ibid* at 318–319.

33 Anne Twomey, "From Bagehot to Brexit: The Monarch's Rights to be Consulted, to Encourage and to Warn" (2018) 107:4 The Round Table 417–428 at 420.

34 Such a course was recommended, albeit with some caution, in *Malloch v Her Majesty's Ordnance*, [1847] OJ No. 106 at para 7; see also Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) c 1.9.7(d.2).

> Sovereign, who is exposed to no such disturbing agency. As the permanent head of the nation, he has only to consider what is best for its welfare and its honour; and his accumulated knowledge and experience, and his calm and practised judgment, are always available in Council to the Ministry for the time without distinction of party.[35]

Two sides of the same coin: the British prime minister advises the Crown with the interests of Parliament in mind; the Crown governs by quietly restraining political actors from their worst tendencies, thus preserving its dignified interest.

Albert's view evokes the immanence of the Crown as a body distinct from its ministers and servants. Ministers that advise the Crown, as well as public servants, are obliged to defend the Crown's reputation. The House of Lords, for example, mentions the phrase in *R v Wilkes*, where the North ministry (1770-82) prosecuted John Wilkes for allegedly publishing a libel against the Crown.[36] In this case, the Sovereign's honour was noted as an occasion for extra-judicial commentary best left to proceedings in Parliament.

In Canada, reserve power is subject to parliamentary scrutiny after the House of Commons added rule 32(7) to its standing orders, which requires a minister to submit the reasons for a prorogation. Those reasons are referred to the Procedure and House Affairs Committee, which recently recommended creating 'procedural "disincentives"' to limit the Crown's use of prorogation.[37] These innovations would, perhaps, give the Canadian Commons the ability to review executive decisions to the exclusion of the courts.[38] Creating such a review jurisdiction cuts the application of *Miller II* off at the pass, but it arguably provides a clearer constitutional framework than the English courts' intervention in *Miller II*.[39]

Current scholarship relating to prorogation and dissolution does not take this historical view.[40] Prorogation in the face of obvious differences

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35 Theodore Martin, *Life of the Prince Consort* (London: Smith, Elder & Co., 1876) at 159–60.

36 *R v Wilkes*, [1769] 2 ER 244 at 248, 19 State Tr 1075.

37 *Report of the Government's Report to Parliament: August 2020 Prorogation–COVID-19 Pandemic*, Parliamentary committee, by Standing Committee on Procedure and House Affairs, Parliamentary committee 43-2–18 (Ottawa, ON: House of Commons, 2021) at 37–8.

38 This consideration seems alive to the Committee's mind: *Ibid* at 33.

39 On this point, we agree with Noel Cox, albeit for different reasons: *supra* note 15 at 158–62.

40 Robert Craig, "Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?", (22 January 2019), online: *UK Constitutional Law Association* <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>, alludes to this point;

between executive and legislative councils may, however, breach the Crown's honour. Its gift, expressed in writs of elections and summons, grants members of Parliament and Senators, the individual and collective right to advise the Crown-in-Parliament.[41] This suggestion—for it can only be a suggestion until the Crown's honour is better understood—balances calls for greater judicial examination of prorogation and dissolution against the conservative view that only constitutional convention can limit prorogation and dissolution.[42] The Crown's honour may be the guiding light in this regard because it fosters a contextual analysis of matters of state, one freed from adversarial politics with and between the so-called branches of government.[43]

## IV.

Canadian courts have not yet acknowledged a right to review executive power over Parliament, yet such power appears inherent when the legal standard regarding the Crown's honourable behaviour is adduced.[44] The seventeenth century contains a wealth of precedents in this regard because jurists and parliamentarians throughout the period sharply curtailed the Crown's prerogatives leading up to the Glorious Revolution (1688). Sir Edward Coke is one such light, and John Selden's interest in honour may be another example. We also see many heraldic print publications appearing between 1580 and 1620, which provides a historical standard for honour. Later nineteenth-century British and Canadian cases apply this wisdom to review ministers' advise to the Crown on political matters.

Edward Coke defines the Crown's honour alongside other examples of regal restraint. As a parliamentarian, he drafted the Petition of Right, a precursor to the Bill of Rights (1689), which claimed that, where the exercise of the prerogative occurs, it must be subject to Parliament and it must have regard to common law.[45] Coke's famous dictum in the *Case of*

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followed by Jeff King, "Can Royal Assent to a Bill Be Withheld If So Advised by Ministers?", (5 April 2019), online: *UK Constitutional Law Association* <https://ukconstitutionallaw.org/2019/04/05/jeff-king-can-royal-assent-to-a-bill-be-withheld-if-so-advised-by-ministers/>.

41 Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge: Cambridge University Press, 2018) at 361–5, 586–91, 626–7.

42 e.g. Warren J Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2009) 27 National Journal of Constitutional Law 217.

43 *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at 471; Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 124.

44 e.g. *Engel v Alberta (Executive Council)*, 2019 ABQB 490 at para 79.

45 *The Petition of Right*, 3 Car I, c 1, s 8.

*Proclamations* subjected the royal prerogative to other branches of law: 'the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm'.[46] He develops a parallel rationale for binding the Crown, as the fountain of honour, to its promises. His reports include several cases that define the honour of the Crown at law by prescribing rules for judicial interpretation of gifts from the Crown. It is these gifts–property that the Crown allows into subjects' hands–that forms the basis of parliamentary representation.[47]

Parliament was the vehicle through which these gifts were confirmed. Coke draws his idea of honour from statute 4 Hen. VI c 4. Henry IV (r. 1399-1413), declared in Parliament that land in the gift of the Crown would only be granted to those who deserved it.[48] Coke first elaborates on this statute in *Sir John Molyn's Case*, where he argued as Attorney General that a subject's tenure in gift from the Crown was contested: 'Note the gravity of the ancient sages of the law, to construe the King's grant beneficially for his honour, and the relief of the subject, and not to make any strict or literal construction in subversion of such grants.'[49] Coke expresses a principle of public law that resonates today in democratic terms. The Crown is limited by the reasonable expectations that it engenders. Courts may derogate from a written instrument issued by the Crown in the measure that the Crown's subsequent representations contradict the instrument.

Coke goes further two years later when an intrusion upon a wood turned on the interpretation of the King's grant. He argued the grant void because the King did not know the law, and thus could not make an effective grant *ex certa scientia et mero motu* (out of certain knowledge and mere motion).[50] The Court agreed: the Crown's knowledge was imperfect, which vitiated the grant.[51] The phrase *mero motu* implicates the Crown's honour because there is no obligation upon the Crown. The grant is a gift in accordance with Henry IV's declaration in Parliament. A gift made thus benefits the King, but it must also confer a tangible benefit on the subject

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46 *Case of Proclamations*, [1610] 12 Co Rep 74 at 75.

47 e.g. *Perry, ex parte*, [1782] V Brown 509; for some sense of the Renaissance interest in property and the franchise, see Melanie Hansen, "Identity and Ownership: narrative of land in the English Renaissance" in Suzanne Trill & William Zunder, eds, *Writing and the English Renaissance* (London: Routledge, 1996) 87 at 94–5.

48 The text reads: '*son entent est de soy abstenir de faire aucuns tielx douns ou g'ntes, sinon a ceux psonnes qe le deservont & come mieultz y semblera au Roy & son conseil*' (*Statutes of the Realm* anno. 1402).

49 *Sir John Molyn's Case*, [1598] 6 Co Rep 5b at 6a, 77 Eng Rep 261.

50 *The Case of Alton Woods*, [1600] 1 Co Rep 40a at 43b, 76 Eng Rep 89: "with certain knowledge and mere motion".

51 *Ibid* at 53a.

(*ex certa scientia* – of a certain knowledge). Coke entrenched this view from the Bench in the *Earl of Rutland's Case*[52] and again in *The Churchwards of St. Saviour in Southwark*.[53]

None of Coke's pronouncements, however, defined 'honour' with criteria that could make it justiciable. John Selden, Coke's fellow jurist, wrote in a heraldic vein that first situated honour as a defining quality of sovereign authority:

> Deserved Honour added to the eminence of some fit mans Vertue, made him by publique consent, or some by his own ambition violently got to be what every of them were in proportion to their owne Families; that is, over the common state, and as for the common good, King.[54]

Selden's definition is a feudal or chivalric expression of Hobbes' compact theory of government.[55] Honour is an explicit and public manifestation of virtues that are recognized by the community or by its representatives. Selden gives no ready example of these virtues. He instead commends antiquity philosophers to his humanist readers' attention.[56]

We need not look too far back: Queen Elizabeth's reign saw a resurgence of heraldic interest, some of which defines chivalric virtue in relation to classic literature.[57] Selden's reference to this older literature appears to vamp on books like John Bossewell's *Workes of Armorie*, which enumerates four virtues through which honour may be attained: prudence, justice, fortitude, and temperance.[58] Prudence requires the search for truth.[59] Justice consists of actions taken with the intent of aiding the community, and cannot knowingly cause another harm.[60] Courage demands constant respect for society's moral principles.[61] Moderation

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52 *Roger Earl of Rutland's Case*, [1608] 8 Co Rep 55a at 56a, 77 E.R. 555.

53 *The Case of The Churchwardens of St Saviour in Southwark*, [1613] 10 Co Rep 66b at 67b, 77 E.R. 1025.

54 John Selden, *Titles of honor*, EEBO STC (2nd ed.) / 22177 (London: John Helme, 1614), sig. B v.

55 Thomas Hobbes, *Leviathan: The English and Latin Texts (i)*, Noel Malcolm, ed (Oxford: Clarendon Press, 2012) at 256–8, 260, 278, 306.

56 Selden, *supra* note 54, sig. A r-v.

57 Steven Thiry, "'In Open Shew to the World': Mary Stuart's Armorial Claim to the English Throne and Anglo-French Relations (1559–1561)" (2017) 132:559 Engl Hist Rev 1405–1439; J F R Day, "Primers of Honor: Heraldry, Heraldry Books, and English Renaissance Literature" (1990) 21 The Sixteenth Century Journal 93–103.

58 John Bossewell, *Workes of armorie deuyded into three bookes, entituled, the concordes of armorie, the armorie of honor, and of coates and creastes*, EEBO STC / 282:09 (London: Richardi Totelli, 1572), sig. A.iiii r.

59 *Ibid*, sig. A.v r.

60 *Ibid*, sig. A.vi r.

61 *Ibid*, sig. A.vii r.

privileges reason in all decisions.[62] Each of these virtues informs the other to arrive at a perfect honour.

This version of honour relates back to the Crown's gift *ex certa scientia et mero motu*. The phrase captures all four chivalric criteria. Prudence and justice speak to the quality of the Crown's knowledge when making its grant. The Crown must be well informed of the factual circumstances giving rise to its generosity; it must be advised of the community's interest. The Crown's simple motion captures the latter two virtues. Gifts are given to promote social order by transmitting property or rights to those deemed worthy. Deeming a person worthy of a gift cognizes their social standing and character (or virtues). The Crown makes a grant through its officers at the end of this cognitive process.

Grants in this wise are promises between ruler and subject enforced with reference to the ruler's character. In the chivalric terms from which honour springs, 'the third vertue of chivalry is, to be just in his behests, that is to say, to hold thy promis given both to foe and frend'.[63] Jumping forward, to a Canadian setting, the Upper Canada Court of Chancery framed the obligation in nineteenth-century language: 'it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people'.[64] The gift promises the Crown's favour and generosity, and the Crown's gifts are thus construed in the Crown's interest.[65] Such promises must imply effective rights, powers, privileges, or obligations because the Crown is chiefly concerned with dispensing 'justice and right.'[66]

The case of *Egerton v Earl Brownlow* (1853) bears this interpretation of the Crown's honour. A will was challenged as against public policy because the legatee's interest was assumed when he took up the title of Duke or Marquis of Bridgewater. The legatee never took up the title, but the will was tainted by the possibility that it encouraged corruption of the Crown's prerogative through bribery of ministers to procure the necessary title. The House of Lords roundly criticized such a proviso, with Lord Brougham saying:

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62 *Ibid*, sig. A.viii r.

63 John Ferne, *The blazon of gentrie*, EEBO STC (2nd ed.) / 10825 (London: John Windet, 1586), sig. H.viii r; Paul Daly, "Royal Treatment — The Special Status of the Crown in Administrative Law" (2017) 22:1 Review of Constitutional Studies 81–102 at 97, provides a modern statement of the Royal need for honour.

64 *Upper Canada (Attorney General) v Harrison*, [1866] OJ No. 288 at para 15.

65 *Rex v Hon William Allan, Hon Peter McGill and SP Jarvis, Esq*, [1831] OJ No. 4 at para 13; *Doe dem Henderson v Westover*, [1852] OJ No. 269 at paras 13, 60.

66 *Malloch v. Her Majesty's Ordnance*, *supra* note 34 at para 7.

> The Crown is the fountain of honour, and the Sovereign must be presumed incapable of giving a wrong direction to its streams, is an undeniable principle of the constitution - an undoubted position of law. But there is another quite as irrefragable, which supersedes it, and precludes its application to the present question. The Sovereign can only act by advisers, and through the instrumentality of those who are neither infallible nor impeccable - answerable, indeed, for all that the irresponsible Sovereign may do, but liable to err through undue influence, and to be swayed by improper motives.[67]

The Crown's minister is fallible and thus responsible for a misstep in the Crown's service.[68] A will that promotes the acquisition of a title for the sake of financial gain undermines the honour conferred with the title. In so doing, Lord Truro suggests that 'acts of state' be accomplished with a 'sense of right and duty'.[69] The use of the prerogative to confer honours and titles was thus bounded by a requirement that all whose influence, public or private, was brought to bear on the conferment come with pure motives.[70]

In an apposite Canadian example, such motives were invoked by prime minister William Lyon Mackenzie King in the wake of the King-Byng affair. In a July 23, 1926, speech, he characterized the Dominion Parliament's role in connection to the British constitution as 'custodians of the honour of the British Crown'.[71] The sociologist condemned Arthur Meighen's assumption of power as ignorance of Parliament's sovereignty: 'the all-important issue of the source from which all power of government is derived, the issue, when Parliament exists, of the supremacy of Parliament itself'.[72] King's reasoning suggests the exercise of the prerogative over dissolution offended the will of Parliament, which body was summoned specifically to advise the Crown on the national interest rather than the execution of the government. By exercising the prerogative to curtail Parliament's advice when the efficient branch of executive power was being criticized, King contended, the Crown betrays its own sovereignty in the *Magna concilium*, thus undermining its own dignity. In a colonial context, when the Crown's dignity was undermined, it seems, the Crown's legitimacy went along with it.[73]

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67 *Egerton v Earl Brownlow*, [1853] 10 ER 359 at 428, 4 H.L.C. 1.

68 *vide. ibid* at 438.

69 *Ibid* at 439.

70 This principle was enshrined in relation to honours in the *Honours (Prevention of Abuses) Act 1925*, 15 & 16 Geo V c 72 (UK).

71 Arthur Berriedale Keith, ed, *Speeches and Documents on the British Dominions 1918-1931* (London: Oxford University Press, 1961) at 157.

72 *Ibid* at 155.

73 *viz*. Bagehot, *supra* note 27 at 7; *cf*. *Miller*, *supra* note 3 at paras 30, 51, 56–8.

On the seventeenth-century logic of royal honour, the Crown's honour provides terms suited to judicial review. The rule, *ex certa scientia et mero motu*, limits such interference to moments when the Crown's original grant is perverted to a point where the grant becomes ineffective, so aligning the Crown's honour with superior courts' review powers. Chivalric norms define the standard to which a court may hold the Crown's servants; in so doing, Coke's logic applies. A grant *ex gratia* is enforceable against the Crown's interest to preserve the subject's rights. A promise of representation made, in Mackenzie King's example, is a promise to hear those representatives, even when hearing them means putting the ministry of the day at risk. This principle extends well beyond parliamentary matters to touch every aspect of conduct undertaken in the Crown's name. It imposes a special duty of care that goes beyond a fiduciary obligation. If the Crown's ministers knowingly undertake a course of action for another that is not required by law, the Crown's honour requires those ministers to keep to their word.

## V.

One Canadian example of the honour of the Crown being engaged in a matter outside dealings with Indigenous populations is the Ryland Affair. This employment dispute between a senior civil servant and the governments of the United Kingdom and the Province of Canada and, after the Confederation, of Canada, Ontario, and Quebec, span the better part of Queen Victoria's reign (1837-1901). The dispute turned on the honour of the Crown because the respective levels of government each argued that the other levels were responsible, yet the employment obligation that sat at the heart of the dispute was created, Lord Sydenham (Charles Poulett Thomson), the Crown's representative in 1841, without consulting the Canadian or home governments.[74] Royal honour thus became emblematic of appeals to London, where the regal presence was better felt and more respected. Successive Canadian governments instead deferred to their newly won responsible governments: the legislature authorized employment and, accordingly, authorized indemnification.[75] The record of

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74 A fact tersely noted up by the Canadian Executive Council: *Canada: copies or extracts of the correspondence and memorials or representations relative to the claim of Mr. Ryland, formerly secretary to the Executive Council of Canada.*, Early Canadiana Online 9_01890 (London: HMSO, 1850) publisher: [London : HMSO, 1850], no. 24, encl. 1.

75 This Canadian position was not of universal application. The New Zealand Court of Appeal would later hold that authority to appoint under a law implied authority to fix remuneration. See: *Attorney-General v Mr Justice Edwards*, [1891] 9 NZLR 321 at

this case shows the Crown's honour implicated in a colonial dispute symbolic of Canada's growing independence.

The injured party in this case, George Herman Ryland, was appointed the Clerk of the Executive Council of Lower Canada by the Earl of Durham.[76] Shortly after appointing Ryland, the Earl published his famous report.[77] The Earl's successor, Lord Sydenham, the first Governor-General of the now-united Province of Canada, induced Ryland to resign from his position as Clerk by offering him the Registrarship of Quebec—a lucrative office at the time of offer.[78] Ryland was promised a minimum income from his new position equal to the pension to which Ryland was entitled had he left public service as the Clerk of the Executive Council (£515).[79]

The promise that he obtained from the Crown's representative was quickly countermanded by the Crown's Canadian servants and its legislature. The new government rearranged the land registry system.[80] At

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344–5, "Irrespective of the reasons upon which the principle that Judges of a Supreme Court should have security of tenure of office, and should have their remuneration also fixed and secured, it is due to the credit and honour of the Crown that, in respect of any office, judicial or otherwise, and to which the Crown is empowered to appoint for life, and the holder of which has public services to perform, there should be adequate remuneration provided, and that such remuneration should be inseparably attached to the office; and, consequently, one is entitled to expect that, where such offices exist under the law, the law has provided for the payment of such remuneration, either by expressly defining such remuneration and providing for it, or by giving to the authority to which is given the power to appoint the power also to define the remuneration, and by providing for that which may be so defined."; and the case found recent application in *North Australian Aboriginal Legal Aid Service Inc v Bradley*, [2002] FCA 297 at para 214, 192 ALR 701.

76 *Supra* note 73, no. 4.

77 Earl of Durham, *Report on the Affairs of British North America* (Montreal: Morning Courier Office, 1839) at 116.

78 *Supra* note 73, nos. 5 - 5a; Sydenham assumed direct control over the government and implemented his policy without the advice of a ministry. See G Poulett Scrope, *Memoir of the life of the Right Honourable Charles Lord Sydenham, G. C. B.*, Early Canadiana Online 36545 (London: J. Murray, 1843) at 245–55.

79 A certified copy of Ryland's swearing-in as Clerk of the Executive Council of the Province of Canada is reproduced in note 73 *supra*

80 See *An Ordinance to prescribe and regulate the Registering of Titles to Lands, Tenements and Hereditaments, Real or Immoveable Estates, and of Charges and Incumbrances on the same: and for the alteration and improvement of the law, in certain particulars, in relation to the Alienation and Hypothecation of Real Estates, and the Rights and Interests acquired therein*, 1841 (4 Vict) Ordinances L C, c 30; *An Act to amend the time allowed by the Ordinance therein mentioned for the Registration of certain charges or incumbrances on Real Estates, and to repeal certain parts thereof*, 1842 (6 Vict) S Prov Can, c 15; *An Act to amend the Ordinance providing for the Registration of Titles to Real Property or Incumbrances thereon in Lower Canada; and further to extend the time allowed by the said Ordinance for the Registration of certain claims*, 1843 (7 Vict) S Prov Can, c 22.

the same time, the legislature reduced the size of Ryland's jurisdiction to the county of Quebec.[81] These acts diminished his revenues such that he was forced to personally fund his office. He began to grieve this state of affairs in 1842. By Sir Charles Metcalfe's administration (1843-5), Ryland was caught between the royal grant made in his favour, the Crown's minister's unwillingness to honour the grant, and the assembly's similar reticence.[82] His claim fell between the royal prerogative and Canadians' view of responsible government.

The honour of the Crown was Ryland's natural recourse.[83] Metcalfe forwarded Ryland's summary of the situation along with his own summary to Lord Stanley, the Secretary of State for the Colonies, on October 25, 1843. Ryland's note rehearses the facts before appealing to the Imperial government for relief out of London's treasury. Ryland based his appeal on colonial intransigence by lamenting:

> the inability of his Excellency [Metcalfe] to afford your memorialist relief, or to oblige his advisers to go before the House with a case founded in justice and reason, which in private life would be considered binding between man and man, and in settlement of which the faith and honour of the British Crown are at stake.[84]

Ryland imputed the Crown's honour *ex certa scientia et mero motu*. Lord Sydenham's promise to Ryland represented the Crown's knowledge and it bestowed upon the Clerk the benefit of a new office with a guaranteed income. London, however, denied Ryland's claim by asserting that the Clerk of the Executive Council held office at pleasure and that Lord Sydenham acted beyond his power during negotiations with Ryland.[85] London's tack conveniently alluded to Sydenham's direct control over government, a politics descried by Robert Baldwin's progressive element in the Canadian legislature.[86] Governor Metcalfe attempted to redress the

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81 *Journals of the Legislative Assembly of the Province of Canada*, Early Canadiana Online 9_00952_5 (Montreal: R. Campbell, 1846) at 201.

82 *Supra* note 73.

83 For a contemporary British view of the Crown's power over Canadians, see James Colthart & Sandra Clark, "British and Canadian Responses to American Expansionism" (1978) 8:2 American Review of Canadian Studies 48–60 at 50.

84 *Supra* note 73.

85 *Ibid* no. 7, no. 8, encl.

86 e.g. Baldwin's remarks in debate regarding the reply to the speech from the Throne on June 18, 1841, in *The Canadian mirror of Parliament*, Early Canadiana Online 9_08121 (Kingston: Chronicle & Gazette Office, 1841); *vide*. Phillip Buckner, "Thomson, Charles Edward Poulett, 1st Baron Sydenham" in *Dictionary of Canadian Biography* (Toronto: University of Toronto / Université de Laval, 2003).

situation by paying some of Ryland's debts and again by appointing him to the more lucrative office of registrar for the county of Montreal.[87]

Ryland nevertheless appealed to the Parliament of the Province of Canada after the Canadian government denied his claim.[88] In 1846, both houses of the legislature voted an address to the Queen that evoked the Crown's honour to emphasize that responsibility for Ryland's claim lay with the British government. John A. MacDonald, on the eve of his accepting office as Receiver General, led the Assembly's committee that drafted the address.[89] The address adopted on May 12 closed by saying: 'And we feel bound to declare our opinion, that the denial of compensation to Mr. Ryland, would be a breach of faith that would greatly weaken public confidence in the acts of Your Majesty's Representatives and Government in this Province.'[90] The Legislative Council endorsed these words on May 13.[91] The language of 'breach of faith' alluded to the Crown's combination of prudence, justice, fortitude, and temperance. The Crown's image, to the pluck from Prince Albert's view of the monarch's role, was a serene representation of these virtues that elicited faith from the governed. More importantly (and something that Ryland intimated to the Imperial government in correspondence),[92] faith in the Crown and its representatives was a cornerstone of Canada's 'Peace and Good Government'.[93] Trust in the home government meant trust in the royal person. A failure in this faith undermined the home government's ability to govern. William Gladstone, who then served a brief stint as colonial secretary, had, by the time of the address, already replied to it by inviting the Canadian legislature to compensate Ryland.[94]

London's response to the Canadian government's deference to its legislature further relied upon the Crown's honour to critique the incumbent ministry. The House of Lords debated Ryland's case in these

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87 *Supra* note 73.

88 *Ibid*, No. 15, encl. 6; *Journals of the Legislative Assembly of the Province of Canada*, Early Canadiana Online 9_00952_4 (Montreal: R. Campbell, 1845) at 375.

89 *Mirror of Parliament of the Province of Canada*, Early Canadiana Online 90148 (Montreal: M. Reynolds, 1846) at 139.

90 *Ibid* at 162.

91 *Journals of the Legislative Council of the Province of Canada*, Early Canadiana Online 9_00967_5 (Montreal: R. Campbell, 1846) at 125.

92 *Supra* note 73.

93 Henry Bliss, *An essay on the re-constitution of Her Majesty's government in Canada*, Early Canadiana Online 21721 (London: E. Wilson, 1839) at 3 (sig. B2r).

94 *Journals of the Legislative Assembly of the Province of Canada from the 2nd day of June to the 28th day of July, 1847*, Early Canadiana Online 9_00952_6 (Montreal: R. Campbell, 1847) at 51.

terms on May 10, 1850, when the Duke of Argyll moved resolutions in favour of Ryland's compensation. The Duke said that:

> He did not know whether the Canadas were so far infected with republican principles that the promises made by the Crown, at a moment when it was taking a course deeply connected with the permanence of the welfare and the power of that great colony, were to be wholly renounced. This repudiation was utterly at variance with the sentiments expressed in a recent speech of Lord John Russell upon responsible governments, in which he asserted the impossibility of confiding implicitly the honour and faith of the Crown to a popular assembly.[95]

The Duke imputed John Russell, then the first minister of a Whig government. The prime minister's words defending the Crown's honour fell flat if his Secretary of State for War and the Colonies, Earl Grey, could not assert the Crown's honour in the face of colonial opposition. Indeed, Earl Grey rose to agree with the Canadian government's approach.[96] Lord Stanley, who had been the conservative Secretary of State for War and the Colonies when Ryland began his claim, rose in reply to emphasize the ideological significance of the Crown's honour:

> His noble Friend [the Duke of Argyll] did not call on them to go to the House of Commons to ask for compensation, but called on them as a body which had the power of controlling the responsible Ministers of the Crown, [...] to declare that in their judgment Mr. Ryland had suffered gross hardship and injustice.[97]

The language of responsible government that Stanley deployed in unison with the Duke of Argyll emphasized Canadians' preoccupation with achieving responsible government—only won in 1848. In so doing, the pair's rhetoric further emphasized the difference between the republic and the monarchy. The personal (and feudal) logic of the monarchy, in which the Crown maintains a personal relationship with its subjects, could only be sustained if its ministers strove to keep the faith in the Crown alive.

That emphasis fell upon a ministry beset by Lord Palmerston's unilateral decision to blockade Greek shipping in the Mediterranean. Members of the opposition took advantage of Palmerston's unilateral action to condemn him and the government. They argued that it violated the Crown's war prerogative, which could only be invoked by the Crown-in-council.[98] The honour of the Crown was invoked in this connection on the floor of the House of Commons by Henry Drummond, the member for Surrey West, on May 23, 1850:

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95 House of Lords, *May 10*, Hansard 110 (Westminster: Hansard, 1850) cols 1291–2.
96 *Ibid* cols 1293–4.
97 *Ibid* col 1297.
98 House of Commons, *April 8*, Hansard 110 (Westminster: Hansard, 1850) cols 14–15.

> Now, suppose two private gentlemen had had a quarrel about one of their servants, and agreed to make peace with each other, would not every feeling of delicacy and honour prevent the name of the servant from being introduced into their conference? It is desirable the House should clearly understand that it is not upon Ministers they are called upon to pronounce judgment in these matters. It is the honour of the Crown which is at stake—it is a question of peace or war.[99]

These arguments found expression in the Duke of Argyll's motion and Lord Stanley's speech in support of Ryland's case: responsible government implied holding Ministers and royal officials to their words, which became only binding because they expressed royal will. This principle would be later repeated in the Lords' decision in *Egerton v Earl Brownlow* HL 1853.

These words proved of little effect at the time, but sentiment in London did finally cause the Imperial government to appoint a commissioner to a very limited jurisdiction in 1855-6. The proposed legate, New Brunswick Chief Justice Sir James Carter,[100] could only decide the amount of Ryland's claim, which he accomplished in October 1856. He awarded Ryland some £7,735, which, with interest, rounded up to £9,000.[101] The British government paid its share in 1856-7.[102] The Canadian government paid its part of the award in 1859 after reluctantly accepting the commissioner's results.[103] Ryland would go on to make further claims, but these took aim at the Canadian government's recalcitrance, which to Ryland's mind created a fresh obligation to pay interest.[104]

Ryland's case was animated by a clash between British Royal dignity and the Canadian impulse toward a responsible government that, at its core, represented the push-and-pull of British control over its colony. The honour of the Crown was evoked throughout this dispute, by colonial and imperial actors, to demonstrate the binding nature of Lord Sydenham's promise. That promise ultimately ran on the Crown's behalf, even though the British government controlled colonial appointments in the Crown's name. Even as early as the 1840s, when Ryland was only embarking on his quest, the Canadian government refused to accede to Imperial demands that the Crown's promise—one made for Canada's benefit—be honoured at least in part from Canadian funds. That refusal speaks to the Crown's

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99 House of Commons, *May 24*, Hansard 111 (Westminster: Hansard, 1850) col 256.

100 *Papers relative to the case of Mr. G.H. Ryland*, Early Canadiana Online 9_01857 (London: HMSO, 1859), no. 3.

101 *Ibid*, appendix.

102 *Ibid*, no. 5.

103 *Journals of the Legislative Assembly of the Province of Canada, from the 29th January to 4th May, 1859*, Early Canadiana Online 9_00952_17 (Toronto: R. Campbell, 1859) at 532.

104 "Report of [Minister] of Justice, on claim for payment" Ottawa (3 February 1877) at 62; "Claim for interest on compensation" Ottawa (1869).

personal nature and growing divisions between English and Canadian political values. The case became emblematic of Canada's growing independence and Britain's acquiescence based in part on the Crown's position as a British institution. Determining which government was responsible for maintaining the Crown's honour in Ryland's case was the deciding factor in the matter, and neither government budged for over a decade.

## VI.

Though disallowance is now considered spent by some, it remains a legal power under which the honour of the Crown found someplace.[105] The federal exercise of disallowance shows the Crown's honour being applied to exhort federal ministers to action and to prescribe a standard of federal review of provincial statutes.[106] This power was quasi-judicial. Its importance in a discussion of the honour of the Crown relates specifically to post-Confederation disallowance, where the federal ministry wielded the Crown's authority to disallow provincial legislation. The first instance of this power derives from governors' instructions. After Confederation, governors' instructions complimented the text of the *British North America Act*. Subjects' pleas to the Canadian ministry adopt the language of these instructions in their requests for disallowance. These pleas were throwaway: they ran on assumptions about the honour of the Crown, which shows how lawyers adapted the concept to litigation on matters of state. The principle *ex certa scientia et mero motu* was being applied to defend grants made by the Crown and by the Crown-in-Parliament.

The Crown's honour is mentioned from the earliest days of imperial disallowance. The first principle on which the Governor's exercise of royal assent relied was stated in 1839: 'The Governor must only oppose the wishes of the Assembly where the honour of the Crown or the interests of the Empire are deeply concerned'.[107] This rule notionally afforded

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105 Eugene Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867" (1938) 4 The Canadian Journal of Economics and Political Science 47–59; *Reference re Power of Disallowance & Power of Reservation (Canada)*, [1938] SCR 71.

106 *Department of Justice Act*, RSC 1985, c J-2, s 4(c).

107 Legislative Assembly of Canada, *Appendix to the first volume of the journals of the Legislative Assembly of the province of Canada : session 1841*, Early Canadiana Online 9_00955_1 (Kingston: G. Desbarats & T. Cary, 1842), app. B.B. Legislative Assembly of Canada, *Journals of the Legislative Assembly of the Province of Canada from the 14th day of June to the 18th day of September, in the year of Our Lord 1841 and in the 4th & 5th years of the reign of ... Queen Victoria : being the first session of the first Provincial Parliament of Canada*, Early

autonomy to colonized subjects while retaining one source of the Crown's legitimacy: its faith. Prudence, justice, fortitude, and temperance could be hallmarks of colonial governance in conquered places far from the metropolis. Though these chivalric virtues were not in evidence through the English occupation of Canada, reference to the Crown's honour in a governor's instructions on the eve of rebellion is indicative of the tensions bubbling under the surface of Canadian politics.

Early Governors' instructions implicitly recognized the need for commentary from local political officials. Governors General, when confronted with legislation that they had to reserve, were to send an explanation to London along with the bill.[108] In this way, the Imperial executive could deliberate on the matter before exercising the Crown's ultimate legislative function. The Queen's power of disallowance bounded the Parliament of Canada's new jurisdiction, but it did so with regard to the Crown's informed discretion.[109]

Canada's first prime minister, John A. Macdonald, was attuned to these powers. He acknowledged the Crown's right to reserve and, potentially, to disallow, legislation in an 1868 memorandum: 'Of late years Her Majesty's Government has not, as a general rule, interfered with the legislation of colonies having representative institutions and responsible government, except in the cases specially mentioned in the instructions to the governors'.[110] Then-governor Lord Monck's instructions enumerated classes of bills that were to be reserved for the Queen's pleasure, one of which was 'any bill, the provisions of which shall appear inconsistent with Obligations imposed upon Us by Treaty'.[111] The central government asserted its sovereignty; treaties were exercises of prerogative that bound the Crown's honour (and the empire) to international actors.[112] Dominion assemblies' interference with these decisions was reviewed by federal and imperial cabinets, and these reviewing ministers became the guardians of royal dignity because the information necessary for all grants out of the prerogative responded to their perspective (*ex certa scientia*).

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Canadiana Online 9_00952_1 (Kingston: Desbarats & Cary, 1842) at 480.

108 *Instructions to Viscount Monck as Governor-General of Canada*, Early Canadiana Online 9_01600 (London: Foreign Office, 1867) , s 8.

109 WE Hodgins, *Correspondence, reports of the ministers of justice and orders in council upon the subject of Dominion and provincial legislation, 1867-1895*, Early Canadiana Online 14543 (Ottawa: Govt. Print Bureau, 1896) at 5–60.

110 *Ibid* at 61.

111 Hodgins, note 109, *supra* s 7(5).

112 e.g. *The Juno (No 1)*, [1799] Prize Causes 198 at 200; *Rex v Phillips*, [1922] 128 Law Times 133 at 114b.

Canadian courts have not much touched on the executive's right of disallowance, whether at the federal or imperial levels,[113] and whether honour might figure into the executive's action in disallowance. The 1938 reference on this point saw the Supreme Court decline any jurisdiction over the power.[114]

The earlier Ontario case of *Goodhue v Tovey* saw Chief Justice Draper (onetime first minister of the Province of Canada) lay down criteria for disallowance that relate to the Crown's honour. The case came on before the Ontario Court of Appeal from the Court of Chancery, where a private act homologizing a will dividing property in favour of the act's sponsors was contested. The Court of Appeal deferred to the legislature's supremacy, but adverted to the disallowance power in relation to the unicameral nature of the legislature:

> such bills are still subject to the consideration of the Governor General who, as the representative of the Sovereign, is entrusted with authority, - to which a corresponding duty attaches, - to disallow any law contrary to reason or to natural justice and equity. So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieutenant Governor announces his assent, after which it is subject to disallowance by the Governor General.[115]

Chief Justice Draper stated a view of the Governor General's duty as something of constitutional equity.[116] The duty incumbent on the Governor General and his cabinet was to review legislation on what modern practitioners would call administrative law grounds. Draper invokes 'equity' as the better term because it evaluates the legislator's reasons for legislation alongside the law's general fairness toward affected subjects.

This precedent shows that the Governor's discretion in the legislative sphere operates with the Privy Council's advice, thus allowing the honour of the Crown to intrude in that council's deliberations.[117] *Goodhue* is cited by counsel making representations for disallowance to the federal Cabinet. The Parliament of Ontario passed an act imposing licencing fees on mining

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113 *Severn v Ontario*, [1878] 2 SCR 70, is an exception to this tendency.

114 *Reference re Power of Disallowance & Power of Reservation (Canada)*, *supra* note 105.

115 *Re Goodhue v Tovey*, [1873] OJ No. 209 at para 51, 19 Gr. 366.

116 Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Jutsice against the Law and the Mordern Constitutional Imagination" (2011) 61:4 The University of Toronto Law Journal 579–616 at 582–3, suggests a similar principle with respect to criminal law and constitutional norms.

117 Putting paid to Hogg's categorical denial of the Governor's power to disallow: *supra* note 33, s 1.9.5 (d). Hogg, note 51 *et seq.*, even qualifies his own categorical view.

rights granted by letters patent before 1891. These rights were to be free from taxation of any kind, a right repeatedly confirmed by legislative enactment. Affected mine owners resisted this legislation by petitioning the federal government for disallowance because the legislation, amongst other things, was 'a gross breach of faith'. Citing the disallowance of British Columbia legislation affecting first nations' territorial rights in 1875,[118] the petitioners' counsel invokes the 'honour and good faith of the Crown' as grounds for disallowance.[119] The act was subsequently disallowed subject to amendments removing impingement on federal jurisdiction.[120]

These examples of the Crown's honour in judicial consideration blend rhetoric and legal considerations. The decision-makers in these examples all acknowledged the limited nature of royal authority based on dignified aspects of the Crown's existence. Those limits themselves required limits, for an impotent Crown emboldened the legislature and, with them, the responsible governments that they supported. When a promise made in the Crown's service creates a precise obligation, the Crown's honour has at times been invoked (even with regard to legislation) to curb its (well, its ministers') enthusiasm for the executive government.

## VII.

Far be it from us to suggest that our current crop of political figures come into executive office with too much zeal. The honour of the Crown similarly ignores these figures' zeal because it is a necessary part of Canadians' British inheritance. Much of this inheritance is rightly viewed with suspicion. The present work aims only to allay concerns about a seemingly fustian politico-legal concept. The honour of the Crown is, as is demonstrated by the cases and law explored above, a technology that, though borne of another time, still captures the essence of legitimate government: faith, or the subject citizen's willingness to sacrifice without the prospect of return.[121] The Crown's servants may not do anything which undermines subjects' faith in their putative master. The image of the state is tarnished: the Crown cannot, or so the story goes, hope to maintain its position if its servants do not govern with prudence, justice, temperance,

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118 Hodgins, *supra* note 109 at 1028.

119 Francis H Gisborne & Arthur A Fraser, eds, *Correspondence, reports of the minister of justice and orders in council upon the subject of provincial legislation, 1896-1920*, Early Canadiana Online FC 02 0203 no. 14544 (Ottawa: F.A. Acland, 1922) at 27, 32.

120 *Ibid* at 44.

121 Melvin L Rogers, "The Fact of Sacrifice and Necessity of Faith: Dewey and the Ethics of Democracy" (2011) 47:3 Transactions of the Charles S Peirce Society 274–300 at 275.

and fortitude in mind. Its ministers carry this burden when they advise the Crown.

The cases where the honour of the Crown has been invoked are cases where subjects redeem a right to fair treatment by the state. This right is incorporated, of course, into administrative law rules; the honour of the Crown is the public equity due to subjects where the Crown's agents extend the Crown's faith—its motive force—to make a grant upon a subject. This grant is interpreted very broadly in the cases: it may include a public-law concept akin to detrimental reliance (George Ryland would, perhaps, advocate for the concept in these terms). In modern vernacular, the honour of the Crown arises when a subject assumes that the state acts in her or his interest yet finds itself at a loss.

The Sovereign cannot, however, derogate from Her council's advice: She ineluctably grants based on Her ministers' information. This view maintains a comity between dignified and efficient parts of executive government. Courts are the appropriate fora for preserving the Crown's honour in matters of state, not because of the division of powers. Courts instead shield the Crown based on their own commissions issued from the prerogative: judges are law officers. They can interpose themselves where they perceive a difference in the Crown's dignified interest – to preserve Her subjects' rights granted out of the prerogative – and the Cabinet's political interest.[122]

Such interposition does not create an unfettered right to review the Crown's decisions in matters of state. Courts instead have the discretion to enforce subjects' pre-existing rights based on freely given Royal promises.

## VIII. CONCLUSION

As noted in the introduction to this paper, in recent years, the provincial governments of Ontario and Quebec have deployed section 33 of the *Canadian Charter of Rights and Freedoms* to curtail labour rights and religious freedoms in ways that have shocked the conscience of the nation and have lead to unrest in the streets, surprising Canadian voters and lawyers alike. The popular sentiment that section 33 is intended only for use in dire circumstances, and sparingly, has no constitutional basis, at least on the letter of the law. Absent some constraint on elected officials' use of section 33, the notwithstanding clause renders the *Charter*'s promises devoid of meaning. Elected officials can instead withdraw constitutional protections with relative ease if they are supported by a legislative majority.

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122 Though the case does not touch on the Crown's honour, *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539, is instructive on this point.

This paper explored the legal foundation for the popular sentiment that there must be something that constrains elected officials' power to override *Charter* rights: this constraint is the doctrine of the honour of the Crown.

In this paper, we have explored the historical development of the common law doctrine of the honour of the Crown through early-modern cases. We suggest that this doctrine has the potential to be deployed as a constraint on lawmakers' power—if (for example) the Crown, by giving Royal assent to legislation, compromises its own grant. We suggest that the honour of the Crown is a doctrine that should be considered as a common law tool that could provide the remedial prospect of striking down or limiting the application of legislation enacted under section 33. Developing ways in which this remedy could be deployed is the next recommended step in research and advocacy that is our purpose in writing this article to suggest.

We argue that the honour of the Crown resonates with the popular sentiment shared by many: elected leaders cannot simply deploy section 33 at will, and that the feudal concept of "honour" owed to and from the Crown animates the Westminster system and Canada's *Charter of Rights and Freedoms* in ways that provide helpful legal arguments to those seeking to constrain political leaders from tyranny and overreach.

Based on the above review of early-modern cases, the Crown is meaningfully involved in lawmaking in Canada. The Crown may make promises, in the form of statutes duly passed by a legislature, and elected leaders make commitments to the Crown upon taking office. Promises made must be kept. The honour of the Crown dictates that the Crown, as the dignified branch of government, is to be preserved from the worst tendencies of its political, or efficient, advisors. The dignified part of government cannot be undermined by its transitory actors. Judges are the last resort to enforce this division of executive power. In so enforcing this division, the Crown's dignity is better preserved because it does not descend into partisan politics, yet it takes in a range of views before exercising its prerogatives. The Crown must be honoured: it is the task of legislators to uphold its dignity and its honour so that it, its parliaments, and its ministries remain, in the long run, as legitimate as possible in Canada and throughout the Commonwealth. Though it has its roots in feudal conceptions of fealty, the doctrine of the honour of the Crown continues to exist in law, and still captures the essence of what is contemporarily understood as legitimate government.