

# manitobaLawJournal

2020 Volume 43(5), Special Issue

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## Criminal Law Edition (Robson Crim)

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We acknowledge the assistance and peer review administration of the editors and collaborators of [www.robsoncrim.com/](http://www.robsoncrim.com/). For a list of our collaborators please visit: <https://www.robsoncrim.com/collaborators>.

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



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

## REFEREE AND PEER REVIEW PROCESS

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

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## INFORMATION FOR CONTRIBUTORS

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

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

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# Continuing the Conversation: Exploring Current Themes in Criminal Justice and the Law

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DAVID IRELAND AND  
RICHARD JOCHELSON

It is our great pleasure to bring you the latest volumes of the Criminal Law Special Edition of the Manitoba Law Journal. Academics, students, and the practicing bench and bar continue to access this publication and contribute to it their knowledge and experience in the criminal law. Publishing a triple volume is a testament to the quality of submissions received. We present 27 articles from 34 authors, highlighting the work of some of Canada's leading criminal law, criminal justice and criminological academics.

The Manitoba Law Journal remains one of the most important legal scholarship platforms in Canada with a rich history of hosting criminal law analyses.<sup>1</sup> With the help of our contributors, the Manitoba Law Journal was recently ranked second out of 31 entries in the Law, Government and Politics category of the Social Sciences and Humanities Research Council (SSHRC). We continue to be committed to open access scholarship and our readership grows with each Criminal Law Special Edition released.

Our content is accessible on [robsoncrim.com](http://robsoncrim.com), [themanitobalawjournal.com](http://themanitobalawjournal.com), [Academia.edu](http://Academia.edu), [CanLII Connects](http://CanLII Connects), [Heinonline](http://Heinonline), [Westlaw-Next](http://Westlaw-Next), and [Lexis Advance Quicklaw](http://Lexis Advance Quicklaw). We have expanded to Amazon ebook platforms as well for those that want to consider print on demand options or who enjoy that format. Since our first edition in 2017, our Special Edition has ranked as high as the top 0.1% on [Academia.edu](http://Academia.edu) and we have had approximately 6,000 downloads and close to 10,000 total views. Since 2016, our own website, [robsoncrim.com](http://robsoncrim.com), has

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

accumulated tens of thousands more engagements with the Special Edition, attracting hits from all over the world. Our readership engages with articles on subjects as diverse as the Tragically Hip and wrongful convictions,<sup>2</sup> bestiality law,<sup>3</sup> and the British Columbia courts sentencing response to fentanyl trafficking.<sup>4</sup>

Since launching in 2016, the Robsoncrim research cluster at the Faculty of Law, University of Manitoba, has continued to develop a unique interdisciplinary platform for the advancement of research and teaching in the criminal law. Robsoncrim.com has now hosted over 500 Blawgs,<sup>5</sup> with contributions from across the country and beyond. Our cluster has over 30,000 tweet impressions a month and our website has delivered approximately 12,000 reads in the past 12 months. We are as delighted as we are humbled to continue delivering quality academic content that embraces and unites academic discussion around the criminal law. Our team of collaborators extends from coast to coast and is comprised of top academics in their respective criminal justice fields.

The peer review process for the Special Edition in Criminal Law remains rigorously double blind, using up to five reviewers per submission. As has become our tradition, we would like to preview for our readers the contents of this year's special edition. The edition is divided into three volumes. The first volume represents the work of our SSHRC funded conference: *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* which took place in October of 2019 and attracted scholars from all over Canada and beyond. The second and third volumes are organized into a number of thematic sections.

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

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

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

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

## I. VOLUME 43(3)

This volume contains papers presented at the *Criminal Justice Evidentiary Thresholds in Canada: The Last Ten Years* conference, hosted at the Faculty of Law, University of Manitoba. The conference focussed on the evolution of the law of evidence and the sometimes radical transformations it has seen over the last ten years since the seminal decision of *R v Grant* in 2009, which reoriented the test for exclusion of evidence at trial. The conference explored questions of the conception of knowledge in modern criminal legal proceedings and the changes in the nature of knowing and constructing criminal responsibility over the last ten years as the information age continues to develop the law of evidence. Unparalleled connectivity, state surveillance capabilities, Canada's commitment to truth and reconciliation with Indigenous communities, and anxieties pertaining to large scale security calamities (like terror events), have altered the landscape in which crime is investigated, and in which evidence is subsequently discovered, and admitted. The conference discussed and unpacked these issues and developed a tremendous body of scholarship which we are proud to present in this volume.

Kent Roach leads the conference volume with his piece "Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition." This article examines the mechanisms of exclusion of evidence in four western democracies, finding similar origins for each mechanism: the protection of the individual. Professor Roach argues that this original rights protection rationale should be reclaimed in the form of *prima facie* rules of exclusion once used in Canada's fair trial test and in New Zealand and Ireland. Roach contends that the exclusionary rules should be subject to a more transparent and disciplined process where the state can justify proportionate limits on the exclusionary remedy based on the lack of the seriousness of the violation, the existence of adequate but less drastic alternative remedies, and, more controversially, the importance of the evidence to the ability to adjudicate the case on the merits.

Michael Nesbitt and Ian M. Wylie present a fascinating empirical study of expert opinion evidence in Canadian terrorism cases. The authors unpack the prevalence of expert testimony in these cases and offer a number of reasons why expert evidence will continue to play a crucial role in terrorism prosecutions in Canada. Following this, University of Alberta Law

Professor Lisa A. Silver dives into the complex world of social media evidence in “The Unclear Picture of Social Media Evidence.” This article interrogates the uncomfortable relationship between our sometimes-archaic rules of evidence and the growth of social media evidence being presented in Canadian courts. Professor Silver takes a deep look at the construction of evidentiary categories and the preference for social media evidence to be viewed in the courtroom as documentary evidence. She then discusses the application of the relevant provisions of the *Canada Evidence Act* and offers a practical solution by discussing the enhanced admissibility approach used for expert evidence.

Professor David Milward’s article, “Cree Law and the Duty to Assist in the Present Day” is an exploration of Indigenous legal orders through the lens of ‘pastamowin’ or the facet of Cree law dealing with laws against harming others. Milward juxtaposes this Indigenous legal principle with the absence of a general duty to help others in Canadian common law. He then uses this model as a platform to discuss Indigenous communities reviving past laws and developing current legal systems that embrace concepts of true self-governance. This impactful piece asks deep questions relating to reconciliation, the Calls to Action of the *Truth and Reconciliation Commission*, and the future of Indigenous self-governance.

“Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the Canadian Charter of Rights and Freedoms” by Ruby Dhand and Kerri Joffe discusses civil mental health laws and the involuntary detention of persons with disabilities. The authors apply a section 7 and section 15 *Charter* analysis to involuntary detention and involuntary treatment provisions in select Canadian jurisdictions. By unpacking the *Convention on the Rights of Persons with Disabilities* (CRPD), the authors draw upon Article 12 of the CRPD and argue that one way in which Canadian mental health laws violate the *Charter* is by prohibiting involuntarily detained persons from accessing supports for decision-making. The theme of mental health and the law is continued by Dr. Hygiea Casiano and Dr. Sabrina Demetriooff in their article “Forensic Mental Health Assessments: Optimizing Input to the Courts.” Here, the authors argue that feedback from legal personnel in mental health assessments for fitness to stand trial and criminal responsibility can potentially lead to improved provision of care and due process for a marginalized population. They conclude by proposing further study into these issues.

James Gacek and Rosemary Ricciardelli unpack how changing drug management policies in Canadian federal prisons create new ways of thinking about responses (policy or otherwise) to drug use and the essence of intoxication in “Constructing, Assessing, and Managing the Risk Posed by Intoxicants within Federal Prisons.” The authors shed light on the complexities underpinning interpretations of intoxicants that are present yet ‘managed’ in prison spaces.

In “Mr. Big and the New Common Law Confessions Rule: Five Years in Review”, Adelina Iftene and Vanessa L. Kinnear take a look at the judicial progeny of the seminal case of *R v Hart*. The authors review the last five years of judicial application of the new *Hart* framework and argue that the flexibility and discretion built into the *Hart* framework have resulted in an inconsistent application of the two-prong test. As the controversial police practice of Mr. Big stings continues in Canada, this article projects further light onto the propriety of this technique.

Alicia Dueck-Read deals with judicial constructions of responsibility in the area of non-consensual distribution of intimate images (NCDII). This article provides a discourse analysis of judicial decision-making on *Criminal Code* section 162.1 cases. Dueck-Read unpacks whether judges adjudicating cases under section 162.1 draw upon privacy frameworks and/or the rape myths common to sexual assault trials. Continuing this theme of harm in the digital age, Lauren Menzies and Taryn Hepburn explore the underlying logics and implementation of section 172.1 of the *Criminal Code* (“Luring a Child”) and critique the current practice of governing child luring through proactive investigations by police. The authors argue proactive child luring investigations have been used to police marginalized sexualities and sex work communities and have inflicted substantial harms upon those who are wrongly caught up in investigations. They then question the legitimacy of proactive investigations as a redress to child sexual exploitation online by examining child luring cases.

This conference volume concludes with an in-depth exploration of victim impact statements in the context of Canadian corporate sentencings. The recent SNC-Lavalin scandal and its political fallout have drawn public attention to an existing culture of impunity enjoyed by corporate criminal wrongdoers, despite the 2004 changes to the *Criminal Code of Canada* that were intended to make corporate prosecutions easier. Erin Sheley convincingly argues that the conceptual problems with corporate criminal liability may lie in the criminal justice system’s general misapprehension of

the nature of corporate crime; especially of the distinct nature of the harm experienced by white collar victims. She also considers the challenges to a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement in Canada and offers a comparative analysis of how corporate criminal sentencings occur in Canada and the United States.

## II. VOLUME 43(4)

Volume 43(4) is divided into three sections. The first section is entitled *International Contributions* and highlights the work of two leading international scholars. The second thematic section is entitled *Current Issues in Criminal Law* and delves into issues as diverse as the use of victim impact statements and the Mr. Big investigatory process. The third and final section is a stand-alone *Year in Review* in which we present a paper summarizing the most recent Supreme Court of Canada and Manitoba Court of Appeal cases.

Leading off the *International Contributions* section is Hadar Aviram's work: "Making Sense of the Experiences of Bar Applicants with Criminal Records." This article offers insight into the bar admission process in the United States, seen through the lens of real-life experiences of the Bar takers themselves. The article provides a legal analysis of the California Bar's determination of moral character, relying on the Bar rules. The author then moves into an empirical examination of the Bar's policy through the eyes of ten California Bar applicants with criminal records, two ethics lawyers, and a Bar official. Aviram then makes recommendations for law schools and the Bar.

Following this piece is "Corporate Criminal Liability 2.0: Expansion Beyond Human Responsibility" by Eli Lederman who asks the question: is corporate criminal liability expanding beyond that of human responsibility? Lederman examines the expansion of criminal liability on non-human legal entities in the U.S. and U.K., reflecting on the possible directions in which corporate liability may be heading.

Elizabeth Janzen leads off our *Current Issues in Criminal Law* section with "The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the Victim Bill of Rights." This paper examines the Canadian regime governing the participation of victims in sentencing through the use of victim impact statements, with a focus on

the regime following the 2015 amendments implemented through the *Victims Bill of Rights Act*. The author argues that an approach to victim impact statements that focuses on their expressive and communicative uses best aligns with both Canadian sentencing principles and respect for victims.

Darcy L. MacPherson then presents a case comment on 9147-0732 *Quebec Inc c Directeur Des Poursuites Criminelles et Penales* in which he argues the assumption that *Criminal Code* standards will and should apply to provincial offences is highly questionable. MacPherson, a notable expert in this area of the law, presents a cogent analysis of the complex jurisdictional issues brought forward by this case.

No current issues section would be complete without a look at “Criminal Law During (and After) COVID-19.” Terry Skolnik delves into this most timely of issues by exploring the current and potential impacts of the pandemic on three specific areas of the criminal law: scope of crimes, bail, and punishment. Skolnik’s analysis shows us why judges, policy makers, and justice system actors should seize on this unique opportunity in history to generate lasting positive changes to the criminal justice system. Following this timely piece comes an equally important analysis of the *Charter* and the defamatory libel provisions of the *Criminal Code*. In “If You Do Not Have Anything Nice to Say: Charter Issues with the Offence of Defamatory Libel (Section 301)”, Dylan J. Williams outlines the existing debate and the *Charter* issues raised by section 301 by tracing relevant lower court decisions, each of which has ultimately struck this offence down. Williams argues that section 301 is unconstitutional because it infringes the freedom of expression found in section 2(b) of the *Charter* and is likely to fail at both the minimum impairment and proportionality stages of the *Oakes* test.

The *Current Issues in Criminal Law* section is concluded by Christopher Lutes “Hart Failure: Assessing the Mr. Big Confessions Framework Five Years Later.” This piece compliments Adelina Iftene and Vanessa Kinnear’s work in volume 43(3). While Iftene and Kinnear found that *Hart* had no substantial impact on the amount of confessions admitted in Mr. Big prosecutions post-*Hart*, Lutes reports that the admission rate of Mr. Big confessions have actually increased since the framework was implemented. Lutes argues this increase is indicative of police relying on Mr. Big type techniques because of increased protections for accused persons while in police custody.

Finally, we present our “Robson Crim Year in Review” by LL.M. student Brayden McDonald and J.D. student (now articling student) Kathleen Kerr-Donohue. This paper summarizes the leading criminal law cases from the Supreme Court of Canada and Manitoba Court of Appeal in 2019. The cases are presented with relevant statistics and divided by themes for ease of reference. The authors also add commentary on discernable themes in this recent case law. All in all, this article is an invaluable resource for students, professors, and the practicing bench and bar.

### III. VOLUME 43(5)

Our third volume of 2020 is also divided into three sections: *Corrections, Judicial Release, and Related Issues*; *Critical Approaches in Criminal Justice*; and *Placing Theory into Criminal Law Practice*. The first section contains two articles: Sarah Runyon’s “Correctional Afterthought: Offences Against the Administration of Justice and Canada’s Persistent Savage Anxieties” and Alana Hannaford’s “Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions.” Runyon’s article interrogates the prevalence of administration of justice charges in the context of Indigenous offenders. She argues that continually charging Indigenous offenders with breaching court orders, so called system generated charges, can create and perpetuate a social hierarchy from which the state justifies continued discrimination and oppression of the Indigenous population. Runyon goes on to revisit the seminal cases of *Gladue* and *Ipeelee* in the context of community-based dispositions. The author argues that rather than ameliorating the crisis of over-incarceration, the imposition of a community-based disposition, which relies on an administrative court order as its enforcement mechanism, serves to exacerbate the social problem endured by Indigenous peoples in Canada. Hannaford’s article on abstention clauses builds upon Sarah Runyon’s piece. Hannaford describes the unfair operation of administration of justice charges on non-violent offenders suffering from addictions. The author argues that abstention conditions on bail orders effectively force people suffering from addictions to keep their use private, which increases the risk of overdose and decreases the likelihood that they will seek treatment independently out of fear of harsh legal consequences. In combination,

these articles highlight many of the issues concerning police overcharging and the inequitable operation of system generated charges.

Florence Ashley presents a feminist perspective on the voluntary intoxication defence to lead off our *Critical Approaches in Criminal Justice* section of this volume. Ashley looks to the Ontario Court of Appeal decision in *R v Sullivan*, a decision frequently decried as antifeminist, and presents a feminist view of the defence that is far more nuanced than has been previously suggested. The article concludes that a feminist analysis of the voluntary intoxication defence requires more nuanced policy discussions than those that have thus far prevailed in the public sphere.

Following this, Lauren Sopic has written “The Criminalization of Non-Assimilation and Property Rights in the Canadian Prairies.” The killing of Colten Boushie in Saskatchewan and the eventual acquittal of Gerald Stanley has left an indelible mark on the relationship between Indigenous and non-Indigenous Canadians. Sopic uses this tragic case as a backdrop to a fascinating analysis of how policies in Canadian property law have privileged white settlers’ property rights as a result of the subjugation of Indigenous human rights. Sopic proposes an overhaul of the Canadian property law system, with a focus on negating the abuse of Indigenous men and the abuse of the property law system itself. This important work situates property law in a settler dominant model that speaks of the ongoing and sustained inequities that exist between white settlers and the Indigenous peoples of Canada.

The third article in this section offers a critical perspective on Supreme Court *Charter* cases and the further disenfranchisement and marginalization of racialized communities in Canada. In “The Supreme Court of Canada’s Justification of Charter Breaches and its Effect on Black and Indigenous Communities”, Elsa Kaka employs Critical Race Theory to undertake an analysis of how Supreme Court of Canada decisions pertaining to *Charter* breaches have allowed for an expansion of police powers that exacerbate the maltreatment of racialized communities by our criminal justice system. This timely article speaks to the importance of the Black Lives Matter movement and the *Truth a Reconciliation Commissions’* Calls to Action in achieving real change to ensure that the *Charter* rights of all Canadians are respected.

Katy Stack’s article “Moms in Prison: The Impact of Maternal Incarceration on Women and Children” closes out the *Critical Approaches in Criminal Justice* section of this volume. Stack examines the impact of incarceration on mothers and children through a case study format. The

author compares maternal incarceration in the U.S. and Canada, examining the impacts on both mothers and children when mothers are imprisoned.

The *Placing Theory into Criminal Law Practice* section contains two articles, “The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8” by Michelle Biddulph and “Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada” by Sarah Ferencz. Biddulph delves into the Supreme Court of Canada cases of *Marakah* and *Mills*, both of which deal with section 8 *Charter* protections. The author discusses how *Marakah* has created a ‘privacy paradox’ in that the rights protections are at once extremely broad and also illusory. The result in *Mills* is then cited as an example of this paradox. This in-depth discussion of section 8 jurisprudence is both academically insightful and also of practical use to lawyers. Finally, Sarah Ferencz’s article deals with the incorporation of social, or non-commercial, drug trafficking within the Canadian legal context. The author recognizes the overly broad ambit of Canada’s drug laws that focus on the inherent predatory nature of trafficking, for profit or otherwise. By unpacking the concept of social supply within this context, Ferencz proposes three avenues for law reform focussing on education and language.

#### IV. LOOKING FORWARD

Our goal remains to provide a leading national and international forum for scholars of criminal law, criminology and criminal justice to engage in dialogue. Too often, these disciplines are siloed and apprehensive to engage in cross-disciplinary exchanges. We believe that high quality publications in these disciplines, and indeed, other cognate disciplines, ought to exist in dialogue. We view this as crucial to enhancing justice knowledge: theory and practice, policy and planning, and even, in resistance to injustice. We strive to break down the barriers that keep these works in disciplinary pigeon holes. This is, of course, an ambitious path to continue upon, but the three volumes we have released this year represent further incremental steps toward our goals.

The work of the Robson Crim research cluster at the University of Manitoba continues to advance criminal law and justice scholarship in Canada. In doing so, and we are fortunate to work with a tremendously talented group of scholars, students, and jurists from across the country. It

is this continued collaboration and free exchange of ideas that drives the publication of this Special Edition in Criminal Law and the rest of our work at Robson Crim. We thank our interdisciplinary collaborator team (<https://www.robsoncrim.com/collaborators>), our editorial team, our student editors, and all of the MLJ staff, without whom these volumes would not exist. We hope you enjoy these volumes and we look forward to our next publication in 2021.



**CALL FOR PAPERS: Closes February 1, 2021**  
**Manitoba Law Journal - Robson Crim's Fourth Special Issue**  
**on Criminal Law**



The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We seek submissions related to two major areas: **1) general themes in criminal law; and 2) evidentiary developments in criminal law** (see details below). This is our eighth specialized criminal law volume, though Manitoba Law Journal is one of Canada's oldest law journals. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. We are in press for volumes 43(3), 43(4), and 43(5) of the Manitoba Law Journal and have published papers from leading academics in criminal law, criminology, law and psychology and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

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

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

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

We also invite papers relating to evidentiary issues in Canada's criminal courts including:

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

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

## SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2021. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

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

Submissions are due February 1, 2021 and should be sent to [info@robsoncrim.com](mailto:info@robsoncrim.com). For queries please contact Professors [Richard Jochelson](#) or [David Ireland](#), at this email address.

## THE JOURNAL

### *Aims and Scope*

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# Correctional Afterthought: Offences Against the Administration of Justice and Canada's Persistent Savage Anxieties

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S A R A H R U N Y O N \*

**A**n offender, who we will refer to as N.J., stood in front of the court plagued by all of those features set out in the landmark ruling of *R v Ipeelee*. His Indigenous community was one marked by fragmentation and re-location. As a child in foster care, he suffered physical and sexual abuse, prompting a life on the street. His daily struggle as a homeless teenager prevented him from completing high school. To cope with the anxiety of a street-entrenched lifestyle, he turned to illicit substances and soon found himself in the active throes of a heroin addiction. He started to steal in order to feed that addiction. His sentences resulted in robust probation orders. As an offender diagnosed with fetal alcohol spectrum disorder and a range of neurocognitive ailments, the conditions of his order required the following: that he report to an assigned probation officer at a specific time each week; stop using the opioids he was addicted to; remain inside a residence he didn't have between 10:00 p.m. and 6:00 a.m.; and not attend in the downtown core of his community. Within one week's time, N.J. missed his probation appointment. With no access to resources that would allow him to safely withdraw from his addiction, he continued to use. He was back before the court – this time inside the prisoner's box. The sentence for breaching his conditions of probation was a short period of custody, followed by the imposition of yet another probation order – now of a longer duration. Fast forward three years later and N.J. has amassed a criminal record consisting of three substantive offences of theft and 26 breaches of administrative court orders. Each breach resulted in a longer period of incarceration. N.J. is the epitome of the revolving door of despair created by the irresponsible and unthinking imposition of administrative court orders. N.J.'s case is far from unique.

In 2015, the Canadian Department of Justice (the Department) recognized that offences against the administration of justice are “a substantial and growing proportion of the caseloads of police, prosecution, youth courts, and custodial facilities.”<sup>1</sup> The Department also acknowledged that “there is almost no published Canadian research on the processes generating these remarkable numbers” nor is there any research identifying the prevailing causes of the disproportionately high number of Indigenous peoples incurring these offences.<sup>2</sup> In a recent report authored by the Canadian Civil Liberties Association (the “CCLA Report”), breaches of court orders overwhelmingly account for police reported crime.<sup>3</sup> Despite the ubiquitous nature of these offences, they have long been regarded as a correctional afterthought.

The Department defines offences against the administration of justice, colloquially referred to as breach offences, as rarely involving harm to a victim, not involving “behaviour that is popularly considered “criminal”[,],... and committed only after another offence has already been committed, or alleged.”<sup>4</sup> The Department recognizes that these offences are “particularly at risk of contributing to the ‘revolving door’ syndrome.”<sup>5</sup> The lack of attention given to the study of administrative offences is at odds with the Canadian government’s efforts over the past two decades to reduce the rates of traditional incarceration in the Indigenous population. Counter-intuitively, while the crisis of Indigenous over-incarceration in Canada is a well-documented feature of its criminal justice system, the ways in which

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<sup>1</sup> Canada, Department of Justice, *Police Discretion with Young Offenders* (Ottawa: DOJ, 2015), online <[www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/descript/discretion.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/descript/discretion.html)> [perma.cc/D878-QpKK] [DOJ, *Police Discretion*] [footnotes omitted].

<sup>2</sup> *Ibid.*

<sup>3</sup> Abby Deshman & Nicole Myers, “Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention” (2014) at 1, 7, 65, 83, online (pdf): *Canadian Civil Liberties Association and Education Trust* <[ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf](http://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf)> [perma.cc/6RUS-5E3J].

<sup>4</sup> DOJ, *Police Discretion*, *supra* note 1.

<sup>5</sup> *Ibid.*

administrative offences reflect and perpetuate the criminalization of these marginalized populations remain largely unexplored.

I aim to address this scholarly gap by responding directly to the Department's request for reflection about the prevailing causes of breach-related crime among the Indigenous populations. Experiential evidence suggests that those offenders living in poverty – usually homeless or transient, addicted, and suffering from cognitive impairment – are the same offenders subject to court ordered curfew conditions, drug and alcohol abstinence clauses, geographic restrictions, and demanding reporting requirements. Statistical evidence confirms the aforementioned traits are endemic to Indigenous offenders in Canada.<sup>6</sup> The goal of reducing Indigenous over-incarceration by employing non-custodial measures is thwarted as these segments of the population become further marginalized, both socially and economically, through the criminal prosecution of their administrative offences. I argue that efforts to reduce over-incarceration will fall short if the justice system and its participants continue to ignore the devastating impact that administrative court orders have on the accused.

As a caveat, I do not aim to provide the answer to over-incarceration in Canada, but I hope to encourage focused attention on the correlation between the imposition of an administrative court order and Indigenous recidivism. My objective is to encourage dialogue about how community-based dispositions can be better deployed, by whom, and for what purpose, in the hopes of moving us one step closer to fulfilling promise espoused in the landmark cases of *R v Gladue*<sup>7</sup> and *R v Ipeelee*.<sup>8</sup>

This paper is organized into three parts. In Part I of this article, I review the statistics that document (i) the proliferation of breach-related offences in Canada and (ii) rates of Indigenous recidivism. While focused attention exists on each of these problems in isolation, the published empirical research that specifically explores the correlation between breach-related offences and Indigenous over-incarceration is thin. In Part II, I situate these

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<sup>6</sup> See e.g. Darcie Bennett & DJ Larkin, "Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia" (2019), online (pdf): *Pivot Legal Society* <d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/3297/attachments/original/project-inclusion-digital.pdf> [perma.cc/LDA9-KU78]. See also Canada, Department of Justice, *Administration of Justice Offences Among Aboriginal People: Court Officials' Perspective*, by Mylène Magrinelli Orsi & Sébastien April (Ottawa, DOJ: 2013) [Orsi & April, *Courts Officials' Perspective*]; Deshman & Myers, *supra* note 3.

<sup>7</sup> [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

<sup>8</sup> 2012 SCC 13 [*Ipeelee*].

statistics (and lack thereof) in the context of critical race theory in order to demonstrate the ways in which administrative court orders can serve to create and perpetuate a form of social hierarchy that justifies continued discrimination and oppression. I argue that the social ordering effect of the administrative court order on the Indigenous accused is reminiscent of the colonial policies that perpetuated racism by condemning an entire class as immoral, inferior, and not deserving of society's tolerance and protection. The second half of this section transitions its focus to revisit the foundational cases of *Gladue* and *Ipeelee*. These decisions are often celebrated for their acknowledgment that “overincarceration and systemic discrimination requires not only innovative uses of community sanctions, but a recognition that the traditional purposes of sentencing frequently do not work and can aggravate disadvantages suffered by... [Indigenous] offenders.”<sup>9</sup>

Part III of this article addresses sentencing judges' responses to *Gladue*'s direction, which often manifests in the form of a community-based disposition administered through a court order. I argue that rather than ameliorating the crisis of over-incarceration, the imposition of a community-based disposition, which relies on an administrative court order as its enforcement mechanism, serves to exacerbate the problem. Using practical examples of commonly imposed conditions, I demonstrate that despite the Supreme Court's dogged efforts toward a restorative justice approach, the criminal justice system's treatment of Indigenous offenders has arrived where it began.

## I. THE PROLIFERATION OF BREACH OFFENCES AND RATES OF RECIDIVISM FOR INDIGENOUS PEOPLES

### A. A Note on Terminology

Before going further, it is important to have a general understanding of what is meant by “administrative court order” or “breach offence”, as well as the legal principles that animate their application. This article focuses on three of the most common administrative court orders: probation orders,

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<sup>9</sup> Kent Roach and Jonathan Rudin “*Gladue*: The Judicial and Political Reception of a Promising Decision” (2000) 42:3 Can J Crim 355 at 359; *R v Itturiliq*, 2018 NUCJ 3177 at paras 17-18; Benjamin Berger, “Sentencing and the Salience of Pain and Hope” (2015) 70 SCLR (2d) 337.

conditional sentence orders, and bail orders.<sup>10</sup> While each order differs in its legislative framework, all rely on preventive discourses to establish their validity.

### 1. Probation Orders

Probation orders are a form of sentence that can be imposed only in circumstances described in section 731 of the *Criminal Code*:

731 (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or

(b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

(2) A court may also make a probation order where it discharges an accused under subsection 730(1).<sup>11</sup>

Traditionally, probation has “been viewed as a rehabilitative sentencing tool.”<sup>12</sup> As explained by the Court in *R v Shoker*:

The probationer remains free to live in the community but certain restraints on his freedom are imposed for the purpose of facilitating his rehabilitation and protecting society. An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an offence under s. 733.1 punishable by up to two years' imprisonment.<sup>13</sup>

All probation orders must contain at a minimum three conditions as prescribed under s. 732.1(2): (a) keep the peace and be of good behaviour; (b) appear before the court when required to do so by the court; and (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.<sup>14</sup>

<sup>10</sup> See generally Statistics Canada, *Trends in Offences Against the Administration of Justice*, by Marta Burczycka & Christopher Munch, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/1433-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/1433-eng.htm)> [perma.cc/26WD-F95U] [Burczycka & Munch, *Administration of Justice*]; Dushman & Myers, *supra* note 3; Bennett & Larkin, *supra* note 6.

<sup>11</sup> *Criminal Code*, RSC 1985, c C-46, s 731(1)-(2) [*Criminal Code*].

<sup>12</sup> *R v Proulx*, 2000 SCC 5 at paras 32 [*Proulx*].

<sup>13</sup> 2006 SCC 44 at para 10 [*Shoker*].

<sup>14</sup> *Ibid* at para 11.

Pursuant to subsection 732.1(3) of the *Criminal Code*, additional optional conditions may be imposed.<sup>15</sup> In *Shoker*,<sup>16</sup> the Supreme Court also discussed this power to impose optional conditions:

The residual power under s. 732.1(3)(h) speaks of "other reasonable conditions" imposed "for protecting society and for facilitating the offender's successful reintegration into the community". Such language is instructive, not only in respect of conditions crafted under this residual power, but in respect of the optional conditions listed under s. 732.1(3): before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community.<sup>17</sup>

The "residual power to craft individualized conditions" is characterized by the Court as "very broad."<sup>18</sup> It is common for bail and probation orders to contain abstention clauses, curfew conditions, reporting requirements, residency constraints, geographical restraints, and various no-contact orders which tend to apply to a complainant, victim, witness, or co-accused.<sup>19</sup>

## 2. *Conditional Sentence Orders*

With the advent of section 742.1, Parliament has mandated that certain offenders, who would otherwise complete a custodial term, will serve their sentences in the community.<sup>20</sup> As explained by the Court in *Proulx*, "[s]ection 742.1 makes a conditional sentence available to a subclass of non-dangerous offenders who, prior to the introduction of this new regime, would have been sentenced to a term of incarceration of less than two years for offences with no minimum term of imprisonment."<sup>21</sup>

As described by the Supreme Court in *Proulx* "offenders who meet the criteria of s. 742.1 will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s.

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<sup>15</sup> *Ibid* at para 12; *Criminal Code*, *supra* note 11, s 732.1(3).

<sup>16</sup> *Shoker*, *supra* note 13.

<sup>17</sup> *Ibid* at para 13 [footnotes omitted].

<sup>18</sup> *Ibid* at para 14.

<sup>19</sup> See generally Bennett & Larkin, *supra* note 6.

<sup>20</sup> *Proulx*, *supra* note 12 at para 12.

<sup>21</sup> *Ibid* [emphasis added].

742.3 of the [*Criminal Code*].”<sup>22</sup> If an offender breaches a condition, they are brought back before a judge, pursuant to section 742.6:<sup>23</sup>

If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.<sup>24</sup>

Indeed, if an offender, without a reasonable excuse, breaches a condition set by the judge, there is a presumption that the offender should serve the remainder of their sentence in jail.<sup>25</sup> This constant threat of incarceration “help[s] to ensure that the offender complies with the conditions imposed.”<sup>26</sup>

Conditional sentence orders have been construed as more punitive than a probation order, notwithstanding the similarities between the two sanctions in respect of their rehabilitative purposes.<sup>27</sup> Conditions such as house arrest or strict curfews are intended to be the norm, rather than the exception.<sup>28</sup>

The conditional sentence order was envisioned as being more effective than incarceration at achieving the restorative objectives of rehabilitation, “reparations to the victim and community, and the promotion of a sense of responsibility in the offender.”<sup>29</sup>

### 3. *Bail Orders*

With few exceptions, the *Criminal Code* requires that the accused be released from detention before trial on bail.<sup>30</sup> Although release is generally the default position, the court may deny the release of an accused or impose conditions on the accused when they are released, if the prosecution justifies the detention or the conditions.<sup>31</sup>

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<sup>22</sup> *Ibid* at para 21.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 39.

<sup>26</sup> *Ibid* [footnotes omitted].

<sup>27</sup> *Ibid* at paras 28–29.

<sup>28</sup> *Ibid* at para 36.

<sup>29</sup> *Ibid* at para 18.

<sup>30</sup> *R v Antic*, 2017 SCC 27 at para 21.

<sup>31</sup> *Ibid*.

The CCLA report<sup>32</sup> reveals that if an accused is released on bail, restrictive conditions are often imposed. Common conditions include curfews; reporting to police or bail supervision workers; movement restrictions and geographical boundaries; no-contact orders; drug or alcohol abstinence orders; medical or addictions treatment orders; bans on cell phones, computers or internet use; and house arrest.<sup>33</sup> Violating any condition of a bail order is a criminal offence.

All of these orders have two things in common. First, they ostensibly aim to prevent crime. By confining people to certain areas, certain residences, certain behavior, criminals (alleged or proven) are thought to be prevented from misbehaving. Second, the imposition of these behavioral conditions fails to acknowledge the realities and complexities of the lives of people experiencing poverty, addiction, mental illness, and lack of education and community support.

Studies,<sup>34</sup> private and public research reports<sup>35</sup>, scholarly works<sup>36</sup>, and jurisprudence<sup>37</sup> have concluded that these are precisely the factors faced by

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<sup>32</sup> Dushman & Myers, *supra* note 3.

<sup>33</sup> *Ibid* at 8.

<sup>34</sup> For the most recent example, see Canada, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Research and Statistics Division, 2017), online: <[www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf](http://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf)> [perma.cc/V8C2-P4AQ].

<sup>35</sup> See e.g. Canada, Department of Justice, *Representation of Aboriginal People in the Canadian Criminal Justice System*, by Karen Beattie, Valerie Boudreau & Meneka Raguparan (Ottawa: Research and Statistics Division, 2014), online: <[publications.gc.ca/collection/s/collection\\_2018/jus/-eng.pdf](http://publications.gc.ca/collection/s/collection_2018/jus/-eng.pdf)> [perma.cc/HL5V-EEF8] [Beattie, Boudreau & Raguparan, *Representation of Aboriginal People*]; Canada, Aboriginal Justice Implementation Commission, *Final Report* (Winnipeg, MB: AJIC, 29 June 2001) (Paul L. A. H. Chartrand & Wendy Whitecloud), online: <[www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html)> [perma.cc/WD9H-R55Z]; Statistics Canada, *The Incarceration of Aboriginal People in Adult Correctional Services*, by Samuel Perreault, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2009), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2009003/article/10903-eng.htm)> [perma.cc/RRQ5-GBR3].

<sup>36</sup> See e.g. David Milward, "Locking up those Dangerous Indians for Good: An Examination of Canadian Dangerous Offender Legislation as Applied to Aboriginal Persons" (2014) 51:3 *Alta L Rev* 619 at 658; David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 *Man LJ* 84 at 110; David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47:3 *UBC L Rev* 1057 at 1083; Jane B Sprott & Nicole M Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Can J Corr* 404.

<sup>37</sup> See e.g. *Gladue*, *supra* note 7; *Ipeelee*, *supra* note 8.

the majority of Indigenous offenders.<sup>38</sup> The ethical imperative of finding better ways to administer the laws relating to bail, probation, and conditional sentence orders in an effort to reduce Indigenous over-incarceration attains strong footing when one looks to the proliferation of administrative offending.

## B. Proliferation of Administrative Offending

Only a few civil rights groups and legal scholars have started to document the rise of charge and conviction rates for breaching administrative court orders.<sup>39</sup> The CCLA report persuasively demonstrates that saddling those released on bail with unrealistic conditions increases the chance of breach, re-arrest, and pre-trial detention, especially considering that alleged breaches are themselves reverse onus offences.<sup>40</sup> The statistics relating to the proliferation of breaches offences are staggering.<sup>41</sup>

The number of charges of failing to comply with a bail order increased by 27% between 2006 and 2012.<sup>42</sup> All of Canada's provinces and territories revealed an overall increase in the rate of charges for this offence, ranging from 169 charges per 100,000 residents in British Columbia to 1099 charges per 100,000 in the Yukon.<sup>43</sup> The report also shows that in 2012, property offences and other non-violent *Criminal Code* offences, including administrative offences, accounted for 79% of police-reported crime.<sup>44</sup> Across Canada, "an administration of justice charge was the most serious

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<sup>38</sup> See also Suzanne Bouclin, "Identifying Pathways to and Experiences of Street Involvement Through Case Law" (2015) 38:2 Dal LJ 345 which explores longitudinal research indicating that Indigenous peoples constitute between 20% and 50% of the urban street-involved population; over half of Indigenous peoples on reserve live in sub-standard housing; Indigenous peoples are at greater risk of socio-economic marginalization and housing inadequacies off-reserve; Indigenous peoples have lower levels of formal, accredited education, higher unemployment rates, and lower individual and family incomes.

<sup>39</sup> See generally Deshman & Myers, *supra* note 3; Bennett & Larkin, *supra* note 6; Sprott & Myers, *supra* note 36.

<sup>40</sup> See generally Deshman & Myers, *supra* note 3.

<sup>41</sup> *Ibid.*

<sup>42</sup> Legal Aid Ontario, *A Legal Aid Strategy for Bail* (Report) (Toronto, ON: Legal Aid Ontario, last visited 2 July 2020), online: <[www.legalaid.on.ca/more/corporate/reports/a-legal-aid-strategy-for-bail/#section1](http://www.legalaid.on.ca/more/corporate/reports/a-legal-aid-strategy-for-bail/#section1)> [perma.cc/FZ]7-XHA4].

<sup>43</sup> Deshman & Myers, *supra* note 3 at 64.

<sup>44</sup> *Ibid* at 1.

charge in over 20% of the criminal and federal cases completed; about half of these cases stemmed from violations of bail conditions.”<sup>45</sup>

In 2019, British Columbia’s Pivot Legal Society published “Project Inclusion,” aimed at confronting Anti-Homeless and Anti-User Stigma in British Columbia.<sup>46</sup> The Report also documents the remarkable rise of administrative offending. Pivot’s numbers reveal that between 2001–2012, “charges for failure to comply with a court order (often breaching a bail condition) increased by” roughly 58%.<sup>47</sup> In British Columbia, charges for breach of probation conditions now represent over 40% of all criminal cases.<sup>48</sup> In provinces such as Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, and Saskatchewan more than 25% of remand cases were attributable to an administration of justice offence.<sup>49</sup>

A 2014 report published by the Canadian Department of Justice, found that “police reported 171,897 incidents of offences against the administration of justice, a rate of 484 incidents per 100,000 population, or about one-tenth of all *Criminal Code* violations (excluding traffic) reported by police.”<sup>50</sup> The same report also noted that “charges were laid against 91% of all persons accused of offences against the administration of justice, compared to 49% of those accused of *Criminal Code* incidents that did not include administration of justice offences (or offences reported by police under the *Youth Criminal Justice Act*).”<sup>51</sup>

While this type of offence accounts for one out of ten criminal incidents that are reported by the police, “administration of justice charges are involved in over one-third of completed adult criminal court cases.”<sup>52</sup> In Canada, in 2013/2014, 39% of adult criminal court cases included at least one administrative offence.<sup>53</sup>

Breaching court orders appears to be linked with a probability of reoffending. A study conducted in Saskatchewan revealed that 50% of offenders found guilty of breaching a court order returned to correctional

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<sup>45</sup> *Ibid* at 2 [footnotes omitted].

<sup>46</sup> Bennett & Larkin, *supra* note 6.

<sup>47</sup> *Ibid* at 75 [footnotes omitted].

<sup>48</sup> *Ibid*.

<sup>49</sup> Orsi & April, *Court Officials’ Perspective*, *supra* note 6 at 2.

<sup>50</sup> Burczykca & Munch, *Administration of Justice*, *supra* note 10 at 6.

<sup>51</sup> *Ibid* at 10.

<sup>52</sup> *Ibid* at 12.

<sup>53</sup> *Ibid*.

services in the four years following their release.<sup>54</sup> The provincial breakdown of breach related recidivism is important. The highest provincial rates of administrative offending were reported in Saskatchewan and Manitoba.<sup>55</sup> Some of the lowest rates are reported in Prince Edward Island.<sup>56</sup> Prince Edward Island has the smallest Indigenous population while Saskatchewan and Manitoba have the country's highest.<sup>57</sup>

The 2014 report published by the Canadian Department of Justice also found that:

In 2014, rates of administration of justice offences recorded in the territories were higher than those reported by the provinces. Rates ranged from 2,448 incidents per 100,000 reported by police in the Northwest Territories, to a rate of 1,706 in Nunavut. Since 2004, the Yukon has reported a 73% increase in the rate of this type of crime, while the rate in the Northwest Territories increased by 11%.<sup>58</sup>

In the Yukon, as of 2016, 23.3% of people identified as "Aboriginal."<sup>59</sup> In the Northwest Territories, that number rises to 50.7%.<sup>60</sup> In Nunavut, that number soars to 85.7%.<sup>61</sup> In Manitoba, Yukon, and Saskatchewan, completed adult criminal court cases involving at least one administration of justice charge represented about half of the cases in those provinces in 2013/14.<sup>62</sup> "Conversely, adult criminal courts in Quebec and Prince

<sup>54</sup> Orsi & April, *Court Officials' Perspective*, *supra* note 6 at 2.

<sup>55</sup> Burczycka & Munch, *Administration of Justice*, *supra* note 10 at 9.

<sup>56</sup> *Ibid.*

<sup>57</sup> Statistics Canada, *Table Two: Number and Distribution of the Population Reporting an Aboriginal Identity and Percentage of Aboriginal People in the Population, Canada, Provinces and Territories, 2011* in *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, Catalogue No 99-011-X (Ottawa: Statistics Canada, last modified 23 December 2015), online: <[www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm](http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/2011001/tbl/tbl02-eng.cfm)> [perma.cc/M2AN-ZWF6] [Statistics Canada, *Distribution of the Population*].

<sup>58</sup> Burczycka & Munch, *Administration of Justice*, *supra* note 10 at 10.

<sup>59</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Yukon, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/star](http://www.statcan.gc.ca/eng/star)> [perma.cc/V7Vp-2X5W].

<sup>60</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Northwest Territories, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/start](http://www.statcan.gc.ca/eng/start)> [perma.cc/E682-TJEP].

<sup>61</sup> Statistics Canada, *Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Nunavut, 2016 Census in Focus on Geography Series, 2016 Census*, Catalogue No 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <[www.statcan.gc.ca/eng/star](http://www.statcan.gc.ca/eng/star)> [perma.cc/92LM-X72A].

<sup>62</sup> Burczycka & Munch, *supra* note 10 at 13.

Edward Island reported smaller proportions of cases involving this type of offence” (roughly 30 per cent).<sup>63</sup> Again, Quebec and Prince Edward Island have the lowest number of Indigenous peoples, while Manitoba, Yukon, and Saskatchewan, have some of the country’s highest.<sup>64</sup>

Turning to more micro-level studies, in 2017 researchers from the University of Ottawa, Simon Fraser University and the University of Montreal, found that administrative court orders are widely used against drug users, sex workers and the homeless in the Downtown Eastside of Vancouver, impacting access to vital resources including food, shelter and harm-reduction services.<sup>65</sup> Repeating findings from the City’s 2017 count, the 2018 City of Vancouver’s homelessness services report found that 40% of Vancouver’s homeless population identifies as Indigenous. That compares to just 2.2% of the general population.<sup>66</sup>

The documented rise of administrative offending is no different under the *Youth Criminal Justice Act*. For example, Nicole Myers and Sunny Dhillon found that 12.2% of all youths (Indigenous and non-Indigenous) charged with an offence in 2009 were charged with failing to comply with an administrative court order.<sup>67</sup> Between 2008 and 2009, “24% of all youth admissions to pre-sentence custody across Canada involved an administrative [offence]... as the most significant charge.”<sup>68</sup>

In the last decade, the attention of the public and those agencies involved in the criminal justice system have not focused on the normative implications of these offences, but on the resources and related costs of prosecuting these and other offences.<sup>69</sup> In 2009, the Department of Justice Canada estimated the total annual system costs of these violations to be

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<sup>63</sup> *Ibid.*

<sup>64</sup> Statistics Canada, *Distribution of the Population*, *supra* note 57.

<sup>65</sup> Marie-Eve Sylvestre et al, “Red Zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver” (2017), online (pdf): *Research Gate* <[www.researchgate.net](http://www.researchgate.net)> [perma.cc/AGU2-6Z9X].

<sup>66</sup> “Response to Homelessness” (1 May 2018) at 17, online (pdf): *City of Vancouver Homelessness Services* <[council.vancouver.ca/20180501/documents/rr1presentation.pdf](http://council.vancouver.ca/20180501/documents/rr1presentation.pdf)> [perma.cc/BRF7-BQG6]. See also Marie-Eve Sylvestre et al, *supra* note 65 at 44, which finds that while Indigenous peoples make up one third (34%) of the homeless population in Metro Vancouver, they represent only 2.5% of the population.

<sup>67</sup> Nicole M Myers and Sunny Dhillon, “The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions” (2013) 55:2 *Can J Corr* 187 at 191.

<sup>68</sup> *Ibid* at 192 [footnotes omitted].

<sup>69</sup> Burczykca & Munch, *Administration of Justice*, *supra* note 10 at 2.

roughly \$730 million (this estimate includes the costs of policing, prosecution, legal aid, courts, and corrections).<sup>70</sup> The annual expenditure has likely increased given the documented increase of these types of offences.<sup>71</sup>

The potential impact of these statistics on the continued over-incarceration of Indigenous accused should be obvious when one considers custody was the most common sentence handed down.<sup>72</sup> However, to date, there is little in the way of published empirical research demonstrating what, if any, correlation exists between the rise of administrative offending and the continued crisis of Indigenous over-incarceration. The scant research that does exist is explored below. However, these studies tend to make only passing reference to breach-related recidivism as part of a larger Indigenous recidivism investigation.

### C. The Continued Problem of Indigenous Recidivism

In 2014, the Department published a “fact sheet” entitled “Representation of Aboriginal People in the Canadian Criminal Justice System.”<sup>73</sup> Statistics cited by the Department reveal that Indigenous peoples are more likely to return “to correctional supervision in the two-year period following release... compared to non-Aboriginal people (45% versus 29%).”<sup>74</sup> Re-involvement rates for Indigenous peoples are “highest in Nova Scotia (47%), closely followed by Saskatchewan (45%), and New Brunswick (40%).”<sup>75</sup>

The Department also found that the rate/number of breaches of community supervision orders, such as the failure to complete a conditional sentence or period of probation, was higher among Indigenous offenders relative to non-Indigenous offenders.<sup>76</sup> The Department relies on the following statistics:

In Saskatchewan, Aboriginal men had a breach rate almost double that of non-Aboriginal men (32% versus 17%), while Aboriginal women had a breach rate

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<sup>70</sup> Canada, Department of Justice, *The Justice System Costs of Administration of Justice Offences in Canada, 2009*, by D Wade & T Zhang (Ottawa: Research and Statistics Division, 2013).

<sup>71</sup> See generally Burczycka & Munch, *Administration of Justice*, *supra* note 10.

<sup>72</sup> *Ibid* at 14.

<sup>73</sup> Beattie, Boudreau & Raguparan, *Representation of Aboriginal People*, *supra* note 35.

<sup>74</sup> *Ibid* at 14.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

almost triple that of their non-Aboriginal counterparts (30% versus 12%). In Alberta, breach rates of Aboriginal adults were higher than that of their non-Aboriginal counterparts both for men (53% versus 34%) and women (48% versus 32%), and across all age groups.<sup>77</sup>

In the spring of 2019, Correctional Service Canada published *A Comprehensive Study of Recidivism Rates among Canadian Federal Offenders*.<sup>78</sup> The stated objective was to provide a “measure of reoffending that would include both returns to federal custody for an offence as well as reoffending that results in provincial or territorial sanctions.”<sup>79</sup> Rates of recidivism for Indigenous offenders continued to be higher relative to the general population: “37.7% for Indigenous men and 19.7% for Indigenous women” compared to 24.2% for non-Indigenous men and 12% for non-Indigenous women.<sup>80</sup>

The rates of recidivism for Indigenous offenders were also recently captured in Celeste McKay and David Milward’s article entitled “Onashowewin and the Promise of Aboriginal Diversionary Programs.”<sup>81</sup> In 2016 Indigenous persons represented “26% of admissions to provincial and territorial jails, and 28% of admissions to federal penitentiaries, despite being only 3% of the Canadian population.”<sup>82</sup> The rates of recidivism for Indigenous offenders are characterized as “higher than for non-Indigenous persons, although studies vary on the degree of difference.”<sup>83</sup> Milward cites the following historical statistics:

[A] 1986 study... found that Indigenous parolees were almost twice as likely (51% to 28%) to have parole revoked in comparison to non-Indigenous parolees. Indigenous prisoners released from federal penitentiary were 12% to 19% more likely to commit an indictable offence following release.... An analysis of 1993 data for offenders released from federal penitentiaries that included 243 Indigenous offenders and 271 non-Indigenous offenders found that Indigenous offenders had a higher recidivism rate (66%) compared to non-Indigenous offenders (47%).... A more recent study was based on all offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation, in the

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<sup>77</sup> *Ibid.*

<sup>78</sup> Correctional Service of Canada, *A Comprehensive Study of Recidivism Rates Among Canadian Federal Offenders*, by Lynn Stewart & Geoff Wilton (Ottawa: CSC, 2019), online: <[www.csc-scc.gc.ca/005/008/092/err-19-02-en.pdf](http://www.csc-scc.gc.ca/005/008/092/err-19-02-en.pdf)> [perma.cc/L9PH-VYRY].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> (2018) 41:3 Man LJ 127 at 161.

<sup>82</sup> *Ibid.* at 132 [footnotes omitted].

<sup>83</sup> *Ibid.*

2004 calendar year. The sample included 1,274 male Indigenous offenders and 418 female Indigenous offenders. The recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders. The rates amongst Indigenous offenders by gender were 60.7% for male offenders and 45.9% for female offenders.<sup>84</sup>

Milward also references a more recent study based on offenders in Ontario who were either released after serving at least one month in provincial jail, were given a conditional sentence, or had begun a term of probation. It was found that “[t]he recidivism rate was 57% for Indigenous offenders, and 33% for non-Indigenous offenders.”<sup>85</sup>

Academic studies aside, the potential correlation between administrative offending and Indigenous incarceration was briefly picked up on by mainstream media. In 2016, *Maclean’s Magazine* published an article entitled “Canada’s Prisons are the New Residential Schools” which acknowledged that charges for violating criminal court orders are “soaring.”<sup>86</sup> *Maclean’s* reported that in British Columbia, “40 per cent of criminal court matters are... ‘administration of justice offences’”.<sup>87</sup> In the province of Alberta, it was reported “that 52 per cent of Indigenous prisoners had been incarcerated for a breach, almost twice the rate for non-Indigenous prisoners.”<sup>88</sup> These startling statistics prompted one former inmate to opine: “[o]nce you are in the system, you never get out.”<sup>89</sup>

In summary, the data released by the Department of Justice and public interest groups reveal that the provincial jurisdictions experiencing the largest volume of administrative offending are jurisdictions that statistically house the majority of Indigenous offenders in Canada. The data further underscores that those marginalized populations, who are statistically more likely to be caught in a cycle of breach, contain a large majority of Indigenous peoples.

In a country obsessed with studying, re-studying, and over studying the cause and effects of Indigenous incarceration, it is noteworthy that the issue of administrative offending among the Indigenous population remains a

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<sup>84</sup> *Ibid* at 132–33 [footnotes omitted].

<sup>85</sup> *Ibid* at 133 [footnotes omitted].

<sup>86</sup> Nancy MacDonald, “Canada’s Prisons are the ‘New Residential Schools’”, *Maclean’s* (18 February 2016), online: <[www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/](http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/)> [perma.cc/FJE4-3MWN].

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

form of *avant garde* concern. By employing a critical race paradigm, we can begin to understand the contours of this intellectual deficit, the obfuscation of the structural forms of prejudice faced by the Indigenous accused within the administrative regime, and the role these factors play in the continued marginalization of Canada's Indigenous population.

## II. CRITICAL RACE THEORY, THE SAVAGE INDIAN TROPE, AND *GLADUE'S* BROKEN PROMISE

Formulating a comprehensive definition of Critical Race Theory (CRT) is a difficult task. Kimberlé Crenshaw, both a founder and leader of the critical race movement, defines contemporary critical race theory as “a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era.”<sup>90</sup> CRT began as a movement of legal scholars and practitioners who interrogated the role that law plays in creating and perpetuating racial oppression. Scholars in this field hold as a starting point that racialization, racism, and white privilege are constitutive elements of the legal system.<sup>91</sup> CRT employs an approach that inquires how law oppresses, dehumanizes, creates, and maintains hierarchy, systems, customs, and other social institutions.<sup>92</sup> CRT's foundational text offers the following broad precis:

The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. The movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up but places them in a broader perspective that includes economics, history, setting, group and self-interest, and emotions and the self-conscious... critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.<sup>93</sup>

The animating principles or basic tenets of CRT are that first, “racism

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<sup>90</sup> Kimberlé Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back to Move Forward” (2011) 43:5 Conn L Rev 1253 at 1261.

<sup>91</sup> Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995); Mari J Matsuda et al, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993) at 3–6.

<sup>92</sup> See generally Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

<sup>93</sup> *Ibid* at 3.

is ordinary.”<sup>94</sup> We operate in a society that is colour coded, not colour blind and, therefore, our laws must be as well. Second, “racism advances the interests of both elite (materially) and working-class whites (physically), large segments of the population have little incentive to eradicate it.”<sup>95</sup> Third, the concept of “race” and “racism” are social constructs as opposed to biological realities.<sup>96</sup> Finally, CRT theorists advance a notion of “a unique voice of color.”<sup>97</sup> Those who have faced oppression offer a form of exclusive narrative. As certain constructed identities are marginalized, the identities that are the normative reference points are accorded privileged societal status.<sup>98</sup>

As stated by Derrick Bell, one of the theory’s pioneers, “most critical race theorists are committed to a program of scholarly resistance... [in order to] lay the groundwork for wide-scale resistance.”<sup>99</sup> This line of scholarship has developed “an orientation around race that seeks to attack a legal system which disempowers people of color.”<sup>100</sup> Laws, according to these theorists, are not created from a neutral perspective because a “neutral” perspective simply does not exist; not all “perspectives are equally valued, equally heard, or equally included.”<sup>101</sup> There is a collective recognition that many perspectives “have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized-and all of this, not accidentally.”<sup>102</sup> In emphasizing the marginality of certain perspectives, these theorists engage in a form “of outreach to those similarly situated but who are so caught up in the property perspectives of whiteness that they cannot recognize their subordination.”<sup>103</sup>

By illuminating the ways in which societal valuations and distributions are manipulated according race, critical race scholarship has historically provided the language and framework necessary to analyze Indigenous identity. In his influential text, *Savage Anxieties the Invention of Western*

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<sup>94</sup> *Ibid* at 8.

<sup>95</sup> *Ibid* at 9.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid* at 11.

<sup>98</sup> *Ibid* at 12.

<sup>99</sup> Derrick A Bell, “Who’s Afraid of Critical Race Theory?” (1995) U Ill L Rev 1995:4 893 at 900.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid* at 901.

<sup>102</sup> *Ibid*.

<sup>103</sup> *Ibid* at 902.

*Civilization (Savage Anxieties)*, Robert A. Williams employs CRT to analyze the trope of the Indian savage as a form of normative instrument used to justify colonial power.<sup>104</sup> Much can be gleaned from Williams' historical account of the savage: one could argue that the notion of the savage continues to inform the criminal justice's response to Indigenous offenders and explains why the issue of over-incarceration remains unabated.

In what follows, I argue that the West's 'savage anxiety' persists and manifests in the form of constant state surveillance of the Indian other. I rely on critical race scholarship as a theoretical framework to explain how the imposition of administrative court orders on the Indigenous accused draw battle lines where contemporary colonialism is simultaneously asserted and resisted.<sup>105</sup> Through the imposition of administrative court orders, we control which subjects not only enter the system, but whether they will stay in the system, and ultimately how they will interact with an incredibly powerful arm of the state. These orders are a form of "power over." They engage features of the historical apparatus that has, for centuries, served to marginalize and control "the savage Indian." They serve to create social order, impose the stigma of criminality, and ultimately perpetuate the prejudice and racism launched against the Indigenous peoples since Greek antiquity.

### A. Savage Anxieties and the Use of the Savage Indian Trope

*Savage Anxieties* holds as its premise that Western civilization has, since Greek antiquity, used negative cultural imagery to construct the other as savage.<sup>106</sup> In the context of colonialism, the savage trope has been created to strip Indigenous communities of their rights, status and ultimately their land through the Doctrine of Discovery.<sup>107</sup> By creating the illusion of the

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<sup>104</sup> Robert A Williams, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

<sup>105</sup> A phrase first offered by Nate Jackson in his article "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence" (2015) 52:4 *Alta L Rev* 927 at 930.

<sup>106</sup> Williams, *supra* note 104.

<sup>107</sup> Black's Law Dictionary defines 'Discovery' as "the foundation for a claim of national ownership or sovereignty, discovery is the finding of a country, continent, or island previously unknown, or previously known only to its uncivilized inhabitants". See Bryan A. Garner, ed, *Black's Law Dictionary* (St. Paul, MN: Thomson Reuters, 2014) sub verbo "discovery". See also Rebecca Tsosie, "Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter's 'Owning

savage infidel, colonizers could justify the colonized as unworthy and incapable of land ownership and, by extension, undeserving of cultural autonomy and self-determination. As Williams explains, it is this image of the savage that justified the forcible expropriation of tribal lands and facilitated “the ultimate extinguishment of Indian tribalism as a way of life on the North American continent.”<sup>108</sup>

This historical stereotype continues to play a pivotal role “in rationalizing individual prejudice and bias in attitudes and behaviors toward... racial groups in our society.”<sup>109</sup> Williams references the Western world’s most advanced countries, and emphasizes that even today we “continue to perpetuate the stereotypes and clichéd images of human savagery that were first invented by the ancient Greeks to justify their ongoing violations of the most basic human rights of cultural survival.”<sup>110</sup> *Savage Anxieties* references compelling examples of the ways in which modern day politicians, military generals, and mainstream media “draw on a language of savagery to describe the West’s violent, dangerously opposed enemies in the ‘primitive’ mountain ranges and ‘tribally controlled’ territories of Afghanistan and Pakistan.”<sup>111</sup> How the West had, at one point, in its head the image of “Osama Bin Laden hiding in a cave in some mountainous, lawless, and inaccessible ‘tribal’ region that marks off that alien and distant part of the world.”<sup>112</sup> Williams also prompts his readers to think of the common images and stereotypes associated with American Indians in the Western world today: “they really do not have ‘red skins,’ few if any live in teepees, they tend to leave their bows and arrows at home when they go to the supermarket, and when they speak their native tongue, they never use the words ‘ugh’ and ‘how’.”<sup>113</sup>

The vocabulary, visual representations, and arguments that surround the image of the savage Indian continue to infiltrate discursive power. Building on Williams’ central thesis that dominant social discourse has both presently and historically employed savage imagery to shape the status of the Indigenous community, I argue that this status is physically signaled by

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Red”, (2016) 94 Tex L Rev 250, which offers a similar explanation of the West’s treatment of the Indigenous other.

<sup>108</sup> Williams, *supra* note 104 at 8.

<sup>109</sup> *Ibid* at 2.

<sup>110</sup> *Ibid* at 8-9.

<sup>111</sup> *Ibid* at 220.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Ibid* at 3.

geographic restrictions, no-contact and abstention clauses, and residency and curfew conditions. The Indigenous occupation of a lower social stratum is reinforced by the constant state surveillance resulting from reporting and residency requirements, geographic restrictions, and drug and alcohol abstention clauses. These conditions, a routine component of administrative court orders, produce and perpetuate social distinction. They are the medium through which discriminatory animus continues to infiltrate our criminal justice system. This was not the intended effect of *Gladue* and its progeny.

### **B. *Gladue* and *Ipeelee*: The Purported Response to the Crisis of Indigenous Over-Incarceration**

In 1996, an amendment to paragraph 718.2(e) of the *Criminal Code* of Canada held the promise of keeping Indigenous offenders outside of prison, whenever possible, by directing sentencing judges to consider the unique and systemic background factors of Indigenous offenders in the search for an appropriate non-custodial sentence.<sup>114</sup> This provision was intended to signal a “paradigm change in the framework for sentencing Indigenous offenders.”<sup>115</sup>

The now prominent decision in *Gladue* provides an examination of the purpose behind paragraph 718.2(e).<sup>116</sup> A unanimous court, famously termed the problem of Indigenous overincarceration “a crisis in the Canadian criminal justice system.”<sup>117</sup> The significant overrepresentation of Indigenous peoples within the Canadian criminal justice system and the prison population was characterized as “a sad and pressing social problem.”<sup>118</sup> Section 718.2 was interpreted as “Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavor to remedy it, to the extent that a remedy would be possible through the sentencing process.”<sup>119</sup>

The unbalanced ratio of imprisonment was attributed to features of substance abuse, lack of education, poverty, and the lack of employment

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<sup>114</sup> *Ipeelee*, *supra* note 8 at paras 58–59; *Criminal Code*, *supra* note 11, s 718.2(e).

<sup>115</sup> Alexandra Hebert, “Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice” (2017) 43:1 *Queen’s LJ* 149 at 151.

<sup>116</sup> *Supra* note 7.

<sup>117</sup> *Ibid* at para 64.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

opportunities for Indigenous peoples.<sup>120</sup> Sentencing judges were given the power to influence the treatment of Indigenous offenders in the justice system and control the problem of overincarceration.<sup>121</sup>

Section 718.2, as interpreted in *Gladue*, reinforced the obligation of the sentencing court to understand the needs, experiences, and perspectives of Indigenous peoples or Indigenous communities. The frank and unequivocal language employed by the Court in *Gladue* made national headlines.<sup>122</sup> Segments of the judgment are worthy of repetition:

Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system”.<sup>123</sup>

The response was a new, ostensibly forward-thinking and culturally sensitive sentencing practice that would keep Indigenous offenders in their respective communities:

[T]he point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.<sup>124</sup>

The decision and its stark pronouncements are cited in virtually all major sentencing cases dealing with an Indigenous accused. The case was celebrated for its revolutionary strategy to decolonize the relationship between the Indigenous people and the Crown and thus inspired high

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<sup>120</sup> *Ibid* at paras 50, 65, 93.

<sup>121</sup> *Ibid*.

<sup>122</sup> See e.g., the following headline Kirk Makin, “Top court appalled as Natives fill Canada’s jails”, *The Globe and Mail* (24 April 1999), online: <fact.on.ca/newspaper/gm990424.htm> [perma.cc/Y7FA-63E2] as noted in Jonathan Rudin “Aboriginal Overrepresentation and *R. v. Gladue*: Where we Were, Where we Are and Where we Might be Going” (2008), 40 *SCLR* (2d) 687 at 694, n 39.

<sup>123</sup> *Gladue*, *supra* note 7 at para 61.

<sup>124</sup> *Ibid* at para 74.

hopes.<sup>125</sup> With the advent of the Court's judgment, provinces across the country experienced the formation of dedicated *Gladue* courts.<sup>126</sup> These specialized courts are described as standard "criminal courts that apply Canadian law in cases involving Aboriginal offenders, but they are distinctive in their approach to sentencing."<sup>127</sup> These courts seek to embrace and apply specialized Indigenous knowledge to produce alternative understandings of an accused to ensure that bail orders and sentences conform to *Gladue's* intent.<sup>128</sup> They aim to situate a defendant's behaviour within collective histories and experiences of colonialism. "[A]lternatives to custody and information about the factors that perpetuate patterns of over-incarceration are also brought before the court."<sup>129</sup>

Canadian courts do not require the specialized *Gladue* architecture to situate the offender's action within a legacy of colonialism. Jurisdictions across the country have access (albeit limited) to *Gladue* writers whose stated goal is to systemically implement *Gladue* principles in the criminal justice system.<sup>130</sup> These highly-skilled writers work with the Indigenous accused, their family, and their community to understand and articulate the ways in which the unique and systemic background factors discussed in *Gladue* have brought the offender before the court. The information is contained in a report prepared for the presiding judge, prosecutor, and defence counsel. Often, a primary goal of the report is to recommend sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of their particular Indigenous heritage or connection.

As a criminal defence lawyer for the Indigenous accused, there is no question that these reports become essential to the judge's understanding of the accused and how their conduct is situated within histories of racial and systemic discrimination and exploitation. However, there is currently no mechanism available in the *Criminal Code* to implement a community-

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<sup>125</sup> Ryan Newell, "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration" (2013) 51:1 Osgoode Hall LJ 199 at 211.

<sup>126</sup> Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451.

<sup>127</sup> *Ibid* at 452.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid* at 452.

<sup>130</sup> "Towards Fair Treatment of Indigenous People in the Criminal Justice System" (last visited 30 June 2020), online: Gladue Writer's Society of British Columbia <[www.gladuesociety.com/about-the-society-1](http://www.gladuesociety.com/about-the-society-1)> [perma.cc/22QCC-49BA].

based sentence without an administrative court order of some kind. Consequently, well-meaning judges, alive to the jurisprudence in *Gladue* and its progeny, as well as the criminogenic factors outlined in the various *Gladue* reports, often prefer to craft onerous conditions of release than order the accused's detention.

Professor Roach and Jonathan Rudin foreshadowed the consequences of *Gladue's* emphasis on a community-based approach:

If trial judges, inspired by *Gladue*, impose punitive and unrealistic "healing" conditions as part of conditional sentences, aboriginal offenders may well find themselves disproportionately breached and imprisoned, perhaps for a longer period than if they had been sent directly to jail. This, combined with the youth of aboriginal populations in Canada, a shortage of community programmes to provide alternatives to imprisonment, and a reluctance to depart from imprisonment in serious cases makes it unlikely that *Gladue*-inspired sentencing innovations will significantly reduce aboriginal overrepresentation in prison in the near future.<sup>131</sup>

Professor Roach and Jonathan Rudin's projections have proven accurate. When *Gladue* was released, the Indigenous accused accounted for 12% of all federal inmates and 19% of all sentenced inmates.<sup>132</sup> By 2004/2005, that number rose to "17 per cent of admissions to federal custody and 22 per cent of admissions to all provincial correctional facilities."<sup>133</sup> This steady upward trend is also observable in young offenders. These numbers have prompted notable jurists to opine "[i]f this is progress, it is progress of the worst kind."<sup>134</sup>

The continued rise in the over-representation of the Indigenous in the justice system has been characterized by some as "mystifying."<sup>135</sup> Others have laid blame on the lack of *Gladue*-specific information the sentencing judge receives about the offender,<sup>136</sup> certain legislative interventions,<sup>137</sup> or a lack of funding for meaningful *Gladue* reports.<sup>138</sup> At the time of writing, the potential correlation between the proliferation of administrative offences

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<sup>131</sup> Roach & Rudin, *supra* note 9 at 357.

<sup>132</sup> Rudin, *supra* note 122 at 701.

<sup>133</sup> *Ibid* [footnotes omitted].

<sup>134</sup> *Ibid* at 701.

<sup>135</sup> See e.g. Julian Roberts & Ronald Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003) 45:2 Can J Corr 211 at 226.

<sup>136</sup> Roach & Rudin, *supra* note 9 at 375, 378.

<sup>137</sup> See e.g. Rudin, *supra* note 122.

<sup>138</sup> Dushman & Myers, *supra* note 3.

and Indigenous over-incarceration, initially anticipated by Professor Roach and Jonathan Rudin, has not been fully explored.

Yet, we know that while the imposition of administrative court orders is on the rise, offences for breaching those court orders are also on the rise. They are increasing in jurisdictions with a high percentage of Indigenous offenders. First, if we stop and think about the characteristics associated with the Indigenous accused and, second, acknowledge that these orders fail to understand the intersection of intergenerational trauma and criminality and the related effects of poverty, addiction, and mental disorder, we begin to see how these orders perpetuate the recidivism that they are designed to prevent.

By employing a critical race paradigm, we can start to understand why it does not seem to matter how much information we receive about the colonial legacy, intergenerational trauma, and the resulting socio-economic issues that plague our Indigenous communities. The hold and control that these orders place on the Indigenous accused is a contemporary form of colonial encounter: these orders, implemented by the colonial government, communicate hegemonic normativity and maintain control over the savage other through constant surveillance justified by the administrative court order. In Part III of this article, I aim to demonstrate the practical ways in which administrative court orders render the Indigenous offender a form of the colonial subject who is once again pitted against the Crown.

### **III. ADMINISTRATIVE COURT ORDERS TO CONTROL THE SAVAGE OTHER**

In the current legal landscape, it is all too easy to create the conditions ripe for breach. The homeless cannot abide by a curfew or residency requirement. Those living on remote reserves and in poverty often do not have a vehicle or telephone, rendering it impossible to report to their bail or probation officer. Geographical restrictions often prevent the accused from accessing resources such as food banks, soup kitchens, and shelters, breeding the same cycle of marginalization which motivated the initial offending. These problems are compounded when dealing with the fetal alcohol spectrum disorder (FASD) offender: alcohol-related neurodevelopmental disorders often render it difficult, if not impossible, for offenders to practice the flawless time management skills that these administrative orders require.

The inevitable breach leads to a badge of criminality and facilitates discrimination because the law, vis-à-vis the administrative court order, permits differential treatment. It becomes easy, if not axiomatic, to punish and discriminate. The net effect is the creation, or perhaps maintenance, of a social hierarchy that encourages constant state surveillance of the Indigenous community, suppresses autonomous community development, justifies employment discrimination and a lack of educational opportunities, separates Indigenous children from their criminal families, and ultimately impairs liberty and autonomy in the prodigious and unforgivable way colonial powers and policies always have. One could argue that Indigenous rights groups have become casualties of their own reforms: state control of the 'savage other' is as much the real goal as it ever was.

By insisting on alternatives to incarceration, the justice system is forced to rely on administrative court orders managed by provincial probation services. The judiciary and justice system participants possess a misplaced faith in the probationary regime which functions as another repressive system of control that necessarily views the Indigenous accused as a risk that must be managed. In what follows, I will demonstrate how the most common probation conditions, far from fostering reintegration, serve to erode individual autonomy and engender mistrust, alienation, resentment, and resistance, creating disunity and discord.

### **A. The Trouble with Canada's Probation System and the Orders it Administers**

The assignment of an offender's probation officer represents an extraordinary transfer of power from sentencing judges to a non-judicial actor. The following judicial pronouncements pulled from a random sample of judgments from across the country demonstrate the level of control the probation officer has over the life of the accused:

I designate that you will be under the supervision of a probation officer. You must report to the probation officer in person today and after that as directed by the probation officer... You will live at a place approved by the probation officer... You will stay in the province of Alberta unless your probation officer gives you permission in writing to go outside the province... You will, in the sole discretion of your probation officer, follow such curfew as may be designated by your probation officer... You must be enrolled in and attend school but I leave it in the discretion of the probation office as to whether you complete such schooling in person or by correspondence. Your probation officer will be entitled to obtain a record of performance... You will be assessed and will take any counselling or treatment directed by your probation officer for alcohol or substance abuse, anger

management and psychological or psychiatric issues and will provide your probation officer with proof of attendance and completion of any counselling or treatment so directed... You will not be in contact, in any way, with L.F. or any other person named in writing from time to time by your probation officer.<sup>139</sup>

The probation officer possesses the unfettered discretion to dictate the frequency of the offender's reporting, where he lived, whether he could travel, when he needed to be home, how he would receive his education, who he could associate with, and force him to engage in the intimate experience of therapy. The form and content of these conditions create space for prejudice and bias to dictate outcomes and shape the lives of many offenders, particularly when we consider that the average length of community supervision is 356 days.<sup>140</sup>

## B. Counselling Conditions

Counselling conditions are commonplace<sup>141</sup> and in many jurisdictions, they appear as a standardized term on the judiciary's bail and sentencing picklist.<sup>142</sup> Prosecutors are quick to seek the therapeutic conditions under the guise that it will "help them stop drinking," "get a handle on their addiction," or "let them sort out anger issues." These standard counselling conditions become particularly problematic for several reasons.

First, the professed therapeutic relationship often becomes a coercive and intrusive experience that manifests as a tool of social control administered by the power of the state. Consider the following example from a sentencing court in Ontario:

When I put such other issues, and that includes such things like grief counselling, which might be appropriate and that is thing that is identified by I believe one of the priests, Reverend Salvadore and I am going to leave that to the discretion of the probation office. You are to sign any release forms required to allow your probation officer to confirm your attendance in counselling and treatment and not discontinue any counselling and treatment recommended by the probation

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<sup>139</sup> *R v LMF*, 2003 ABPC 174 at para 37.

<sup>140</sup> British Columbia, Ministry of Public Safety and Solicitor General, *A Profile of BC Corrections: Reduce Reoffending, Protect Communities 2017* (Vancouver, BC: Ministry of Public Safety and Solicitor General, 2017) at 10 [BC, *A Profile of BC Corrections*].

<sup>141</sup> Dushman & Myers, *supra* note 3 at 49.

<sup>142</sup> See "Court Issues Standardized Terms for Criminal Court Orders: Its Latest Initiative to Produce Orders More Quickly, Accurately and Consistently" (27 June 2017), online: *Provincial Court of British Columbia* <[www.provincialcourt.bc.ca/enews/enews-27-06-2017](http://www.provincialcourt.bc.ca/enews/enews-27-06-2017)> [perma.cc/54JV-WSH8].

officer without the consent of your probation officer.<sup>143</sup>

The vast majority of Indigenous offenders come into contact with the justice system as a result of experiencing intergenerational trauma associated, either directly or indirectly, with the legacy of colonialism. The judiciary has long accepted that those criminogenic factors are the result of state action. The irony in coercing the offender to revisit and cope with that trauma in the way the state deems acceptable is palpable. If an offender refuses to attend or participate in programming, it can result in a breach of the court order, leading to a subsequent criminal charge.<sup>144</sup> The imposition of this type of condition, more than any other, reflects a complete lack of understanding of the colonial context, and intergenerational trauma and its contribution to socio-economic problems plaguing Indigenous communities.

Second, a more practical concern: the only no-cost counselling sessions available to the offender are delivered by the provincial probation system. In British Columbia, the programs typically consist of a Substance Abuse Management Program or a Living without Violence course.<sup>145</sup> In the confines of these programs, the offender does not have the ability to select a therapist or clinician of their choosing (indeed, it is frequently the assigned probation officer who serves as the program's facilitator).<sup>146</sup> The sessions are scheduled on a specific day, at a specific time, for a series of weeks. If the offender arrives intoxicated or fails to attend, they are often expelled, and a breach charge is forwarded to the prosecution.

We return to the circumstances of N.J., mentioned at the beginning of this article. His main priorities are how he will find shelter that evening, where he can find a meal, and where he can find heroin before he becomes dangerously sick from withdrawal. He does not own a watch or a cell phone. Having no steady routine or orientation, N.J. loses track of the days and week. He does not have a friend or family member to predictably remind him of the time of his counselling session. The factors that prompt him to miss a counselling session are the same factors he has little to no control

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<sup>143</sup> *R v Eckert*, 2001 OJ No 5060 at para 17.

<sup>144</sup> In British Columbia, counselling available through community corrections consists of the Living Without Violence Program, Substance Abuse Management Program, Sex Offender Treatment and Maintenance Program, and Thinking Leads 2 Change. See BC, *A Profile of BC Corrections*, *supra* note 140 at 13.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* at 12.

over, which have contributed to his cycle of offending: he did not ask to be plagued by the effects of fetal alcohol spectrum disorder, and very few, if any, offenders choose to be hungry, addicted, and alone on the street. The imposition of an administrative court order telling him to be at the local probation office on Tuesday at 4:00 p.m. for a counselling session lasting sixty minutes does little, if anything, to address his rehabilitation and even less to satisfy the ostensible objective of public safety.

### C. Reporting Requirements

The erosion of autonomy under the probationary regime is patent when dealing with mandatory reporting requirements:

The conditions of Mr. LeBlanc's probation included that he report to and be under the supervision of a probation officer. Mr. LeBlanc complains that he has been required to report in person to the probation office in Burton, some distance from his home.

The probation officer has the discretion to consider Mr. LeBlanc's concerns and to reduce the number of his personal attendances or to let him report by telephone. Mr. LeBlanc can discuss those concerns with his probation officer or his probation officer's supervisors.<sup>147</sup>

All too frequently, offenders residing on remote reserves are compelled to attend in person to a local community corrections office. Reporting by telephone or some other medium is often left to the discretion of the probation officer. Similarly, if offenders are employed in remote, camp-like settings, or in the commercial fishing industry (as so many members of Canada's west coast reserves are), the form of reporting is at the sole discretion of the probation officer:

After your first reporting your regular reporting may include reporting by telephone in the discretion of your probation officer. That is to allow you, if you are in camp, to be able to report. If they allow it. They have to give you permission.<sup>148</sup>

It is not at all uncommon to hear offenders complain to a Provincial Court judge that their bail supervisor or probation officer refuses to grant permission to attend work. The explanations for refusal often consist of the

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<sup>147</sup> *R v Leblanc*, [1998] NBJ No 159 at paras 8–9, 1998 CarswellNB 158.

<sup>148</sup> *R v Berry*, 2007 BCPC 506 at para 15.

inability of an offender to provide a predictable work schedule.<sup>149</sup> In order to highlight the collateral damage of a term that, at first blush, appears to be of no consequence, consider the following example.

H.S. was charged with sexual assault and released on bail. His bail order was robust. He lived on a remote reserve with no cellular reception, some two hours away from the nearest bail office. His band had previously paid for him to receive the training he needed to be employed in the wildfire fighting industry. He was the sole breadwinner: he supported his wife and seven children by fighting wildfires. Throughout the course of his life, he worked to overcome the effects of residential school. He had no formal education and was limited in terms of his career opportunities. I asked him what he did at these weekly report meetings. The response: *I just sign my name on a piece of paper and leave.*

The weekly reporting requirement meant that H.S. could not accept shifts of employment. H.S. brought this to the attention of his bail supervisor. Permission to pursue his (only) line of employment would be granted if he could produce a predictable work schedule. That was impossible for H.S. to do. The nature of his work was on-call and fluctuated with the patterns of the environment. Without employment, he could no longer afford a vehicle. Without a vehicle, he could not return to his reserve and continue to satisfy the in-person reporting requirement. H.S. was forced to live in a city shelter, away from his family and community. He soon returned to consuming alcohol and predictably, a breach of several conditions on his bail order followed. These consequences are the result of an order intended to “protect the public.”

#### D. Spatial Restrictions

Prohibiting an accused or offender from accessing certain public spaces is a common feature of bail and probation orders. One study revealed that geographic restrictions account for nearly 20% of all conditions imposed through criminal proceedings.<sup>150</sup>

Experiential evidence suggests that those offenders with a history of committing petty crime, most often to feed to their addiction or themselves, become a nuisance for local businesses. Not only do these petty acts of theft

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<sup>149</sup> Which is often the case with employees of the commercial fishing industry whose length of voyage depends on the fluctuating fish stocks, or those employed to combat wildfire who must leave on very short notice.

<sup>150</sup> Sylvestre et al, *supra* note 65 at 4.

disrupt the bottom-line, observable effects of addiction are unpleasant to customers. Voices from local commerce are often heard loudly at city hall. Those voices carry over to the local prosecution office, often manifesting in the form of a so-called “red-zone.” The accused is ousted from public space and often from those areas that house the local soup kitchen, food bank, shelter, sobering centers, social assistance offices, and other valuable resources. Rather than addressing the root cause of this petty offending, supervision and control of offenders that are subject to red zone conditions becomes a primary and expensive mandate of local law enforcement street crime units. “Such state control over Indigenous people's movements is part of a long history of colonial efforts to displace and contain Indigenous people in order to facilitate settlement.”<sup>151</sup>

For example, an accused named G.S. was released on bail after allegedly committing a series of minor offences in the downtown core of her community. The prosecution sought and received a red-zone condition restricting her from attending within a certain radius of the downtown core. G.S. was from a reserve in Canada’s far north. The only set of contacts she had in her new community resided within the red-zone. She was collecting social assistance and she had to enter the red-zone to collect her cheque. She was addicted to a series of illicit substances and the city’s only drug outreach and sobering center was in the red-zone. Often homeless or transient, one of the only two shelters in the city was located in the red zone. G.S. had stronger temptations to offend now than she ever did before.

### E. Abstention Clauses

Release orders frequently require individuals to abstain from consuming drugs, alcohol, or both: “[a]cross all courts, a quarter of releases required the accused to not purchase, possess or consume any non-medically

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<sup>151</sup> Gabe Boothroyd, “Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice” (2019) 56:3 Alta L Rev 903 at 932 [footnotes omitted]. For a more general discussion of the ways in which spatial restrictions impact marginalized segments of society see Sylvestre et al, *supra* note 65, which offers a strong case for arguing that the criminal justice system (i.e., prosecutors and judges) are responsible for keeping certain offenders under constant judicial surveillance, thus creating the conditions for the perpetration of crime. Sylvestre and colleagues further argue that problematic situations or conflicts that the state chooses to criminalize are not merely the result of actions undertaken by individuals who have immediate personal interests, but instead, they are the result of relationships and interactions embedded in social and economic systems, dynamics of power, and political and cultural resistance.

prescribed drugs, and 27.3% of releases required accused to abstain absolutely from the purchase, possession or consumption of alcohol.”<sup>152</sup> The CCLA report found that most accused who reported ongoing problems with alcohol were released on a condition that they not consume alcohol. Similarly, the majority “of accused who reported drug use problems were specifically required to abstain from consuming drugs while on bail.”<sup>153</sup> The utility of this condition, and others like it, received scrutiny in a compelling lower court judgment out of Alberta.

*Omeasoo*<sup>154</sup> concerned the sentencing of two Indigenous offenders, each an alcoholic, who were charged with minor offences and released from police custody on the condition that they abstain from consuming alcohol. Justice Rosborough framed the issues as follows: (1) “[u]nder what circumstances should alcoholics be prohibited from consuming alcohol as a condition of their release from custody? [(2)] What is a fit sentence for those alcoholics who breach that condition?”<sup>155</sup>

Justice Rosborough imposed nominal sentences on each offender and moved to address the generalized imposition of unreasonable conditions leading to repeated breaches of conditions:

There are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached. This is seldom the case with alcoholics subjected to abstention clauses, however. Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to “just cheer up”. This type of condition has been characterized by some courts (at least in the context of a probation order) as “not entirely realistic”.... It has been found to have set the accused up for failure.<sup>156</sup>

The absence of an abstention clause from an order for judicial interim release does not place the community in any greater danger than release of an offender on an undertaking with an abstention clause that (s)he will not comply with.<sup>157</sup>

There is nothing rehabilitative or restorative about placing an alcoholic or drug addict on an abstention clause. Indigenous communities in Canada

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<sup>152</sup> Dushman & Myers, *supra* note 3 at 56.

<sup>153</sup> Experiential evidence suggests that the same is true of the offenders placed on probation.

<sup>154</sup> 2013 ABPC 328 [*Omeasoo*].

<sup>155</sup> *Ibid* at para 1.

<sup>156</sup> *Ibid* at para 37 [footnotes omitted].

<sup>157</sup> *Ibid* at para 39. Despite the volume of administrative offences, the reasoning in *Omeasoo* has been cited on few occasions.

appear to be particularly vulnerable to the effects of fetal alcohol spectrum disorder.<sup>158</sup> Schwartz and colleagues explained:

It is estimated that the prevalence of FAS/FAE in high-risk populations, including First Nations and Inuit communities may be as high as 1 in 5. The rates of FAS/FAE in some First Nations and Inuit communities are much higher than the national average which is estimated to be somewhere between 123-740 FAS and 1000 FAE babies born each year. FAS/FAE has been termed a "northern epidemic" and \$1.7 million in funding is reported to be made available every year to support a new initiative addressing FAS/FAE impact on First Nations and Inuit reserve communities.<sup>159</sup>

Research also indicates that many Indigenous youth involved in the justice system suffer from some form of Fetal Alcohol Spectrum Disorder. In *R v FD*, a case that dealt with the sentencing of an Indigenous youth with FASD, the court noted that out of the total reported youth cases, "89% of aboriginal young persons were suffering from FASD."<sup>160</sup> The disorder has emerged as a significant risk factor to youth offending, as young people suffering from FASD are "likely to have diminished capacity to foresee consequences, make reasoned choices or to learn from their mistakes."<sup>161</sup>

Returning to the pronouncements in *Omeasoo*:

Even without this evidentiary expedient, however, the high incidence of substance abuse amongst Alberta [A]boriginals and even amongst the [A]boriginal population in Hobbema have been the subject-matter of authoritative (if somewhat dated) comment. In the *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, March 1991*, (the 'Cawsey Report'), the Task Force made the following remarks (at pp. 8-5 to 8-7):

A high percentage of Aboriginals who come into contact with the justice system abuse alcohol, drugs or other substances.

The Brief from the Poundmaker's Lodge offered the following observations: "Hobbema, one of the wealthiest Reserves in Alberta where poverty and poor housing are not the major problems facing the community, alcohol and teenage suicides are the primary issues facing the reserve. Eighty percent of the community is having problems with alcohol and drugs."

The cycle of social and economic problems that lead first to alcoholism, then to involvement with the criminal justice system, then to subsequent release to

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<sup>158</sup> Bryan P. Schwartz, Terrence Laukkanen & Justine Smith, "A Prevention Strategy: Eliminating FASD in Indigenous Communities" (2017) 40:2 Man LJ 123 at 123.

<sup>159</sup> *Ibid* at 144 [footnotes omitted].

<sup>160</sup> 2016 ABPC 40 at para 7.

<sup>161</sup> *Ibid*.

the community only to engage in the same activities is often repeated. If left untreated, the disease of alcoholism is fatal.

Alcoholism must be treated as a disease and not as a crime. The criminal justice system has proven conclusively that incarceration, fines and community service do not cure the disease....<sup>162</sup>

The warped logic of continuing to impose abstinence-based conditions, as statistics reveal the courts so often do, is an extension of a key feature of colonialism: deploying strategies of social oppression that serve to further marginalize and control. I do not mean to suggest that every sentencing judge presiding over an Indigenous offender is necessarily racist, consciously inflicting the law's violence. But I do argue that the imposition of these conditions often reflects, at the very least, the ways in which the legacy of colonialism has permeated the criminal justice system and the unconscious and subtle ways systemic racism infects our justice system.

## F. Curfew Conditions and Residency Clauses

In *R v J (TJ)*, a young Indigenous accused stood in front of the Court charged with crimes of violence.<sup>163</sup> The prosecution's case against the accused was admittedly weak.<sup>164</sup> The bail court judge was informed that the accused was addicted to alcohol, diagnosed with fetal-alcohol spectrum disorder, and suffered from depression.<sup>165</sup> The accused was released on onerous terms. Within one month he was back before the court and was released on similar terms. He was released again, breached within another month, and was then in custody for months before applying for bail a third time.<sup>166</sup> None of the alleged breaches involved substantive offending or behavior that could be construed as violent. Instead, this young accused, struggling with severe cognitive deficits, breached his curfew and could not stop consuming the alcohol he was addicted to.

The bail judge was sensitive to symptoms of fetal alcohol spectrum disorder and held that courts had the responsibility to accommodate this disability: "[t]he justice system should not be used as a substitute for social

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<sup>162</sup> *Supra* note 154 at para 23; Alberta, *Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton, AB: Justice and Solicitor General, 1991) at 8-5 to 8-7.

<sup>163</sup> 2011 BCPC 155.

<sup>164</sup> *Ibid* at para 55.

<sup>165</sup> *Ibid* at para 36.

<sup>166</sup> *Ibid* at paras 3-4.

services and supports for these most vulnerable citizens.”<sup>167</sup> However, the accused was ultimately released on the same set of strict bail conditions. It is as if the sentencing judge experienced a gravitational pull to “do something” to promote the illusory promise of rehabilitation and restorative justice, even if the result generated more harm than good.

These conditions, and the paternalistic framework they operate in, are not eradicating crime, but classifying and regulating the Indigenous offender in ways that replicate colonial practices and foster a relationship of domination and subordination that continues to discursively infuse the contours of our criminal justice system. “They” are the social problem, the threat to public order and the probationary regime is here to “fix” them. By continuing to impose these orders we simply pay lip-service to demands for reform by citing the rhetoric and semantics so often seen in *Gladue* and its progeny. The colonial gaze of the court is left to revel in its purported benevolence while reproducing the injustices it ostensibly wants to prevent. But lurking behind the scenes are those persistent anxieties Williams dissects. Colonialism has not just lead to factors that produce crime, contemporary forms of colonialism are producing crime.

It is no surprise that advocacy groups, such British Columbia’s Pivot Legal Society paint a bleak landscape of administrative offending.<sup>168</sup> These administrative court orders are setting some people up to fail, leading them into a cycle of criminalization and incarceration because these conditions fail to reflect the ways in which “intersections of poverty, substance use, mental health, disability, and racism shape people’s lives and daily activities.”<sup>169</sup> The result is that Indigenous peoples:

[A]re treated by the criminal justice system as prolific offenders. Their records expand year over year, breach after breach—often starting with things like petty theft for stealing food when they were hungry, or using drugs to dull the pain of homelessness, injury, or illness. These are the so-called “criminals” who now crowd our prisons.<sup>170</sup>

The net effect of these orders leads to over-policing and over-surveillance of the Indigenous population which serves to deepen social disorganization and marginalization.

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<sup>167</sup> *Ibid* at para 3.

<sup>168</sup> Bennett & Larkin, *supra* note 6.

<sup>169</sup> *Ibid* at 74.

<sup>170</sup> *Ibid* at 75.

Donna Coker, a noted American scholar, writes about the ways in which drug enforcement concentrated in poor inner-city areas in the United States, occupied by people of colour deepens social disorganization in already troubled neighborhoods.<sup>171</sup> The removal of individuals in large numbers from their communities is said to contribute to “higher levels of joblessness, low economic status, and family disruption.”<sup>172</sup> These factors disrupt the “social structural and cultural determinants of community-based control.”<sup>173</sup> Over-surveillance was also acknowledged as an invitation for “other agents of state control, notably child protection services.”<sup>174</sup> Coker’s analysis extends by analogy to Canada’s urban Indigenous population.

Experiential evidence suggests that the prevalence of administrative court orders also contributes to racial profiling. As can be gleaned from countless reports to Crown counsel, local enforcement often develops an expectation that the Indigenous members of the community are subject to some form of court order and are immediately branded as suspect. The Ontario Human Rights Commission in its report, “Paying the Price: The Human Cost of Racial Profiling” highlights research that found “the psychological effects of racial profiling... include post-traumatic stress disorder and other forms of stress-related disorders, perceptions of race-related threats and failure to use available community resources.”<sup>175</sup>

One consistent, collective effect that emerged from the Commission’s inquiry was the disempowering impact of profiling. Victims of profiling “used the words ‘impotent’, ‘powerless’, ‘helpless’ and ‘emasculated’ to describe how they felt as a result of” racialized policing.<sup>176</sup> This sense of powerlessness is often experienced by entire communities, not simply individual victims of the practice. Collateral effects include a reluctance to seek out and gain positions of power or authority in societal institutions. As a consequence, “these communities are not well represented in key societal institutions, including the ones that have some control over the issue of

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<sup>171</sup> Donna Coker, “Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System” (2003) 93:4 J Crim & Criminology 827 at 843.

<sup>172</sup> *Ibid* at 840.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid* at 842-43 [footnotes omitted].

<sup>175</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Queen’s Printer for Ontario, 2003) at 17, online: <[www3.ohrc.on.ca/sites/default/files/attachments/Paying\\_the\\_price%3A\\_The\\_human\\_cost\\_of\\_racial\\_profiling.pdf](http://www3.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf)> [perma.cc/9YMV-H4YX] [footnotes omitted].

<sup>176</sup> *Ibid* at 35.

racial profiling itself.”<sup>177</sup> The administrative court order insidiously operates to perpetuate racial subordination and can be considered the latest social mechanism used to exclude the Savage Other.

#### IV. CONCLUSION

My aim has been to demonstrate that the required and optional conditions of these administrative court orders act as a form of tripwire, rendering the offender vulnerable to sanction. These community-based dispositions should no longer be viewed as a progressive alternative to incarceration. In Part I of this article, I explored the staggering proliferation of administrative offending and the unabating rise of Indigenous recidivism. The objective was to showcase how the likely correlation between these two issues suffers from a massive intellectual deficit: these issues are undertheorized and under-researched by the scholarly community and justice system participants alike. As a consequence, we are suffering from a dearth of policy solutions that could provide better outcomes in the immediate future.

In Part II and III, I explored, in broad strokes, critical race scholarship as a pragmatic means to critique Canada’s criminal justice system and the way in which racism is institutionalized in and by law. We then narrowed the focus to administrative court orders as the medium through which exploitation and domination of the Indigenous accused are rendered morally permissible and defensible. Viewing these orders and their intended target from a critical race perspective exposes how these orders have evolved to insidiously perpetuate, rather than curtail, Indigenous marginalization and criminalization. The collateral consequences function to confine the Indigenous accused to the primitive end of the civilization spectrum. The antiquated idea of the Savage Indian is still tethered to the criminal justice system’s modern perception of the Indigenous offender.

Until we devise a better policy alternative to administer community-based sanctions, which will likely involve amendments to Canada’s *Criminal Code*,<sup>178</sup> the responsibility lies with defence counsel to advocate against the imposition of these conditions just as fiercely as custodial terms; to educate

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<sup>177</sup> *Ibid.*

<sup>178</sup> In a forthcoming publication, I argue that Canada’s *Criminal Code* must be amended to include provisions that allow for community-based sanctions administered by Indigenous communities themselves.

the court and the prosecution about the circumstances that surround the Indigenous offender to demonstrate the unique ways in which their clients become entrenched in the criminal justice system as a result of these orders.

Prosecutors have a responsibility to ensure that the conditions they seek to impose are “reasonable” pursuant to section 732 of the *Criminal Code*, as opposed to unjustifiable state intrusions. Common sense dictates that only those conditions that are fair and attainable will motivate and support offenders in reintegrating into society. When the inevitable breach occurs, sentencing judges must refrain from viewing the contravention as an oppositional move intended to demonstrate a blatant disrespect for court orders. The time has also come for a moment of judicial activism. That criminal sentencing courts continue to endorse the utility of these court orders, demanding that the accused undertake to follow the order, thus feeding (or at least maintaining) the crisis of Indigenous over-incarceration, is unjustifiable.

My hope is that this paper inspires empirical research on the correlation between over-incarceration and administrative offences. The spirit of *Gladue* is entirely compromised if we simply acknowledge “the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples”<sup>179</sup> but continue to deploy a different version of the same oppressive tactics. Thus far, this is exactly what the criminal justice system has done but we, as a justice system, refuse to acknowledge that. Our current efforts at “restoring” and “rebuilding” are misguided, and the effect was not what *Gladue* intended.

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<sup>179</sup> *Ipeelee*, *supra* note 8 at para 60.



# Issues Surrounding Pre-Conviction Abstention Conditions on Persons Suffering from Illicit Substance Addictions

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A L A N A H A N N A F O R D

## ABSTRACT

Onerous bail conditions result in an increase of administration of justice offences and unnecessary detention in remand centres. Non-violent offenders suffering from substance addictions are disproportionately faced with the risk of increased detention time and “double charges” for use of illicit substances that is both a condition violation and an independent offense. The psychological effects associated with violating such conditions is counter-productive to a rehabilitation-oriented justice system. People suffering from conditions may feel forced to use in secret and may fear obtaining clean needle kits and access to other harm reduction resources. Abstention conditions effectively force people suffering from addictions to keep their use private, which increases the risk of overdose and decreases the likelihood that they will seek treatment independently out of fear of harsh legal consequences. There is the possibility of a successful section 12 *Charter* argument against the imposition of onerous bail conditions on people suffering from addictions as cruel and unusual punishment.

The federal government has taken steps to enable a more compassionate and individualized assessment of condition violations without requiring automatic charges. The new federal scheme may see a reduction in the remand population, but it remains to be seen if it has an impact in the frequency of abstention conditions ordered in Manitoba. The meth crisis in Manitoba requires cooperation from all levels of government as well as increased public health funding to treat people suffering from addictions in long term facilities.

**Keywords:** meth crisis; bail conditions; remand; addictions; administration of justice offences; Bill C-75

## I. INTRODUCTION

Manitoba is experiencing an unprecedented increase in methamphetamine use; straining health, law enforcement, court, and corrections resources. The current approach of ordering abstinence from substance conditions for non-violent offenders at the undertaking or judicial interim release stage is unreasonable. In similar circumstances, lower courts in other jurisdictions have refused to enforce abstinence clauses on alcoholics. People suffering from addictions who have committed non-violent offenses should not be ordered to abide by abstinence conditions without increased access to treatment resources. Tackling the “Meth Crisis” in Winnipeg requires a public health approach that has an emphasis on reasonable rehabilitation for accused persons.

Criminal charges by Winnipeg Police Services for methamphetamine possession has increased by 809% since 2012.<sup>1</sup> There has been a 1700% increase in methamphetamine related emergency room visits since 2013.<sup>2</sup> There is an average of ten to twenty Manitoba Liquor Store thefts per day in Winnipeg, which the Winnipeg Police Services are attributing to the increase in use of methamphetamine in the city.<sup>3</sup> There has been a 19% increase in property crime between 2017-2018 and a 77% increase in shoplifting under \$5000 in Winnipeg.<sup>4</sup> Prosecutions related to Methamphetamine use have increased 18,125% in the last twenty years.<sup>5</sup>

The “war on drugs” prohibition mentality in Canada has had the effect

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<sup>1</sup> Manitoba, Illicit Drug Task Force, *Recommendations to Reduce the Use and Effects of Illicit Drugs Within Manitoba’s Communities*, (Winnipeg: IDTF, 28 June 2019) at 1, online: <[www.winnipeg.ca/-Illicit-Drug-Task-Force-Report.pdf](http://www.winnipeg.ca/-Illicit-Drug-Task-Force-Report.pdf)> [perma.cc/367Q-EZXZ] [*Drug Task Force*].

<sup>2</sup> *Ibid.*

<sup>3</sup> “Retailers Face ‘Darkest Time in Winnipeg History’ as the Rates Surge, Security Firm CEO Says”, *CBC News* (30 October 2019), online: <[www.cbc.ca/news/canada/manitoba/shoplifting-thefts-liquor-stores-retailers-security-winnipeg-1.5340767](http://www.cbc.ca/news/canada/manitoba/shoplifting-thefts-liquor-stores-retailers-security-winnipeg-1.5340767)> [perma.cc/B4GU-W3MM].

<sup>4</sup> “2018 Annual Statistical Report” (last modified 20 November 2019), online (pdf): *Winnipeg Police Service* <[www.winnipeg.ca/police/AnnualReports/2018/2018\\_wps\\_annual\\_report\\_english.pdf](http://www.winnipeg.ca/police/AnnualReports/2018/2018_wps_annual_report_english.pdf)> [perma.cc/7SCL-2MB3] at 2.

<sup>5</sup> *Drug Task Force*, *supra* note 1 at 3.

of arbitrarily criminalizing people suffering from addictions.<sup>6</sup> This article will consider the treatment of persons suffering from substance addictions at the pre-conviction point in the criminal justice system, including the undertaking, the bail process and during remand detention. While improvements have been made to combat the devastating effects of addiction and its links to increased criminal activity in Manitoba at the sentencing phase, there is a substantial lack of resources for accused persons who are in the pre-conviction phase of the criminal justice process. Onerous undertaking conditions and judicial interim release conditions, excessive administration of justice offence charges and the ongoing remand overpopulation crisis are all significant issues within the Manitoba criminal justice system. As an important note, this paper is not meant to establish that perpetrators of violent crimes, firearms offences or gang-related activity such as high-level drug trafficking should be treated with excessive leniency. This paper is concerned with the treatment of people suffering from addictions who commit non-violent offenses, such as possession for personal use and administration of justice offenses, due to their addictions and ongoing drug use.

Continued disproportionate prosecution of non-violent drug related offenses committed by persons addicted to illicit drugs, specifically administration of justice offenses, is not an appropriate response, nor does it encourage rehabilitation. Persons suffering from addictions can be subject to a revolving door of charges based on onerous undertaking and interim release abstinence conditions that, in effect, make it more difficult for them to access rehabilitative treatments. Continuous contact with remand facilities and the criminal justice system has an erosion effect on section 11(d) and 11(e) *Charter* rights; there are strong arguments that both unreasonable interim release conditions and prolonged detention in remand facilities are a violation of section 12 of the *Charter*.

This article will first set out the background of law of the right to reasonable bail prescribed under section 11(e) of the *Charter*, following with a discussion the increasing trends administration of justice offenses and overcrowding of remand centres. This article will then set out the judicial treatment of abstinence conditions for alcoholics and the potential

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<sup>6</sup> Diane Riley, "Drugs and Drug Policy in Canada: A Brief Review & Commentary" (1998), online: *Canadian Foundation for Drug Policy* <[sencanada.ca/content/sen/committee/371/ille/library/riley-e.htm](http://sencanada.ca/content/sen/committee/371/ille/library/riley-e.htm)> [perma.cc/W38Z-X3AE].

application of that body of law to abstention conditions for people suffering from illicit substance addictions. The social and psychological effects of abstention conditions on people suffering from addictions themselves will then be explored; followed by an introduction and brief discussion of court-ordered treatment conditions.

This article will then explore some *Charter* issues that all of the above topics raise through a detailed discussion of sections 11(e) and 12 based on current academic research and jurisprudence. Next, the recent changes to the *Criminal Code* made by Bill C-75 will be examined with an emphasis on how these changes may impact the enforcement of abstention conditions. This article will finish with a look at how the provincial government of Manitoba is responding to the meth crisis with public health initiatives and recommendations on further steps.

## II. LEGAL BACKGROUND

### A. Right to Reasonable Bail

The *Canadian Charter of Rights and Freedoms* section 11(e) guarantees that any person charged with an offence has the right to not be denied reasonable bail without just cause.<sup>7</sup> This right has two distinct aspects: (1) the right to not be denied bail without “just cause” and (2) the right to “reasonable bail.”<sup>8</sup> This section of the paper will focus on the conditions that can be applied with judicial discretion onto accused persons and if certain conditions, such as abstention and treatment conditions on persons suffering from addictions, are objectively “reasonable” for the purposes of section 11(e).

When a person has been charged with a crime, they can be released before their trial on a judicial interim release, otherwise known as bail.<sup>9</sup> The accused can also be released with conditions imposed by the judge or justice so long as such conditions are justified by the Crown.<sup>10</sup> Release is to be ordered in accordance with the “ladder principle”, meaning that a more onerous form of release cannot be ordered unless it is shown by the Crown

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<sup>7</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

<sup>8</sup> *R v Antic*, 2017 SCC 27 at para 21 [Antic].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

why a “less onerous form is inappropriate.”<sup>11</sup> *Criminal Code* subsections 515(1) to (3) are the current codification of the ladder principle.<sup>12</sup> The least onerous form of release is without conditions, and the other provisions within subsection 515(2) are ordered in escalating restriction on the liberty interests of the accused.<sup>13</sup> Of interest to this paper is the meaning and intention behind the inclusion of the words “with such conditions as the justice directs” in every potential release term within section 515.<sup>14</sup>

Subsection 515(4) outlines the conditions that a justice may authorize as a part of the judicial interim release.<sup>15</sup> Such conditions included in the *Criminal Code* are: reporting to a designated person at ordered times, remaining within a certain area or jurisdiction, notification of change in address, abstaining from communicating with certain persons, abstaining from going to certain places, surrendering passports, and complying with any other condition specified.<sup>16</sup>

*R v Antic* sets out principles and guidelines for the application of bail provisions; in regard to subsection 515(4) the Court states:

Terms of release imposed under s. 515(4) may “only be imposed to the extent that they are necessary” to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person’s behaviour or to punish an accused person.<sup>17</sup>

Conditions imposed on an accused who is applying for judicial interim release must be connected to one of the three grounds for detention as articulated by subsection 515(10) of the *Criminal Code*.<sup>18</sup> These grounds are: (1) to ensure attendance in court; (2) public safety and the likelihood of reoffending upon release and; (3) maintaining confidence in the administration of justice.<sup>19</sup>

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<sup>11</sup> *Ibid* at para 29.

<sup>12</sup> RSC 1985, c C-46, ss 515(1)-(3) [*Criminal Code*].

<sup>13</sup> *Ibid*, s 515(2).

<sup>14</sup> *Ibid*, s 515.

<sup>15</sup> *Ibid*, s 515(4).

<sup>16</sup> *Ibid*.

<sup>17</sup> *Antic*, *supra* note 8 at para 67(j) [emphasis added].

<sup>18</sup> *Criminal Code*, *supra* note 12, s 515(10); *Antic*, *supra* note 8 at para 67.

<sup>19</sup> *Criminal Code*, *supra* note 12, s 515(10).

If an offender is an Indigenous person, reasonable bail includes the application of *Gladue* to their release assessment.<sup>20</sup> Reasonable bail must take into account what is reasonable for the Indigenous accused with consideration of the systemic issues that many Indigenous people are facing including surety requirements and their ability to abide by conditions.<sup>21</sup> Indigenous persons are overrepresented in prison populations as well as disproportionately experience issues with substance abuse, addiction and homelessness in Winnipeg.<sup>22</sup> It is important to note that while the issues that are affecting Indigenous people in terms of access to treatment and other systemic barriers in the justice system is a profoundly important area of research, this paper will be focusing on the experience of people in the bail process who suffer from drug addictions in general.

Despite the Court's insistence in *Antic* that conditions are not meant to punish an accused -but presumptively innocent – person, many conditions imposed instead appear to be less concerned with “primary and secondary grounds, and are more concerned with behaviour or character modification.”<sup>23</sup> Conditions that monitor and modify the behaviour of an accused prior to a finding of guilt are considered by some experts to be the equivalent of a punishment prescribed on an innocent person.<sup>24</sup> Conditions that are commonly imposed onto individuals released on bail that are not expressly articulated in the *Criminal Code* include curfews, drugs and alcohol abstinence orders, drug and alcohol treatment orders, bans on possessions of cell phones, computers and internet access and house arrest.<sup>25</sup> The imposition of conditions that cannot be reasonably complied with can be

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<sup>20</sup> “Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention” (2014) at 19, online (pdf): *Canadian Civil Liberties Association and Education Trust* <ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf > [perma.cc/895H-68RF] [CCLA, “Set Up to Fail”]: “[T]he court is required to take judicial notice of the unique systemic factors which have affected aboriginal people in Canadian society in order to place in the proper context the individual applying for bail. Part of this context is the fact that aboriginal people are disproportionately denied bail.”

<sup>21</sup> *Ibid.* See e.g. *R v Omeasoo*, 2013 ABPC 328 [Omeasoo].

<sup>22</sup> Josh Brandon & Christine Maes Nino, “The Winnipeg Street Census 2018: Final Report” (2018), online (pdf): *Social Planning Council of Winnipeg* <streetcensuswpg.ca/wp-content/uploads/2018/10/2018\_FinalReport\_Web.pdf> [perma.cc/BE72-P633].

<sup>23</sup> “Reasonable Bail?” (2013) at 10, online (pdf): *John Howard Society of Ontario* <johnhoward.on.ca/wp-content/uploads/2014/JHS-Reasonable-Bail-report-final.pdf> [perma.cc/5SLQ-AQ9Z] [John Howard Society, “Reasonable Bail”].

<sup>24</sup> *Ibid.*

<sup>25</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 10.

considered to be unconstitutional, and an infringement of an accused's section 11(e) rights.<sup>26</sup>

A recent study in Ontario considered one hundred and fifty-eight accused persons with conditions imposed on their judicial release: ninety-nine people were required to abstain from drugs, ninety-seven were required to abstain from alcohol and twelve were required to enter court mandated programs or treatment.<sup>27</sup> Typically, accused persons are subject to an average of six additional conditions as a part of their release.<sup>28</sup> While many conditions do have merit and often a nexus with the crime allegedly committed by the accused, there is a trend for some conditions to be vague, ambiguous, or focus on character improvement such as “seek treatment” for drug or alcohol dependency.<sup>29</sup> Where conditions imposed included abstention from drugs or alcohol, the likelihood of a breach increases.<sup>30</sup>

Abstention conditions are not limited to judicial interim release. As per subsection 499(2)(g) of the *Criminal Code*, officers who are releasing accused persons from custody on an undertaking are also expressly permitted by the *Criminal Code* to authorize alcohol and drug abstention conditions.<sup>31</sup> These conditions are imposed on an accused by peace officers, often prior to the appearance of the accused in court. Paragraph 11(e) applies broadly to all forms of interim release, including undertaking to appear.<sup>32</sup>

## B. Administration of Justice Offences

*Criminal Code* subsection 145(3) creates the offence of failing to comply with a condition of undertaking or recognizance, meaning that any person who fails to abide by the conditions imposed on them as a part of the judicial interim release or undertaking is liable to be charged with a separate hybrid offence for violating those conditions:<sup>33</sup>

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<sup>26</sup> *Ibid* at 2.

<sup>27</sup> John Howard Society, “Reasonable Bail”, *supra* note 23 at 11.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* (this study was conducted in Ontario. A Manitoba defense counsel interviewed for the purpose of this paper has not experienced excessively vague conditions ordered in Manitoba courts).

<sup>30</sup> *Ibid* at 12.

<sup>31</sup> *Criminal Code*, *supra* note 12, s 499(2)(g).

<sup>32</sup> *R v Pearson*, [1992] 3 SCR 665 at para 48, [1992] SCJ No 99 [*Pearson*]. A discussion of the changes to this section as set out in Bill C-75 will occur later on in this paper.

<sup>33</sup> *Supra* note 12, s 145(3), as it appeared on 17 December 2019.

Failure to comply with condition of undertaking or recognizance

145(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance<sup>34</sup>

Generally, section 145 governs all offences collectively known as administration of justice offences, which are offences that occur prior to sentencing that are the result of breaching a judicial order or judicially-created offences.<sup>35</sup>

In 2011/2012 administration of justice offences that were the result of a breach of a bail condition made up 44% of cases where the most serious charge involved was the administration of justice offence itself.<sup>36</sup> In 2014/15, 51% of cases where the administration of justice offence was the most serious offence the accused was charged with, a custodial sentence was ordered.<sup>37</sup> In 2014/2015 there were approximately 75,000 ongoing administration of justice cases throughout Canada.<sup>38</sup> Manitoba has the second highest rate of failure to comply with an order charges in Canada.<sup>39</sup> Webster and colleagues propose that the reason for the increase in remand populations is due to the evolution of a culture of risk-aversion behaviour by criminal justice decision makers.<sup>40</sup> The idea that increasing conditions for pre-trial release will reduce crime is actually creating more “crime” where administration of justice offences are increasing despite a decline in the total crime and violent crime rates.<sup>41</sup> Release of some accused persons can leave the justice system vulnerable to criticisms from the public and reduce

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, s 145; Marie Manikis & Jess De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences” (2019) 60:3 C de D 873 at 877, 879.

<sup>36</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 8 (in both criminal and federal courts).

<sup>37</sup> Department of Justice, *Bail Violations, AOJOs and Remand* (Fact Sheet) (Ottawa: Research and Statistics Division, October 2017), online: <[www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/oct01.html](http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/oct01.html)> [perma.cc/4226-PR2M] [DOJ, *Bail*].

Canada, Office of the Federal Ombudsman for Victims of Crime, *Administration of Justice Offenses: Getting Fair Outcomes for Victims in Canada’s Criminal Justice System* (Ottawa: OFOVC, 2017), online: <[www.victimsfirst.gc.ca/res/pub/GFO-ORE/AJO.html](http://www.victimsfirst.gc.ca/res/pub/GFO-ORE/AJO.html)> [perma.cc/ZA7D-ZGUL].

<sup>39</sup> DOJ, *Bail*, *supra* note 37.

<sup>40</sup> Cheryl Marie Webster, Anthony N Doob & Nicole M Meyers, “The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada” (2009) 21:1 Current Issues Crim Justice 79 at 99.

<sup>41</sup> *Ibid.*

confidence in the criminal justice system as a whole if such persons reoffend while on pre-trial release.<sup>42</sup> Conversely, the benefits of releasing an accused person prior to trial are not always appreciated by the general public.<sup>43</sup>

Administration of justice offences do not disappear if the underlying charge is resolved, even with an acquittal entered for the original offence.<sup>44</sup> Additionally, because breach of conditions are separate criminal offences, appearing in bail court for a breach of condition in addition to the underlying primary offence makes it more likely that more onerous conditions, or possibly prolonged detention may be imposed on an accused.<sup>45</sup> Often once an accused person is charged with an administration of justice offence and are released they are usually subject to more conditions than they were for the initial offense.<sup>46</sup>

In practice, administration of justice offences can have the effect of “cycling” people through the justice system for longer periods of time and with a significant increase in punitive potential than what would be contemplated for the original charge.<sup>47</sup>

### C. Remand Centre Overcrowding

There is a disproportionate amount of people detained in remand centres awaiting trial compared to those that have been found legally guilty of an offence.<sup>48</sup> Over the last ten years in Manitoba, an average of 66% of the population of remand centres were accused persons who were waiting on disposition of their charges.<sup>49</sup> In 2007, Manitoba had the highest average remand count in Canada; 90 per 100,000 residents.<sup>50</sup> It is important to remember that accused persons who are remanded have yet to be convicted of a crime, and are therefore legally innocent.

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<sup>42</sup> *Ibid* at 100.

<sup>43</sup> *Ibid* at 101.

<sup>44</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 9.

<sup>45</sup> *Ibid* at 9–10.

<sup>46</sup> Senate, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada: Final Report of the Standing Senate Committee on Legal and Constitutional Affairs* (June 2017) at 139 (Chair: Hon Bob Runciman), online: <[sencanada.ca/en](http://sencanada.ca/en/perma.cc/ZZ5T-WCRG)> [perma.cc/ZZ5T-WCRG] [Delaying Justice].

<sup>47</sup> John Howard Society, “Reasonable Bail”, *supra* note 23 at 10.

<sup>48</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 11.

<sup>49</sup> Manitoba Justice, *Remand Percentage* (Manitoba: Manitoba Justice, last visited 16 May 2020), online: <[www.gov.mb.ca/justice/cjism/remand.html](http://www.gov.mb.ca/justice/cjism/remand.html)> [perma.cc/5GLC-5RLD].

<sup>50</sup> Webster, Doob & Myers, *supra* note 40 at 84.

Remand centres and pre-trial detention have long been criticized for the harsh treatment of legally innocent people.<sup>51</sup> Pre-trial detention can cause personal hardships such as loss of employment, negative financial outcomes, loss of housing, loss of access to treatment programs, and infrequent visitation with family.<sup>52</sup> The centres themselves have been criticized for overcrowding of inmates, lack of access to medical care, and heightened violence.<sup>53</sup>

### D. Judicial Treatment of Abstention Conditions on Alcoholics

The Alberta Provincial Court case, *R v Omeasoo* dealt with an abstention from alcohol condition imposed on a woman who suffered from alcoholism as a part of her release conditions for a minor offence.<sup>54</sup> Omeasoo was later involved in an assault, but because she was intoxicated at the time, she was also charged with a breach of her undertaking despite being the victim of the assault.<sup>55</sup> Omeasoo was an Indigenous person, and the Provincial Court Justice did take this into account, as well as her upbringing by alcoholic parents.<sup>56</sup> The Court found that reasonable conditions must be “oriented towards ensuring compliance with the goals of judicial interim release. It must operate in such a fashion to ensure the accused’s attendance in court, ensure the safety of the public and/or maintain confidence in the administration of justice.”<sup>57</sup> Conditions that an accused “cannot or almost certainly will not comply with” were not found to be reasonable in *Omeasoo*.<sup>58</sup> *Omeasoo* used the analogy of ordering an alcoholic not to drink is the same in principle as ordering a clinically depressed person to “just cheer up.”<sup>59</sup>

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<sup>51</sup> Nathan Jon Shubael Gorham, *Wrongful Pre-Trial Detention in the Toronto Bail System* (LLM Thesis, University of Toronto, 2015) [unpublished], online: <space.library.utoronto.ca/bitstream/1807/89032/3/Gorham\_Nathan\_J\_201511\_LLM\_thesis.pdf> [perma.cc/ZP8P-RWZA].

<sup>52</sup> *Ibid* at 53–54.

<sup>53</sup> *Ibid* at 54.

<sup>54</sup> *Supra* note 21.

<sup>55</sup> *Ibid* at para 6.

<sup>56</sup> *Ibid* at para 8.

<sup>57</sup> *Ibid* at para 30.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* at para 37.

A similar case arose in Nova Scotia, *R v Denny*, where the accused was released on judicial interim release with an alcohol abstention condition.<sup>60</sup> She was found intoxicated in a private residence by the police with no recollection of why the police were called.<sup>61</sup> The Court found that ordering abstention conditions on alcoholics in some cases may put the accused's health and well-being at risk if they are suffering from alcohol addiction.<sup>62</sup> *Denny* also cites studies that make the strong proposition that "prohibiting someone with an alcohol addiction from having any access to it may give rise to potentially lethal withdrawal effects unless arrangements are put in place for immediate access to emergency medical treatment."<sup>63</sup> The judge in *Denny* refused to enforce the abstention condition because the Court did not have the jurisdiction to order the accused to access and enter immediate treatment.<sup>64</sup>

*Omeasoo* and *Denny* can be read to stand for the principle that alcoholics should not be required to abstain from alcohol as a condition of their release if it is highly unlikely for them to be able to do so or if their health would be at immediate risk if they were denied access to alcohol. Abstention conditions should, rather, be tailored to the individual accused and be reasonable for the accused to comply with under reasonable circumstances. Such reasonable circumstances may include abstention conditions to further the objectives of an ongoing treatment plan. There must also be consideration of if the accused is agreeing to abide by a condition to secure release, where actual compliance with the condition is wholly unrealistic.<sup>65</sup>

However, the provincial judge in *Denny* made it clear that the decision was influenced by the fact that alcohol is a legal and a highly available product that is sold to people who are legally allowed to purchase it.<sup>66</sup> *Denny* makes an implicit distinction made in this line of cases between alcoholism and an addiction to illicit drugs – namely, that the court considers if the substance itself that is the source of addiction is legal.

Conditions that require the abstention from illicit drugs for accused persons charged with drug-based offences or with offences they allegedly committed while under the influence of illicit substances will typically meet

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<sup>60</sup> 2015 NSPC 49 [*Denny*].

<sup>61</sup> *Ibid* at para 8.

<sup>62</sup> *Ibid* at para 15.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* at para 17.

<sup>65</sup> *Omeasoo*, *supra* note 54 at para 40.

<sup>66</sup> *Supra* note 60 at para 17.

the secondary detention criteria of preventing the accused from reoffending. Some advocates and academics in British Columbia are pushing to reframe the narrative of addiction as a criminal justice issue to an issue centered in public health.<sup>67</sup>

### *1. The Effect of Abstention Conditions on People Suffering from Drug Addictions*

Outside of the medical dangers associated with withdrawal, abstention conditions can force persons suffering from addictions to use drugs in secret, consequentially avoiding safe spaces and resources, such as clean needle kits, out of fear of breaching such conditions.<sup>68</sup> Fear of punishment for breaching abstention conditions can also force persons suffering from addictions to refuse to seek help in the event of a potential overdose, or to fear seeking out resources that offer addictions support. Abstention conditions may cause people suffering from addictions to be dishonest with probation officers, lawyers, and other members of the law enforcement community.<sup>69</sup> In effect, abstention conditions may actually operate in opposition of the rehabilitation goals of the Court when ordering them; persons with addictions are less likely to seek help and treatment for fear of further criminal prosecution, harsher conditions, or increased jail time.<sup>70</sup> In practice, 40.9% of abstention conditions ordered in Manitoba are regarding the consumption of illicit drugs (45.5% are for alcohol).<sup>71</sup>

Adding abstention from illicit drugs as a condition to judicial interim release has been considered a double punishment for people suffering from drug addictions because of the illegality of the substance.<sup>72</sup> Persons who are suffering from narcotic addictions may face charges for breach of conditions and possession of narcotics as they are two separate offenses.<sup>73</sup> If a person

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<sup>67</sup> Haley Hrymak, *The Opioid Crisis as a Health Crisis Not Criminal Crisis: Implications for the Criminal Justice System* (LLM Thesis, University of British Columbia, 2018) [unpublished], online: <[open.library.ubc.ca/cIRcle/collections/ubctheses](http://open.library.ubc.ca/cIRcle/collections/ubctheses)> [perma.cc/8ARZ-S36H].

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at 51.

<sup>70</sup> *Ibid.*

<sup>71</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 56.

<sup>72</sup> John Howard Society, “Reasonable Bail”, *supra* note 23 at 12.

<sup>73</sup> Manakis & De Santi, *supra* note 35 at 895.

has abstinence conditions through a probation order as well, they may be held accountable for three separate offences based on the one behaviour.<sup>74</sup>

### E. Treatment Conditions

In some cases, it may be appropriate for the court to order treatment as a condition of judicial interim release; but some experts in British Columbia argue that the increased trend to order rehabilitation plans as a component of bail plans is contrary to the purpose of bail and is in actuality an attempt to change the character of the accused.<sup>75</sup> Treatment conditions ordered at the interim release stage are not as common in Manitoba as in Ontario.<sup>76</sup> The success of a person fulfilling these conditions depends almost entirely on the availability of programs and resources that suit their needs.

In Manitoba, one advocate spoke to the wait time of getting into treatment centres, even if the treatment condition was proposed by defense counsel... “It’s not uncommon to have a condition that the accused attend AFM for an assessment ... [but] ...even if the accused is successful in getting bail, they could sit for months in jail waiting for a space to open up.”<sup>77</sup>

Currently in Manitoba, there are three types of drug treatment services offered for people suffering from addictions: Rapid Access to Addictions Medicine clinics (“RAAM Clinics”), detox centres, and long-term treatment. Crown organizations, such as the Addictions Foundation of Manitoba, offer long-term treatment programs in Winnipeg; as of January 2019, the wait time to access treatment was fifty-two days for men and two hundred and six days for women.<sup>78</sup> Other non-profit agencies in Winnipeg, such as Main Street Project, offer emergency non-medical detoxification but do not offer long-term treatment. RAAM clinics are newer initiatives that have locations in Winnipeg, Brandon, Thompson, and Selkirk.<sup>79</sup> These clinics have very limited hours (some only open two hours per week) and do not offer detox or long-term treatment services. RAAM clinics do coordinate with mental

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<sup>74</sup> *Ibid.*

<sup>75</sup> Hrymak, *supra* note 67 at 52.

<sup>76</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 59.

<sup>77</sup> Defence Counsel – Manitoba, Remarks (2019) [Defence Counsel] (“AFM” refers to the Addictions Foundation of Manitoba).

<sup>78</sup> Sean Kavanagh, “Wait Time for Addiction Treatment Rises, Manitoba Liberals Say”, *CBC News* (14 January 2019), online: <[www.cbc.ca/news/canada/manitoba/funding-treatment-wait-times-addictions-mental-health-manitoba-1.4977568](http://www.cbc.ca/news/canada/manitoba/funding-treatment-wait-times-addictions-mental-health-manitoba-1.4977568)> [perma.cc/5LMA-SBAG].

<sup>79</sup> *Ibid.*

health professionals and can prescribe addiction combating drugs such as naloxone and methadone.<sup>80</sup> There are also privately-owned facilities that offer long-term treatment and rehabilitation for a fee.

### III. DISCUSSION: *CHARTER* ISSUES

#### A. Abstention Conditions

The *Charter* section 11(e) guarantees the right to reasonable bail free from onerous conditions. The jurisprudence from lower courts in other jurisdictions shows that abstention conditions should not be imposed on alcoholics that have no reasonable ability of compliance with such conditions. It flows from this argument that the same type of conditions should not be imposed on persons suffering from substances addictions involving illicit drugs. There is general consensus in the literature that onerous conditions operate to effectively punish the accused prior to a finding of guilt through due process, which is contrary to the presumption of innocence protected by section 11(d) of the *Charter*.<sup>81</sup>

Treatment conditions can be considered a more reasonable route for the objective of treating the root of substance abuse issues, but the order for treatment must serve one of the three objectives of detention in order to be constitutionally valid. For crimes involving illicit drugs or where the accused was intoxicated at the time of the offence, treatment conditions may not be seen as arbitrary and unreasonable to order. In Manitoba, one advocate stated that it was common for both the defence counsel and the Court to include treatment conditions as a component of the bail plan.<sup>82</sup> The primary barrier to release where acceptance into a treatment program is a condition is the substantial wait time associated with access to publicly funded treatment resources.

In the article, “Antic: What the Supreme Court said and Did Not Say about Bail”, Fitzgerald proposes that the conditions imposed as per subsection 515(4) are not qualitative “rungs” on the ladder as set out in

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<sup>80</sup> Joel Schlesinger, “Help in a Hurry” (2018), online: *Wave* <[www.wavemag.ca/2018/11/help-in-a-hurry.php](http://www.wavemag.ca/2018/11/help-in-a-hurry.php)> [perma.cc/UTF2-QSZX] (Access to services in Northern and rural areas is even more onerous. The geographical limits of access to addictions services is unfortunately outside the scope of this paper but should be acknowledged as a serious barrier to addiction treatment in of itself).

<sup>81</sup> John Howard Society, “Reasonable Bail”, *supra* note 23 at 10. The *Charter* protected right to presumption of innocence is discussed further later on in this paper.

<sup>82</sup> Defense Counsel, *supra* note 77.

subsection 515(2).<sup>83</sup> The addition of conditions to the appropriate form of release, or “rung”, is a form of judicial consideration of the individual characteristic of the accused, and bail courts “should not approach the imposition of conditions with the same hesitance with which they consider imposing a stricter form of release.”<sup>84</sup> The imposition of conditions prevents the Court from having to move up the ladder to a more restrictive form of release.<sup>85</sup>

Conditions imposed should be connected to a primary, secondary, or tertiary ground. The bail system has flaws, and the imposition of abstention conditions is a significant challenge and threat to the liberty interests of people with addictions. Abstention conditions are applied differently throughout every jurisdiction in Canada.<sup>86</sup> However, there are situations where abstention conditions are appropriate, such as where the individual is a threat to public safety when they are intoxicated.<sup>87</sup> An accused with an unreasonable condition as a part of their judicial interim release would not have a practicable section 52 remedy – the laws governing the bail process are not unconstitutional. In *Antic*, the SCC found that proper judicial interpretation of the *Criminal Code* bail provisions did not amount to a finding that the law itself engaged section 11(e).<sup>88</sup> An individual accused could seek a 24(1) remedy, where the action of the government is infringing their *Charter* protected rights.<sup>89</sup> However, if Fitzgerald’s interpretation of *Antic* is to be followed, and so long as there is no error in application of the ladder principle, it is possible that onerous conditions may not engage section 11(e).

In his article entitled “Beyond Boudreault: Challenging Choice, Culpability, Punishment”, Skolnik takes a different approach to the interaction of onerous bail conditions and the *Charter* when analyzing the Supreme Court’s decision in *R v Boudreault*.<sup>90</sup> In *Boudreault*, the Court found that the imposition of mandatory victim surcharges

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<sup>83</sup> Oliver Fitzgerald, “*Antic*: What the Supreme Court Said and Did Not Say about Bail” (WL Can, 2018).

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 56.

<sup>87</sup> *Ibid* at 57.

<sup>88</sup> *Antic*, *supra* note 8 at para 61.

<sup>89</sup> Terry Skolnik, “Beyond Boudreault: Challenging Choice, Culpability, Punishment” (WL Can, 2019).

<sup>90</sup> *Ibid.*

disproportionately affected poor individuals, therefore these charges amounted to cruel and unusual punishment and were a breach of section 12 of the *Charter*.<sup>91</sup> Skolnik argues that *Boudreault* supports the proposition that bail conditions requiring abstinence from both alcohol and drugs are “unconstitutional where defendants’ personal circumstances severely restrict their freedom of choice whether to comply with those conditions.”<sup>92</sup> Freedom of choice for people suffering from addictions has been discussed by the Supreme Court before in *Insite*, where “severe drug addiction results in a loss of control that impairs the free choice to do drugs”; the Court in *Insite* rejected the argument that choice played a factor in health issues associated with addictions.<sup>93</sup>

Section 12 of the *Charter* is the right to not to be subjected to any cruel and unusual treatment or punishment.<sup>94</sup> If a punishment is found to be “grossly disproportionate” under section 12, there is a “constitutional remedy in relation to the penalty, but” the criminalization of the conduct itself remains valid and “punishable by an alternative form of penalty.”<sup>95</sup> In *R v Smith*, the Court was tasked with determining the constitutional validity of subsection 5(2) of the *Narcotics Control Act*:

The undisputed fact that the purpose of s. 5(2) of the Narcotic Control Act is constitutionally valid is not a bar to an analysis of 5(2) in order to determine if the minimum has the effect of obliging the judge in certain cases to impose a cruel and unusual punishment, and thereby is a *prima facie* violation of s. 12.<sup>96</sup>

Section 12 works in conjunction with section 7 (everyone has the right not to be deprived of like liberty and security of the person) and section 9 (protection against arbitrary detention) of the *Charter* when the state is imposing a “treatment or punishment” on individuals.<sup>97</sup> The standard for cruel and unusual punishment is gross disproportionality; the test as set out by the Supreme Court is if Canadians would find the punishment

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<sup>91</sup> 2018 SCC 58 [*Boudreault*].

<sup>92</sup> Skolnik, *supra* note 89.

<sup>93</sup> *Ibid*; *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at paras 101, 106.

<sup>94</sup> *Supra* note 7, s 12.

<sup>95</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 149.

<sup>96</sup> *R v Smith*, [1987] 1 SCR 1045 at para 52, 1987 CarswellBC 198 [*Smith*] [emphasis added].

<sup>97</sup> *Charter*, *supra* note 7, ss 7, 9, 12.

abhorrent or intolerable, or if the “punishment prescribed is so excessive as to outrage standards of decency.”<sup>98</sup>

Pre-trial interim release conditions would not meet the first arm of the test for “punishment” as articulated by the Supreme Court in *R v KRJ*, where (1) it must be a consequence of a conviction.<sup>99</sup> The Court has not yet defined what “treatment” means in the context of section 12, but has referred to the broad definition of treatment to mean “a process or manner of behaving towards or dealing with a person or thing”<sup>100</sup> and “there must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute ‘treatment’ under section 12.”<sup>101</sup> In *Charkaoui v Canada*, the Supreme Court found that detention without the means to challenge the terms may render the detention arbitrarily indefinite and that “onerous conditions of release that seriously restrict a person’s liberty without affording an opportunity to challenge the restrictions” may also be cruel and unusual.<sup>102</sup> Whether conditions of judicial interim release meet the definition of a “treatment” is questionable as it is possible to apply to vary the terms of a release order as set out in subsection 523(2) of the *Criminal Code*.<sup>103</sup> Skolnik makes the argument that merely because judicial discretion exists, personal circumstances of the accused may increase the difficulty of applying to the point of effectual impossibility.<sup>104</sup> For example, if the person suffering from addiction is dependent on legal aid for their representation, it is possible that access to variation applications would be difficult based on funding concerns or the perceived inaccessibility to the nuances of the justice system. If the Court were to accept this line of reasoning, it is possible that release conditions could be found to be “treatments” and therefore engaging section 12.

The next step in the section 12 analysis is to determine if the treatment is cruel and unusual such that it is grossly disproportionate. *Boudreault*

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<sup>98</sup> *Smith*, *supra* note 96 at para 54; *R v Morrissey*, 2000 SCC 39 at para 26.

<sup>99</sup> 2016 SCC 31.

<sup>100</sup> *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 735, 90 DLR (4th) 289.

<sup>101</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 611, 107 DLR (4th) 342.

<sup>102</sup> 2007 SCC 9 at para 96.

<sup>103</sup> *Criminal Code*, *supra* note 12, s 523(2).

<sup>104</sup> Skolnik, *supra* note 89.

shows the Court's willingness to look at vulnerable groups of offenders who "live in serious poverty...have precarious housing situations... [and] struggle with addiction" when determining if a specific punishment or treatment is disproportionate to that group.<sup>105</sup> Consideration of individual circumstances is not a new concept to the Supreme Court; *R v Gladue* and later, *R v Ipeelee*, both affirm that a framework for consideration of aboriginal offenders must be applied in sentencing and supervision orders, or LTSO's, post-release.<sup>106</sup> In *Ipeelee*, the Court also states "there is nothing in the *Gladue* decision which would indicate that the background and systemic factors should not also be taken into account for other, non-Aboriginal offenders."<sup>107</sup>

Abstention conditions are ordered with judicial discretion; they are not mandatory and they can be varied by application to the Court. Skolnik's reasoning post-*Boudreault* is valid for a section 12 claims against mandatory fines for systemically disadvantaged groups, it is unclear that even if bail conditions passed the threshold for "treatment" that they would then be found to be so grossly disproportionate by the Court to be a violation of section 12. From an academic perspective, the argument is viable enough to proceed with a chance of success on a case-by-case basis. However, from a policy perspective, pursuing section 12 claims based on abstention conditions could be a burden on limited legal aid resources. Such action could leave courts open to an onslaught of claims in cases where judicial interim release abstention conditions were validly enacted and in the public interest to impose. This has the potential to undermine the intent and purpose of the bail system as a whole where abstention conditions are actually appropriate.

## B. Remand Overcrowding

Accused persons who are in remand awaiting trial are legally innocent people subject to state detention and therefore a restriction on their *Charter* protected section 7 right to life, liberty, and security of the person, as well as a potential infringement of the presumption of innocence under section 11(d) of the *Charter*.<sup>108</sup> Prolonged detention in remand centres is, in effect,

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<sup>105</sup> *Supra* note 91 at paras 54, 86.

<sup>106</sup> *R v Gladue*, [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385; *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

<sup>107</sup> *Supra* note 106 at para 77.

<sup>108</sup> Gorham, *supra* note 51 at 56.

a punitive measure on legally innocent persons. Conditions can be so harsh that time served in remand is eligible for a 1.5 day credit, however, if an accused is acquitted there is no recourse for the time they spent in detention prior to their trial.<sup>109</sup> Often pleading guilty to the charges results in less time spent in remand than if the accused follows through in asserting their right to a trial.<sup>110</sup> There is a positive correlation with being held in remand and pleading guilty – some people will plead guilty just to escape remand conditions.<sup>111</sup> There is also a positive correlation with an accused being subject to pre-trial detention and ultimately being found guilty.<sup>112</sup>

Administration of justice offences accounted for 68% of admissions to remand in 2008/2009.<sup>113</sup> There is typically no access to treatment for addictions in remand centres for accused persons, in contrast to the options for treatment and alternative sentencing available for sentenced offenders.<sup>114</sup> Other advocates believe that the treatment of accused persons in remand centres may also be eligible for a section 12 application for cruel and unusual punishment and a 24(1) remedy.<sup>115</sup>

#### IV. DISCUSSION: BILL C-75, SOLUTIONS, AND CRITICISMS

There are clear *Charter* issues that can be raised surrounding abstention conditions and the bail process in general. Parliament enacted Bill C-75 in part as a response to the mounting criticism to the bail system.

##### A. Undertakings

Bill C-75 removed the express mention of abstention from drugs and alcohol conditions as conditions a peace officer can order on an undertaking to appear.<sup>116</sup> Subsection 501(3)(k) of Bill C-75 still allows for a

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<sup>109</sup> CCLA, “Set Up to Fail”, *supra* note 20 at 9.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at 10.

<sup>112</sup> *Ibid.*

<sup>113</sup> DOJ, *Bail*, *supra* note 37.

<sup>114</sup> *Delaying Justice*, *supra* note 46 at 135.

<sup>115</sup> Justin Ling, “Canada’s Prisons are Failing” (12 August 2019), online: *The Canadian Bar Association* <[www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing](http://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing)> [perma.cc/RS5Y-P55].

<sup>116</sup> Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 2nd Sess, 42nd Parl, 2019, cl 215 [Bill C-75].

discretion when awarding “any other specified condition for ensuring the safety and security of any victim or any witness to the offence.”<sup>117</sup> If peace officers continue to impose abstention conditions on undertaking to appear notices now that Bill C-75 has come into force, the validity of such notices may be subject to an argument of statutory interpretation: removal of the express provision authorizing the ordering of abstention conditions may have indicate that it is Parliament’s intent to limit or eliminate their use in the undertaking process.

### 1. *Judicial Interim Release Conditions*

The *Criminal Code* previously did not authorize abstention from drug and alcohol conditions under judicial interim release.<sup>118</sup> Bill C-75 did not change judicial discretion to order additional reasonable conditions under the new subsection 515(4)(f).<sup>119</sup>

### 2. *Administration of Justice Offenses*

The most significant change that will impact people with addictions who fail to comply with abstention conditions are the changes to section 524 of the *Criminal Code*, which was previously titled “Arrest of Accused on Interim Release” but has been renamed to “Proceedings Respecting Failure to Comply with Release Conditions.”<sup>120</sup> Subsection 145(3), which makes it an offence to fail to comply with conditions of orders and undertaking remains largely unchanged in substance.<sup>121</sup>

*Criminal Code* subsection 524(4) previously governed the “Retention of Accused”:

(4) Where an accused described in paragraph (3)(a) is taken before a judge and the judge finds

(a) that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance...

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<sup>117</sup> *Ibid.*

<sup>118</sup> *Criminal Code*, *supra* note 12, s 515(4).

<sup>119</sup> *Ibid.*, s 515(4)(f) (becomes 515(4)(h), comply with any other reasonable conditions specified in the order that the justice considers desirable); Bill C-75, *supra* note 116.

<sup>120</sup> *Criminal Code*, *supra* note 12, s 524; Bill C-75, *supra* note 116, cl 234 (changed *Criminal Code* sections 524 to 523.1).

<sup>121</sup> Bill C-75, *supra* note 116 (*Criminal Code*, *supra* note 12, s 145(3) became s 145(4) “failure to comply with undertaking” and 145(5) “failure to comply with order.” The penalties remain the same).

he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).<sup>122</sup>

This section substantially restricted the options of the judge when dealing with violations of conditions and the onus is on the accused to show why detention is not justified in the circumstances. The new subsection 523.1(3) in Bill C-75 expanded the powers of judges to properly assess the circumstances of the condition breach:

Powers- Judge or Justice

(3) If the judge or justice who hears the matter is satisfied that the accused failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the judge or justice shall review any conditions of release that have been imposed on the accused and may, as the case may be,

(a) take no action;

(b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and, as the case may be,

(i) make a release order under section 515, or

(ii) if the prosecutor shows cause why the detention of the accused in custody is justified under subsection 515(10), make an order that the accused be detained in custody until the accused is dealt with according to law and if so detained, the judge or justice shall include in the record a statement of the judge's or justice's reasons for making the order;<sup>123</sup>

The new approach to administration of justice offences is much more compassionate and allows for consideration of individual circumstances, and the circumstance of the breach to be taken into account when determining if the accused should be detained as a consequence of the breach. A violation of a condition that did not cause any harm to a victim or property will automatically lead to detention with a reverse onus on the accused will no longer be the default position. Under the new provisions, the Crown must show why detention is necessary. In theory, if a condition is unreasonable or too onerous such that it will be impossible for the accused to comply with it, and the breach did not cause harm, the judge or justice does not have to cancel the release and order detention. The judge or justice

<sup>122</sup> *Supra* note 12, ss 145(3), 524(4) [emphasis added].

<sup>123</sup> Bill C-75, *supra* note 116, cl 234 [emphasis added].

can cancel the onerous release order and make a new release order under section 515 or dismiss the administration of justice charge altogether.<sup>124</sup>

The federal government's approach is consistent with the belief that abstention conditions are warranted in some cases to protect the public from accused offenders that truly are a risk if they are intoxicated. Some advocates disagree with this approach: "[i]t is positive to give discretion to not lay charges... [but it would be better to] remove stupid non-violent, non-dangerous breaches from the code altogether."<sup>125</sup> The *Criminal Code* still allows for discretionary orders of abstention clauses; violation of these clauses still require a hearing to determine the consequences; court time and resources will still be used in the process.

This approach to administration of justice offenses will hopefully address issues with overpopulation in remand centres. What it does not do is address the concerns and fear of people suffering from addictions revolving in and out of the justice system for minimal breaches of onerous conditions. Discretion to vary the consequences of the breach does not remove the fear associated with violating a court order. Addicts may still feel the need to avoid safe spaces and use in secret to avoid law enforcement intervention and constant contact with the criminal justice system. Varying the consequences does not necessarily make a violation of a condition less stressful for the people suffering for addictions; the social isolation and fear of seeking resources to help with addictions will still exist despite the changes to the *Criminal Code*.

There is only so much that the federal government can do, or is willing to do, to mitigate the disproportionate impact that abstention conditions have on people suffering from addiction.<sup>126</sup> Bill C-75 is a step in the right direction, but the changes are still recent enough that it remains to be seen if the new legislation actually has led to a reduction of abstention conditions ordered overall. Bill C-75 may ultimately have no effect on the frequency of conditions ordered; but it appears that application of the new administration of justice provisions may reduce unnecessary detention and escalating penalties for people already struggling with addictions.

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<sup>124</sup> *Ibid.*

<sup>125</sup> Justin Ling, "Trial and Error: Criminal Justice Reform" (24 May 2018), online: *The Canadian Bar Association* <[www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/trial-and-error-criminal-justice-reform](http://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/trial-and-error-criminal-justice-reform)> [perma.cc/9L3F-QNSU].

<sup>126</sup> Hrymak, *supra* note 67 at 75 (some advocates call for decriminalization of substances for personal use, which would be in the power of the federal government. A discussion on the politics and practicality of decriminalization is outside the scope of this paper).

Addiction is not a solely criminal matter; many academics, health organizations, and advocates are calling for increased funding for treatments, detox, and counselling that can help treat the root cause of addictions.<sup>127</sup> Reshaping the provincial approach to the meth crisis as a health issue and not primarily a matter of criminality is an important and necessary step to reduce addictions and the increase in crime related to substance abuse.

## B. Manitoba's Approach

In June 2019, the Government of Manitoba's Illicit Drug Task Force released their final report *Recommendations to reduce the use and effects of illicit drugs within Manitoba's communities*.<sup>128</sup> Recommendations in the report included: developing recreation activities, increase 24/7 safe spaces, expand the capacity of Winnipeg Drug Treatment Court, expand Drug Treatment Court to other cities, co-ordinate a "continuum of care" including increasing detoxification centres and increasing long-term care, expanding RAAM clinics and establishment of a centralized harm-reduction distribution point (for clean needle kits and access to other life-saving tools such as naloxone).<sup>129</sup> The report did not go beyond making recommendations to establish how such changes should be implemented in the province. The report also did not go so far as to recommend safe injection sites, despite evidence from Vancouver indicating that safe injection sites are reducing harm and overdose deaths by 35%.<sup>130</sup>

In the 2019 fall election, the Conservative government ran on a platform promising \$20 million dollars for thirty beds in a new provincially run short-term detox facility, new recovery and drop in centres, new RAAM clinics and increased community outreach.<sup>131</sup> There has not been any more information released from the province on timelines for these promises, nor has there been any information released on provincial intent to increase

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<sup>127</sup> *Ibid* at 78.

<sup>128</sup> *Drug Task Force*, *supra* note 1.

<sup>129</sup> *Ibid*.

<sup>130</sup> "The Safety" (last visited 18 December 2019), online: *InSite for Community Safety* <[www.communityinsite.ca/science.html](http://www.communityinsite.ca/science.html)> [perma.cc/YC42-EXXC] (statistical sample was of people living within 500m of the safe injection site).

<sup>131</sup> Ian Froese, "Tories Announce 3-Component Plan to Tackle Manitoba's Meth Problem", *CBC News* (7 August 2019), online: <[www.cbc.ca/news/canada/manitoba/tory-meth-strategy-announcement-1.5239102](http://www.cbc.ca/news/canada/manitoba/tory-meth-strategy-announcement-1.5239102)> [perma.cc/69ZL-K6AW].

access to long term treatment, or further expansion of the capacity of Winnipeg's Drug Treatment Court.

The Province needs to divert more funding to establishing long-term treatment facilities, supplement the funding for non-profits that supply such services, and work on decreasing wait times for access to publicly funded services. If the Courts are going to continue to order abstention and treatment conditions on persons with addictions, there needs to be support systems in place so that people suffering from addictions will not be set up to fail from the moment they are released or spend unnecessary time in detention waiting on access to court ordered services.

## V. CONCLUSION

The challenges facing the Province of Manitoba in light of the Meth Crisis are extensive and complex. There is no easy solution to reducing criminal activity, increasing public health resources, and reducing drug abuse in the Province. The solution does not lie in punishing people who are already suffering from addiction-based illnesses for non-violent offenses. The continuous application of onerous abstention conditions has quickly become a *Charter* infringing practice, with sections 7, 11(d), 11(e), and 12 all potentially infringed at some point in the pre-conviction process. The federal government has chosen to amend the *Criminal Code* to ease the pressure on remand facilities that are dealing with overpopulation issues and allow more judicial discretion when assessing violations of conditions. The Province now needs to take the next steps of increase public health funding and access to long-term treatment facilities.

Onerous bail and undertaking abstention conditions ordered for people suffering from substance addictions should be found to be unreasonable; defense counsel, the Crown and Judges should avoid excessive use of such conditions if the individual circumstances of the accused indicates (and the judge agrees) that they would be incapable of compliance. Treatment conditions may be a reasonable alternative, but the delay in accessing such treatments is causing legally innocent persons to be detained in remand for an excessive and unacceptable amount of time.

The changes to the administration of justice offense provisions as set out in Bill C-75 appear to be a step in the right direction in terms of allowing judges to be more lenient on people suffering from addictions who have breached a condition of their release. Judicial discretion to avoid stacking

charges on people suffering from addictions may avoid the section 11(d) and 11(e) *Charter* issues. However, there is still judicial discretion to order any condition that is reasonable, so it remains to be seen if there is an actual decrease in administration of justice offense charges brought before the Courts and a decrease in ultimate convictions that stem from breaches.

The meth crisis in Manitoba is not going to be substantially resolved without cooperation and compassion from our federal and provincial governments, courts, corrections, non-profits and health services. Addiction does not exist in a vacuum - a multi-faceted problem requires a multi-faceted solution.



# Nuancing Feminist Perspectives on the Voluntary Intoxication Defence

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FLORENCE ASHLEY\*

## ABSTRACT

The defence of voluntary intoxication, which has been back in the news as a result of the recent decision of the Ontario Court of Appeal in *R v Sullivan*, is frequently decried as antifeminist. Pursuant to the defence, defendants who acted while intoxicated to the point of automatism or severe psychosis may be acquitted. This article seeks to complicate feminist perspectives on the voluntary intoxication defence, showing that the issue of voluntary intoxication is far more nuanced than some suggest. After summarizing the state of the law of the voluntary intoxication defence and reviewing its prevalence in the jurisprudence, this article critically reflects on the voluntary intoxication defence and highlights how its removal contributes to the criminalization of mental illness and weakens crucial criminal law standards used to protect the most vulnerable – both problems from a feminist standpoint. The article concludes that a feminist analysis of the voluntary intoxication defence requires more nuanced policy discussions than those that have prevailed in the public sphere.

**Keywords:** voluntary intoxication defence; automatism; criminalization of mental illness; principles of fundamental justice; carceralism; feminism

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## I. INTRODUCTION

Accused of any crime, a person can be acquitted by proving that they were under the effect of a drug, including alcohol, to the point of automatism or severe psychosis.<sup>1</sup> Automatism refers to a state in which a person has no conscious control over their actions and typically comes with subsequent amnesia.<sup>2</sup> Psychosis will generally have the requisite severity if it precludes the person from distinguishing right from wrong.<sup>3</sup> Where the drug is voluntarily ingested, the defence is known as a defence of voluntary intoxication.<sup>4</sup>

Long recognized in England before being rejected by the Supreme Court of Canada in 1977, the voluntary intoxication defence was reintroduced in Canadian law in 1994.<sup>5</sup>

The decision that reintroduced the defence, *R v Daviault*, involved a 74-year-old man accused of sexually assaulting a 65-year-old woman, who was partially paralyzed and used a wheelchair, after having drunk excessive quantities of alcohol.<sup>6</sup> The Supreme Court of Canada ordered a new trial, ruling that a person could be acquitted of any crime if intoxicated to the point of automatism or severe psychosis.<sup>7</sup> The decision was met with intense public outrage and significant scholarly criticism. The government rapidly

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<sup>1</sup> I use "severe psychosis" for what courts typically call "insanity", as the latter term conjures and feeds prejudice against mentally ill persons. The term 'severe psychosis' is used in this way in *R v Bouchard-Lebrun*, 2011 SCC 58 at para 13 [*Bouchard-Lebrun*].

<sup>2</sup> *R v Stone*, [1999] 2 SCR 290 at paras 155-56, 173 DLR (4th) 66 [*Stone*]; Harold Kalant, "Intoxicated Automatism: Legal Concept vs. Scientific Evidence" (1996) 23:4 Contemp Drug Probs 631.

<sup>3</sup> *Bouchard-Lebrun*, *supra* note 1 at para 57.

<sup>4</sup> Although neither a justification (the act was done but was not wrong, e.g. self-defence) nor an excuse (the act was done and is wrong but the defendant should not be punished, e.g. necessity or duress) because it negates an essential component of the offence, it is typically called a defence because the burden of establishing it lies on the defendant: *R v Sullivan*, 2020 ONCA 333 at para 3 [*Sullivan*].

<sup>5</sup> For English law, see *DPP v Majewski*, [1976] UKHL 2 and *DPP v Beard*, [1920] AC 479 (HL (Eng)), cited by Justice Dickson in *Leary v The Queen*, [1978] 1 SCR 29 at 39, 74 DLR (3d) 103. The defence is said to have been abandoned in *Leary*, although the meaning and impact of the decision has been disputed.

<sup>6</sup> [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*].

<sup>7</sup> A new trial was ordered instead of an acquittal because the trial judge had used the wrong evidentiary threshold: he had acquitted the defendant because he believed he might have been extremely intoxicated and not because it was the most plausible explanation based on the evidence.

proposed adding section 33.1 to the *Criminal Code*, less than five months later,<sup>8</sup> prohibiting the voluntary intoxication defence in cases involving violations of physical integrity or assault.<sup>9</sup> Since then, doubts have loomed over the constitutionality of the provision.

In its June 2020 decision, *R v Sullivan*, the Ontario Court of Appeal declared section 33.1 unconstitutional, allowing the two defendants to invoke the voluntary intoxication defence.<sup>10</sup> One of the two defendants was acquitted, whereas a new trial was ordered for the other. Unlike Henri Daviault, neither of the two defendants were drinking or charged with sexual offences. Instead, both had suffered from drug-induced psychoses, leading to convictions of aggravated assault for David Sullivan and manslaughter for Thomas Chan.<sup>11</sup> The decision is binding on other courts in Ontario and will likely be persuasive in other provinces and territories.

As was the case following previous decisions invalidating section 33.1, the public's reaction to the judgment was profoundly negative, accusing it of reflecting an anti-feminist and pro-rape culture position. The Women's Legal Education and Action Fund claimed that it "risks sending a dangerous message that men can avoid accountability for their acts of violence against women and children through intoxication."<sup>12</sup> Reactions on social media

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<sup>8</sup> Isabel Grant, "Second Chances: Bill C-72 and the *Charter*" (1995) 33:2 Osgoode Hall LJ 379 at 383–85. It received Royal Assent on July 13, 1995, nine and a half months after the *Daviault* decision.

<sup>9</sup> The section only applies to 'general intent' offences. Voluntary intoxication remains for offences that require 'specific intent'. Typical specific intent offences include theft and murder, whereas general intent offences include manslaughter, sexual assault, and assault. Most offences require general intent and someone who lacks the specific intent of, say, murder can nevertheless be found guilty of manslaughter. These lesser included offences are a substantial reason why the voluntary intoxication defence is not as controversial for specific intent crimes.

<sup>10</sup> *Sullivan*, *supra* note 4.

<sup>11</sup> The language of automatism is used inconsistently in the jurisprudence. The Ontario Court of Appeal in *Sullivan* appears to have conflated automatism and psychosis, saying that "those who are in a state of automatism are incapable of appreciating the nature and quality of their acts or of knowing at the time of their conduct that it is morally wrong". (See *Sullivan*, *supra* note 4 at para 4). This is inconsistent with the Supreme Court's language and with the definition set up earlier.

<sup>12</sup> Kayla Goodfield, "A Painful Step Backwards': Calls for Appeal of Intoxication Ruling in Ontario Echo Throughout Canada", *CTV News* (5 June 2020), online: <toronto.ctvnews.ca/a-painful-step-backwards-calls-for-appeal-of-intoxication-ruling-in-ontario-echo-throughout-canada-1.4971355> [perma.cc/HH99-4RDA].

were particularly strong, mirroring unnuanced headlines such as ‘A *hall pass* for rape.’<sup>13</sup>

Although allowing voluntary intoxication defences may turn out to be antifeminist because it facilitates sexual assault and intimate partner violence and contributes to a culture of impunity around them, an informed outlook on the issues raised by this area of the law reveals important nuances that makes the debate substantially more complex. Nuances have been lost in public discussions surrounding the *Sullivan* decision: productive nuances.<sup>14</sup> In the hopes of guiding our conversations forward on the (anti)feminism of the voluntary intoxication defence, I offer a review of the voluntary intoxication defence and how it is used, followed by an examination of two critical issues relating to abolishing it: the criminalization of mental illness and the weakening of criminal law standards.

## A. What is the Voluntary Intoxication Defence and How is it Used?

To understand the voluntary intoxication defence, it is crucial to understand the principles behind the defense, what kind and standard of proof must be met to succeed in using the defence, and how often the defence is used and successfully used. The voluntary intoxication defence functions to limit the punishment of those with little to no moral culpability.<sup>15</sup> It is extremely difficult for the defence to prove and is rarely used successfully, especially when it comes to alcohol.

### 1. *The Principles Behind the Defence*

Only the morally guilty can be punished and only in some degree of

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<sup>13</sup> Sudbury Star Staff, “A Hall Pass for Rape?”, *Sudbury Star* (6 June 2020), online: <[www.thesudburystar.com/news/](http://www.thesudburystar.com/news/)> [perma.cc/XE53-DSP3].

<sup>14</sup> As Kieran Healy has pithily pointed out, nuance isn’t always good. See Kieran Healy, “Fuck Nuance” (2017) 35:2 *Soc Theory* 118.

<sup>15</sup> In the logic of *Daviault*, *supra* note 6 at 100, those who acted in a state of automatism or severe psychosis are morally innocent of the crimes (such as assault, sexual assault, or manslaughter) that they are accused of. However, they may carry moral culpability in other ways, as intimated by the Court’s suggestion in *Daviault*, that Parliament could criminalize harming others while drunk.

proportion with their guilt.<sup>16</sup> Although the principle knows many exceptions and outright failures, it has been the driving concern behind the modern law of voluntary intoxication. One of the concerns at the heart of *Daviault* was the idea of taking the intention of getting drunk and holding it as an adequate substitute to intention to commit the criminal act in question.<sup>17</sup> Where the consequences of getting drunk are not foreseen, let alone intended, there is no common measure between the intent of intoxication and the intent of the crime. And the risks of psychosis or harm to others are rarely foreseen.<sup>18</sup> Holding otherwise, in the eyes of the Court, would have jeopardized the principle that there must be some proportionality between moral culpability and punishment.<sup>19</sup> It gives me pause that the correctness of the legal precedent disallowing the voluntary intoxication defence was first called into question at the Supreme Court level by Justices Bertha Wilson and Claire L'Heureux-Dubé, respectively the first woman and the most vocal feminists on the Supreme Court bench.<sup>20</sup>

Even if one accepts that getting intoxicated to the point of automatism or severe psychosis is morally reprehensible, voluntary intoxication is intertwined with the problem of moral luck. Automatism and psychosis caused by intoxication are far more common than are instances of violence committed while in a state of automatism or under severe psychosis. There is little readily ascertainable difference between those who gravely hurt others and those who do not. While propensity for violence could be conjectured, few people would not resort to violence under any situation

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<sup>16</sup> Gross disproportionality violates section 12 of the *Canadian Charter*, which guarantees the right to be free from cruel and unusual punishment. See *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]; *R v Nur*, 2015 SCC 15. Gross disproportionality is also prohibited under section 7. See *R v Bernard*, [1988] 2 SCR 833 at 889, 1988 CanLII 22 [Bernard]; *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 70–72.

<sup>17</sup> *Supra* note 6 at 90.

<sup>18</sup> Or are overshadowed by other considerations. In the *Sullivan* case (*Sullivan*, *supra* note 4), David Sullivan regularly experienced (apparently non-violent) psychoses, but he became violent when he took a much, much larger dose of a prescription drug as part of a suicide attempt.

<sup>19</sup> *R v Martineau*, [1990] 2 SCR 633 at 645–46, 109 AR 321. See also *R v DeSousa*, [1992] 2 SCR 944 at 964–66, 95 DLR (4th) 595 [DeSousa]; *Bernard*, *supra* note 16 at 889.

<sup>20</sup> Their concurrence in *Bernard*, *supra* note 17 was cited approvingly by and was integral to the majority judgment in *Daviault*. Justice L'Heureux-Dubé concurred with the *Daviault* majority. Justice Wilson had since retired. Justice L'Heureux-Dubé also called for relaxing the threshold for allowing the voluntary intoxication defence in her dissenting opinion in *R v Robinson*, [1996] 1 SCR 683, 133 DLR (4th) 42.

whatsoever, and hallucinations during severe psychosis are hardly controllable. As I will detail later, David Sullivan seemingly believed that he was defending himself against evil aliens when he stabbed his mother and ran away when he realized that he was wrong. Moral luck poses a problem for the criminal law: people with the same intent, making the same plans, and acting the same way can lead to vastly different consequences.<sup>21</sup> Though the problem of moral luck arises throughout the criminal law, it is magnified in the context of voluntary intoxication because of the oft-remote nature of the foreseen risk and the sheer disproportion between the moral culpability associated with the relatively mundane act of getting drunk or high and the moral culpability associated with manslaughter or sexual assault. I suspect that many readers will have taken recreational drugs in a quantity sufficient to occasion psychosis at some point in their lives but were lucky enough to have a pleasant time instead.

## *2. Proving the Necessary Level of Intoxication*

The voluntary intoxication defence is a bit of a misnomer.<sup>22</sup> The question is not so much whether the person is intoxicated than whether they have reached a mental state akin to automatism or severe psychosis.<sup>23</sup> As mentioned earlier, automatism is a state in which a person has no conscious control over their behaviour,<sup>24</sup> whereas severe psychosis involves a misperception of the world that prevents the person from distinguishing right from wrong.<sup>25</sup> Oftentimes, the person invoking voluntary intoxication has a pre-existing neurological predisposition or vulnerability, and the mental state is more accurately said to be triggered rather than caused by the intoxication. However, the verdict of “not criminally responsible by reason of mental disorder” that is normally available to those who

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<sup>21</sup> I am speaking here more particularly of resultant luck. See e.g. Dana K Nelkin, “Moral Luck” (26 January 2004), online: *Stanford Encyclopedia of Philosophy Archive* <plato.stanford.edu/archives/sum2019/entries/moral-luck/> [perma.cc/9S7E-8XV6].

<sup>22</sup> The misnomer may have arisen from the gradual collapse of the ‘drunkenness defence’ and ‘insanity defence’ (which applied even when the mental state was self-induced) under the umbrella of intoxication defences, which require different levels of intoxication depending on whether the intoxication is voluntary and if the crime is one of specific or general intent. Whereas the name may be fitting for the advanced intoxication defence, it is less fitting in cases of extreme intoxication.

<sup>23</sup> The jurisprudence uses the derogative term ‘insanity’ to refer to this kind of severe psychosis.

<sup>24</sup> Kalant, *supra* note 2; Stone, *supra* note 2 at para 156.

<sup>25</sup> Bouchard-Lebrun, *supra* note 1 at para 57.

experience automatism or a severe psychosis due to a mental disorder will be unavailable in cases involving voluntary intoxication if a similarly situated person without the neurological predisposition or vulnerability could have fell into automatism or severe psychosis from taking the same dose of the substance(s).<sup>26</sup> The fact that someone without the predisposition or vulnerability could have been in a state of automatism or severe psychosis from the drug prevents a finding of “not criminally responsible by reason of mental disorder,” even the automatism or severe psychosis of the defendant may not have occurred but-for their neurological predisposition or vulnerability. In *Sullivan*, as is frequently the case, part of the debate at Thomas Chan’s trial was whether his psychosis had been caused by the drugs or was attributable to his brain injury. Although he may have been more likely to experience a severe psychosis from taking psilocybin (“magic mushrooms”), the fact that someone without a brain injury could also have had a severe psychosis from the same dose (though it was unknown in this case) prevented him from successfully using a mental disorder defence and left him with only the voluntary intoxication defence. Where the line is being drawn seems unfair.

It is not easy to prove extreme intoxication, which must be done when using the voluntary intoxication defence. In the words of the Supreme Court in *Daviault*, “it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful.”<sup>27</sup> The defendant, Henri Daviault, had seven or eight beers and a whole litre of brandy. His blood alcohol levels were around 0.4% to 0.6%, which is five to seven and a half times the legal driving limit of 0.08%.<sup>28</sup> Most people would be either in a coma or dead with that much alcohol. It’s not altogether clear whether that was enough for an acquittal, since the new trial ordered by the Supreme Court was never held. However, the Ontario Court of Appeal in *Sullivan* suggested that he would likely have been convicted, because scientific evidence shows that alcohol probably cannot lead to extreme intoxication at all.<sup>29</sup>

Normally, the criminal law only asks for a reasonable doubt to acquit someone. However, you cannot be acquitted just by showing that extreme intoxication is possible enough to raise a reasonable doubt. The standard of

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<sup>26</sup> *Ibid* at paras 71–72.

<sup>27</sup> *Supra* note 6 at 100.

<sup>28</sup> *Ibid* at 105.

<sup>29</sup> *Supra* note 4 at para 137.

proof is elevated, and the defendant must show that they were extremely intoxicated “on a balance of probabilities.” In other words, they must show that automatism or severe psychosis due to intoxication is the most plausible interpretation of the evidence.<sup>30</sup> And, unlike the usual approach in criminal law, it is not the prosecutor’s job to prove that the defendant was not ‘extremely’ intoxicated. Instead, it is the defendant’s job to prove that they were. How likely it is that the defendant was extremely intoxicated depends on how much of the substance was taken, and it will be very difficult to argue the voluntary intoxication defence without being able to prove how much alcohol or drug(s) they took. The law also requires expert testimony to prove that the intoxication was at the level of automatism or severe psychosis.<sup>31</sup> The defence does get thrown out when the defendant does not have an expert or when the expert is not convincing. In most circumstances, the expert will be a pharmacologist or toxicologist, and the government usually hires an expert to contradict the expert of the defendant.

With the current state of science, there is serious doubt as to whether alcohol by itself can lead to automatism or severe psychosis. According to Harold Kalant, a professor of pharmacology and expert on alcohol and drug tolerance, there is little evidence that it does. In his view, “[t]here is no scientific evidence whatsoever that automatism is directly caused by alcohol intoxication alone, no matter how severe the intoxication.”<sup>32</sup> The problem with the idea that alcohol causes automatism, as opposed to the idea that alcohol can trigger automatism in someone who already has a neurological condition, is that alcohol impacts all nerve cells at the same time. Nerve cells responsible for consciousness and those responsible for coordinated movements both decrease their activity at the same time and speed.<sup>33</sup> This effect of alcohol on brain cells is called central nervous system depression, and alcohol is different from some other substances because it does not selectively depress the central nervous system; it does not select one part of the brain to affect more than others. As a result, being drunk enough to lose consciousness also means being drunk enough that you cannot do complex, coordinated movements.<sup>34</sup> If you are drunk to the point of losing consciousness, you might have simple, uncoordinated, purposeless, and

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<sup>30</sup> Daviault, *supra* note 6 at 101-02.

<sup>31</sup> *Ibid* at 101, 103.

<sup>32</sup> Kalant, *supra* note 2 at 638 [emphasis in original].

<sup>33</sup> *R v McCaw*, 2019 ONSC 53 at paras 317-18 [McCaw].

<sup>34</sup> *Ibid* at paras 289-92.

repetitive movements, but you cannot have the series of movements that happen in sexual assault. Complex movement can happen with automatism, but usually it is automatism from dissociative states that are different from the automatism caused by alcohol.<sup>35</sup> A review of studies on alcohol blackouts showed that there is a strong negative relationship between alcohol and the ability to form memories, but that there's little evidence that alcohol can have negative impacts on cognitive functioning.<sup>36</sup> On the contrary, studies showed that people in a blackout state had higher cognitive functions and could engage in social interactions. So, even though automatism comes with amnesia, alcohol-induced amnesia does not seem to come with automatism.<sup>37</sup>

Alcohol can trigger automatism and psychotic symptoms in other, more complicated ways, but the symptoms are quite different. First, there is 'alcohol idiosyncratic intoxication' where someone ingests a small amount of alcohol and undergoes a marked behaviour change (usually aggressive, violent, and/or self-harming).<sup>38</sup> It may also come with visual hallucinations.<sup>39</sup> Not everyone agrees that alcohol idiosyncratic intoxication exists, but what is most important to note is that it is triggered by an unusually small amount of alcohol and does not come with slurred speech or lack of coordination that is common when people are severely drunk.<sup>40</sup> Second, alcohol can trigger a "complex partial seizure" in the temporal lobe of the brain, which can cause violent and/or psychotic behaviours; it usually lasts only a few minutes and is followed by deep sleep, and the automatism behaviours themselves are "simple, stereotyped, unsustained, and never supported by a consecutive series of purposeful movements."<sup>41</sup> Third,

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<sup>35</sup> Kalant, *supra* note 2 at 637.

<sup>36</sup> Mark R Pressman & David S Caudill, "Alcohol-Induced Blackout as a Criminal Defense or Mitigating Factor: An Evidence-Based Review and Admissibility as Scientific Evidence" (2013) 58:4 J Forensic Sci 932 at 938-39.

<sup>37</sup> See Kalant, *supra* note 2 at 640.

<sup>38</sup> The diagnosis was recognised under the DSM-III-R and DSM-IV but collapsed into the general categories of alcohol intoxication and alcohol-related disorders. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (Washington, DC: American Psychiatric Association, 2000) at 222.

<sup>39</sup> For a recent case report, see Xiao-Ling Lin & Da-Li Lu, "Development of Psychotic Symptoms Following Ingestion of Small Quantities of Alcohol" (2016) 12 Neuropsychiatric Disease & Treatment 2449.

<sup>40</sup> Kalant, *supra* note 2 at 638-39.

<sup>41</sup> *Ibid* at 635.

people can have alcohol-induced psychotic disorder.<sup>42</sup> The disorder typically follows a period of prolonged, heavy drinking and lasts even after the person becomes sober again, typically clearing up within one to six months.<sup>43</sup> The most prevalent symptom is auditory hallucinations. And fourth, alcohol can also precipitate the development of mental health conditions that cause automatism or severe psychosis.<sup>44</sup> The person has an underlying, undeveloped mental health condition that is brought to the surface by alcohol. Depending on the condition, it may not be obvious outside of episodes, but there will typically be symptoms of some kind afterwards, such as other episodes of automatism or psychosis.

Blacking out while severely drunk tends to look quite different from these four conditions. The archetypical picture of someone who is severely intoxicated is slurred speech and poor coordination, with no symptoms indicating automatism or psychosis the next day. Meanwhile, sexual assault requires a series of complex actions. Each of those elements contradict one or multiple of the common features of alcohol idiosyncratic intoxication, complex partial seizure, alcohol-induced psychotic disorder, and precipitation of an underlying mental condition. In a way, evidence that someone is drunk makes the thesis of extreme intoxication less plausible.

It is precisely this kind of reasoning that led to the conviction of Cameron McCaw after the judge in his case declared section 33.1 constitutional. If he had been in a state of alcohol-induced extreme intoxication, reasoned Justice Nancy Spies, he would not have been able to sexually assault the victim as he did since it involved a complex series of steps.<sup>45</sup> According to the judge, he might have blacked out, but that did not mean that he was extremely intoxicated. Based on his actions, the scientific evidence suggested he was not. He went to prison. A similar reasoning was also adopted in *Dow c R*.<sup>46</sup>

To use the voluntary intoxication defence, the defendant must meet a higher-than-usual standard of proof, find and pay for an expert who will confirm that the circumstances are indicative of automatism or severe

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<sup>42</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (Washington, DC: American Psychiatric Association, 2013) at 5.

<sup>43</sup> Melany L Hendricks et al, "Cognitive Changes in Alcohol-Induced Psychotic Disorder" (2017) 10:166 *BMC Research Notes* 1, DOI: <10.1186/s13104-017-2485/0>.

<sup>44</sup> Kalant, *supra* note 2 at 641.

<sup>45</sup> McCaw, *supra* note 33 at para 380. He had also taken GHB but the expert evidence demonstrated that GHB had alcohol-like effects.

<sup>46</sup> 2010 QCCS 4276 at paras 81ff, 100 [*Dow*].

psychosis, and fight an uphill battle against the entrenched scientific view that alcohol cannot cause automatism by itself. By arguing the voluntary intoxication defence, the defendant has to admit material facts, like their presence during the crime, and they cannot readily contradict the victim's account of the events since automatism comes with amnesia. Admitting the facts and proving that it is more likely than not that they were that intoxicated will rarely be easier than denying the facts and hoping the judge is left with a reasonable doubt (unless there is damning evidence of these facts). This leaves little incentive to use voluntary intoxication as a defence against sexual assault charges.

### 3. *Jurisprudential Statistics*

Judges do not always apply the law correctly and law-in-action can look drastically different from law-on-paper. In the wake of *Daviault*, a major concern had been the impact the judgment would have on acquittals. Professor Elizabeth Sheehy revealed three successful uses and one unsuccessful use of the voluntary intoxication defence in the half a year following the decision.<sup>47</sup> All involved assaults or sexual assaults against women, and at least some of them suggested that the high threshold set by the Supreme Court was not being followed. In one of the cases, the fact that spousal violence was (allegedly) uncharacteristic of the defendant was used to support the conclusion of extreme intoxication – despite the fact that many men become violent when drunk without automatism or severe psychosis.<sup>48</sup> In the years since, however, successful or would-be successful uses of the voluntary intoxication defence have been much rarer.

I reviewed the cases referring to section 33.1 from 1995 to 2020, when *Sullivan* came out.<sup>49</sup> The entire period is of interest, since the first cases

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<sup>47</sup> Elizabeth Sheehy, “The Intoxication Defense in Canada: Why Women Should Care” (1996) 23:4 Contemporary Drug Problems 595 at 603–04.

<sup>48</sup> *Ibid* at 603; Heather MacMillan-Brown, “No Longer ‘Leary’ About Intoxication: In the Aftermath of *R. v. Daviault*” (1995) 59:2 Sask L Rev 311 at 330. Since the decision was handed down less than one month after *Daviault*, it is legitimate to wonder whether the same decision would have been rendered had the entire trial been conducted after the release of *Daviault*. Regardless, the reasoning is immensely worrisome.

<sup>49</sup> I conducted my search exclusively on CanLII, which gave me 147 results. I also searched for cases citing section 33.1 on WestLaw, but only added the two cases declaring the section unconstitutional that were not on CanLII, bringing the total to 149. The WestLaw search returned a total of 154 results, close to the CanLII numbers.

declaring the law unconstitutional date back to 1999-2000,<sup>50</sup> and many cases that do not declare section 33.1 unconstitutional nevertheless make findings as to whether the defendant was in a state of extreme intoxication.

The constitutionality of section 33.1 was considered in 14 files.<sup>51</sup> It was ruled constitutional in five and unconstitutional in nine.<sup>52</sup> A total of four defendants were acquitted or would have been acquitted if not for the finding of constitutionality.<sup>53</sup> One of the would-be acquittals, dating back to 2000, involved sexual assault.<sup>54</sup> The other three involved neither sexual assault nor intimate partner violence. Among the cases that did not consider the constitutionality of section 33.1, two further acquittals would have resulted were it not for the law.<sup>55</sup> Neither of the two involved sexual assault or intimate partner violence.

Five were found guilty or would have been found guilty despite the declaration of unconstitutionality.<sup>56</sup> They fell short of the level of extreme

<sup>50</sup> *R v Dunn*, [1999] OJ No 5452, 28 CR (5th) 295 (ONCJ) [*Dunn*]; *R v Jensen*, [2000] OJ No 4870, 2000 CarswellOnt 6489 (ONSC).

<sup>51</sup> With *Sullivan* counted twice, once for each defendant. Of note, I have included *R v Brenton* (1999), 180 DLR (4th) 314, [2000] 2 WWR 269 (NWTSC) [*Brenton*] even though it was overturned in *R v Brenton*, 2001 NWTCA 1 [*Brenton* 2001] since the Court of Appeal declined to address the constitutional argument. By contrast, the constitutional findings in *R v Chan*, 2018 ONSC 3849 [*Chan*], were directly overturned in *Sullivan*, *supra* note 4 and, therefore, they were not included among cases declaring the provision constitutional.

<sup>52</sup> Constitutional: *R v Vickberg*, [1998] BCJ No 1034, 16 CR (5th) 164 (BCSC) [*Vickberg*]; *R v T (BJ)*, 2000 SKQB 572 [*T(BJ)*]; *Robb v R*, 2019 SKQB 295 [*Robb*] (stayed in *R v Robb*, 2020 SKQB 60); *R v SN*, 2012 NUCJ 2 [*SN*]; *Dow c R*, 2010 QCCS 4276 (new trial ordered on other grounds in *R c Dow*, 2014 QCCA 2086). Unconstitutional: *R v Sullivan*, 2020 ONCA 333 (for two defendants); *R v Brown*, 2020 ABQB 166 [*Brown*]; *R v Fleming*, 2010 ONSC 8022 [*Fleming*]; *R v Dunn*, [1999] OJ No 5452, 28 CR (5th) 295 (ONCJ); *R v Jensen*, [2005] OJ No 1052, 129 CRR (2d) 126 (ONCA) [*Jensen*]; *R v Cedeno*, 2005 ONCJ 91 [*Cedeno*]; *R v Brenton*, (1999) 180 DLR (4th) 314, 69 CRR (2d) 323 (NWTSC) [*Brenton*] (convicted in *R v Brenton*, 2001 NWTCA 1); *R v McCaw*, 2018 ONSC 3464 [*McCaw* 2018] (convicted in *R v McCaw*, 2019 ONSC 53).

<sup>53</sup> *Sullivan*, *supra* note 4 (David Sullivan); *Brown*, *supra* note 52; *Vickberg*, *supra* note 52; *T(BJ)*, *supra* note 52.

<sup>54</sup> *Ibid.*

<sup>55</sup> *R c Lebrun*, 2011 SCC 58, aff'g 2008 QCCQ 5844; *R c Côté*, 2013 QCCQ 4485. An acquittal based on voluntary intoxication was also overturned in *R v Martin*, 1999 CanLII 1708 (ONCA) but the reasons are terse and do not specify whether the trial judge instructed the jury on advanced (negating specific intent) or extreme (negating general intent) intoxication, though the decision suggests that the trial judge mistakenly classified the offence as a specific intent one.

<sup>56</sup> *Jensen*, *supra* note 52; *Cedeno*, *supra* note 52; *McCaw* 2018, *supra* note 52 (found guilty

intoxication. *R v McCaw*, discussed in the last section, is an example. In another case, *R v Jensen*, the defendant was convicted of second-degree murder after he presented a voluntary intoxication defence to both murder and manslaughter, meaning that he far was from the level of extreme intoxication since the threshold for reducing murder to manslaughter due to intoxication is much lower.<sup>57</sup> Among cases that did not consider the constitutionality of section 33.1, findings that the degree of intoxication did not reach (or, sometimes, remotely suggest) 'extreme' levels were exceedingly common and I found around 50 such cases.

The other five cases merely allowed the defence to be argued, but I was unable to find whether they resulted in convictions or acquittals.<sup>58</sup> Some led to acquittals for unrelated reasons.<sup>59</sup> Various cases that did not consider the constitutionality of section 33.1 may have allowed the defence to be argued if not for section 33.1.<sup>60</sup>

A potential of six acquittals, only one of which involves sexual assault or intimate partner violence, over 25 years is a small number, especially considering the much larger number of cases clearly indicating that the person would have fallen below the level of extreme intoxication. But we must also consider the limits of the statistic. Some of the new trials were ordered recently and we do not know the outcome yet. Some judges and defendants did not consider applying the defence only because of section 33.1, notably because of the cost of challenging the constitutionality of the law, and we do not know if they would have led to an acquittal. There may be more acquittals that are not reported in the law databases. Additionally, not every charge leads to trial and not every crime is reported. The statistics do not account for the impact of the voluntary intoxication defence on

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in *R v McCaw*, 2019 ONSC 53); *Brenton*, *supra* note 51 (convicted in *Brenton* 2001, *supra* note 51, on the grounds that extreme intoxication was not proven regardless of the constitutionality of section 33.1); *Dow*, *supra* note 46 at para 154 (the judge stated that there was no evidence of extreme intoxicated and he was later convicted, but the conviction was overturned on other grounds and the file has gone through many levels of appeals and three trials in total thus far for the same charges).

<sup>57</sup> *Supra* note 52. Since murder is a specific intent offence, he only needed to raise an advanced level of intoxication to defeat the charge.

<sup>58</sup> *Sullivan*, *supra* note 4; *Fleming*, *supra* note 52; *Dunn*, *supra* note 50; *Robb*, *supra* note 51 (stayed in *R v Robb*, 2020 SKQB 60 [*Robb* 2020]); *SN*, *supra* note 51.

<sup>59</sup> For instance, *Robb*, *supra* note 52 was stayed in *Robb* 2020, *supra* note 58 because his right to trial within a reasonable time was violated.

<sup>60</sup> *R v JAW*, 2006 ABPC 178; *R c DD*, 2010 QCCQ 953; *R c Hébert-Ledoux*, 2020 QCCQ 976; *R v Pavlovsky*, 2005 NBQB 346.

peoples' willingness to report sexual assault or on police and prosecutors' willingness to investigate complaints of sexual assault, issues identified as major concerns after *Daviault* came out.<sup>61</sup> Under-reporting and under-investigation of sexual assault remain major problems in Canada.<sup>62</sup>

Even though it would be unreasonable to claim that the voluntary intoxication defence is only associated with a risk of six acquittals over 25 years, the small number gives a sense of scale for the problem that the defence poses in the context of sexual assault and intimate partner violence. In the same 25-year period, the legal database I used reported 5,459 decisions referring to the sexual assault provisions of the *Criminal Code*. What is clear from reviewing the courts' decisions is that judges are not very receptive to the claim of extreme intoxication, especially in cases involving alcohol and/or sexual assault and intimate partner violence. When courts consider the argument of voluntary intoxication, they are much more likely to consider that the intoxication was not extreme. These numbers are in line with the Supreme Court's suggestion in *Daviault*, based on the experiences of Australia and New Zealand, that allowing the voluntary intoxication defence would not lead to a significant increase in the number of acquittals since extreme intoxication is difficult to prove and extremely rare.<sup>63</sup>

Injustice cannot be encapsulated by numbers. Each wrongful acquittal is a blemish on the justice system, as is each wrongful conviction – perhaps even more so. Each sexual assault, each case of intimate partner violence that goes unrecognized is a harm to the principles of feminism. Nevertheless, feminist perspectives on the voluntary intoxication defence need to begin from a place of knowledge. Although the voluntary intoxication defence may be morally or politically undesirable, there is little evidence of a severe impact on the number of acquittals in sexual assault and intimate partner violence cases. The case law suggests that the defence

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<sup>61</sup> Sheehy, *supra* note 47 at 611.

<sup>62</sup> Robyn Doolittle, "Unfounded: Police Dismiss 1 in 5 Sexual Assault Claims as Baseless", *The Globe and Mail* (3 February 2017), online: <[www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/](http://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/)> [perm.cc/SP234E L9]; Alana Prochuk, *We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast LEAF, 2018).

<sup>63</sup> *Supra* note 6 at 103-04. According to Patrick Healy, "Intoxication in the Codification of Canadian Criminal Law" (1994) 73 *Can Bar Rev* 515 at 543 [Healy, "Intoxication"], the approach in *Daviault* limits the defence more than Australian and New Zealand law does.

is rarely used and even more rarely used successfully, even though the constitutionality of section 33.1 of the *Criminal Code*, the section prohibiting the defence, has been in doubt since 1995.<sup>64</sup> As the same time, these statistics cut both ways. Policy and political discussions of cases declaring section 33.1 unconstitutional like *Sullivan* should be had under the illuminating shine of the current state of the law, science, and jurisprudence.

## II. CRIMINALIZING MENTAL ILLNESS

While Henri Daviault does not readily attract much sympathy, despite his alcohol addiction, the defendants of the most recent Ontarian case, Thomas Chan and David Sullivan, are a whole other matter.<sup>65</sup>

Thomas Chan, a high school student, took magic mushrooms while hanging out with friends at his mother's house. It was not his first time. After half an hour, he was the only one sober of the group and took some more. He suffered a psychotic break, characterised by erratic and violent behaviour. He went outside, shattered the window of a car, tried to fight one of his friends, and yelled "This is God's will" and "I am God." He then ran to his father's house nearby and, instead of getting in using the fingerprint recognition system, he broke into the house through a window. His father was in the kitchen, but he did not seem to recognize him and stabbed him repeatedly, causing his death. He then began attacking his stepmother, who said he did not seem to recognize her. She survived. At trial, the evidence showed that Thomas Chan suffered from a mild traumatic brain injury that had not healed by 2018, despite being first diagnosed in 2013. The injury was sustained due to repeated concussions during his rugby career, and it likely impacted his frontal and temporal lobes. However, the judge found that the link between brain injuries and toxic psychosis from magic mushrooms was insufficiently conclusive for his severe psychosis to be considered caused by a mental disorder. He received

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<sup>64</sup> According to Professors Baker and Knopff, section 33.1 has stood so long without a Supreme Court challenge in large part due to strategic behaviour of the Court, as well as many cases that could have come to the Supreme Court being stalled in lower level courts. See Dennis Baker & Rainer Knopff, "Daviault Dialogue: The Strange Journey of Canada's Intoxication Defence" (2014) 19:1 Rev Const Stud 35.

<sup>65</sup> The facts in the following paragraphs are drawn from *Sullivan*, *supra* note 4; *Chan*, *supra* note 51; *R v Chan*, 2019 ONSC 783.

a five-year sentence of imprisonment for manslaughter and aggravated assault.

David Sullivan, for his part, was living with his mother and was prescribed Wellbutrin to help him stop smoking. Psychosis is a known risk of the medication, especially among those susceptible to it. He sometimes took it recreationally and had experienced psychotic episodes before. On the fated day, he took an enormous quantity of tablets (between 30 and 80) while attempting suicide. He experienced what the judges called “a profound break with reality” and thought he had captured an evil alien. His mother tried to reassure him that there was no alien in the room, but the drugs made him believe that she was also an alien, and he stabbed her several times with kitchen knives. She called out “David, I’m your mother”, which made him drop the knives and run away. She survived. He was convicted of aggravated assault and assault with a weapon.

Neurological vulnerability, prescription medication usage, and addiction are frequently in the background of voluntary intoxication cases. The role of mental health in both tragedies and the similarity of the facts to many cases leading to a verdict of not criminally responsible on account of mental disorder brings to the forefront the relation that section 33.1 entertains with the criminalization of mental health. I am not suggesting that section 33.1 criminalizes mental illness because mentally ill people are disproportionately violent or because a high percentage of mentally ill people are incarcerated as a result of section 33.1. People with mental illnesses, including psychotic disorders, are rarely violent and are much more prone to being victims of violence than perpetrators of it.<sup>66</sup> The paucity of cases invoking section 33.1 to prevent an intoxication defence that would otherwise have succeeded also means that section 33.1 plays only a small role in the overall pattern of overincarceration of people living with mental illnesses. Rather, I want to suggest three things: (1) the (former) unavailability of the voluntary intoxication defence for violent crimes leads to the incarceration of mentally ill people for acts that are inextricably linked to mental health issues, (2) disallowing the defence perpetuates a broader pattern of treating mental health problems as a criminal rather than healthcare issue, and (3) incarcerating mentally ill people, regardless of reason, further entrenches social inequalities because of inadequate and discriminatory treatment of mentally ill people in carceral facilities.

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<sup>66</sup> Jennifer Skeem et al, “Psychosis Uncommonly and Inconsistently Precedes Violence Among High-Risk Individuals” (2016) 4:1 *Clinical Psychological Science* 40.

Even though neither Thomas Chan, nor David Sullivan were found to have experienced a psychosis as a result of an underlying mental health condition, their stories may have looked wildly different had mental health aspects been taken out of the picture. Under the current state of the law, the defence of automatism or severe psychosis due to a mental disorder will often be unavailable even if the events would probably not have occurred without the pre-existing mental health or neurological issue (whether diagnosed or not). To use the defence when intoxication is involved, the defendant must convince the judge that the underlying condition did not just make them more likely to have an automatism or severe psychosis episode, but that someone without that condition could not have had automatism or severe psychosis.<sup>67</sup> That legal approach is incompatible with the reality that many conditions only make automatism or severe psychosis more likely and that the drugs involved have the potential to cause automatism or severe psychosis on their own.<sup>68</sup> Thomas Chan may not have had a severe psychotic episode if not for his brain injury, but the hard line set by the law between severe psychoses caused by neurological conditions and intoxication led to his conviction at trial regardless. I am also left to wonder why he did not have any further neurological testing between 2013 and 2018 – perhaps he would have refrained from taking hallucinogenic drugs if he had known that his brain injury was lingering.

David Sullivan's mental health was equally implicated by the combination of addiction and suicidality. He was taking Wellbutrin to deal with his smoking. The addiction was bad enough that he readily endured the occasional psychotic episodes that came as a side-effect. As he took the medication recreationally as well; I wonder whether he may have been addicted to it as well.<sup>69</sup> Most heartbreakingly, the fated psychotic break that

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<sup>67</sup> *Bouchard-Lebrun*, *supra* note 1 at paras 71–72.

<sup>68</sup> Michelle S Lawrence & Simon Verdun-Jones, “Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to Have Committed Criminal Acts While in States of Substance-Associated Psychosis, Where Intoxication Was Voluntary” (2015) 93:3 *Can Bar Rev* 571.

<sup>69</sup> Michelle Lawrence notes that, in *Bouchard-Lebrun*, *supra* note 1, the Court suggested that addiction to the psychosis-inducing drug may preclude voluntariness. See Michelle Lawrence, “Drug-Induced Psychosis: Overlooked Obiter Dicta in *Bouchard-Lebrun*” (2016) 32:1 *CR* (7th) 151. Whether the law will develop in that direction remains to be seen. Rulings in this direction would undermine the objective pursued by section 33.1, since those committing sexual assaults and intimate partner violence while drunk are often addicted to alcohol, further exposing the tension between the objectives of section 33.1 and the realities of those living with mental illness.

led to him stabbing his mother arose out of a suicide attempt – hardly a trivial fact. Were it not for his addiction and suicidality, there is little doubt that he would not have attacked his mother. Was he adequately supported during his treatment and in relation to his suicidality? Why was he still on medication that gave him psychotic symptoms? What systemic failures led to him being suicidal and living with his mother while undergoing recurrent psychotic episodes?

Harm is harm, regardless of whether the perpetrator is living with a mental illness. However, approaching harm caused by people living with mental illness with a mind to punishment instead of adopting a public health outlook lies at the heart of the criminalization of mental illness. As a society, we too often deal with mentally ill people as criminals rather than people in need of support and services.<sup>70</sup> As a result, mentally ill people are grossly overrepresented in the carceral system, and their overrepresentation only worsens when considering subgroups that are also marginalized on other grounds like women, Black and Indigenous peoples, other people of colour, and members of LGBTQ+ communities. The criminalization of mental illness is deeply intertwined with racism and it is one of the ways in which the overincarceration of Black and Indigenous peoples is perpetuated.<sup>71</sup> Whereas white, middle-class individuals have greater access to mental health services, including addiction treatment, Black and Indigenous poor people overwhelmingly do not, and instead, they get targeted by police and funnelled towards prison.<sup>72</sup>

According to the Canadian Correctional Investigator, “Canadian penitentiaries are becoming the largest psychiatric facilities in the country.”<sup>73</sup> Among federally incarcerated women, 4.6% had a current diagnosis of psychotic disorder and 6.5% of all incoming federal offenders

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<sup>70</sup> Gary Chaimowitz, “The Criminalization of People With Mental Illness: Position Paper” (2012) 57:2 *Can J Psychiatry* 1; Michael Rembis, “The New Asylums: Madness and Mass Incarceration in the Neoliberal Era” in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York, NY: Palgrave Macmillan US, 2014) 139.

<sup>71</sup> Syrus Ware, Joan Ruzsa & Giselle Dias, “It Can’t Be Fixed Because It’s Not Broken: Racism and Disability in the Prison Industrial Complex” in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York, NY: Palgrave Macmillan US, 2014) 163.

<sup>72</sup> Nirmala Erevelles, “Crippin’ Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline” in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York: Palgrave Macmillan US, 2014) 81.

<sup>73</sup> Cited in Ware, Ruzsa & Dias, *supra* note 71 at 168.

from the Atlantic region had a psychotic disorder.<sup>74</sup> The global prevalence of psychotic disorders is 0.46%, meaning that inmates are 10 to 14 times more likely to have a psychotic disorder than the general population.<sup>75</sup> Female inmates also have extremely high rates of borderline personality disorder (33.3%), which can come with psychotic features,<sup>76</sup> and substance use disorders are exceedingly common across the carceral spectrum.<sup>77</sup> This pattern of overincarceration of the mentally ill disproportionately impacts people of colour, especially those who are Black and Indigenous, because of higher mental illness rates in those communities and of racially-correlated over-policing and overincarceration, both linked to systemic racism and colonialism.<sup>78</sup> Critical race and mad studies scholars point out that this is not a flaw of the system, but a feature built into it throughout history.<sup>79</sup> Racism and colonialism are causes of mental illness. Instead of focusing on meeting the needs of people living with mental illness, Canada incarcerates them.

Once incarcerated, the services offered are woefully inadequate. The demand for mental health services is far larger than the resources dedicated

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<sup>74</sup> Correctional Service Canada, *Prevalence of Mental Health Disorders Among Incoming Federal Offenders: Atlantic, Ontario, & Pacific Regions*, by Janelle Beaudette, No ERR-13-3 (Ottawa: CSC, 2013) [CSC, *Prevalence of Mental Health*]; Correctional Service Canada, *National prevalence of mental disorders among federally sentenced women offenders: In custody sample*, by G Brown et al, No R-406 (Ottawa: CSC, 2018) [CSC, *National Prevalence*].

<sup>75</sup> Berta Moreno-Küstner, Carlos Martín & Loly Pastor, “Prevalence of Psychotic Disorders and its Association with Methodological Issues: A Systematic Review and Meta-Analyses” (2018) 13:4 PLOS ONE 1.

<sup>76</sup> Katrin Schroeder, Helen L Fisher & Ingo Schäfer, “Psychotic Symptoms in Patients with Borderline Personality Disorder: Prevalence and Clinical Management” (2013) 26:1 *Curr Opin Psychiatry* 113.

<sup>77</sup> CSC, *National Prevalence*, *supra* note 74; CSC, *Prevalence of Mental Health*, *supra* note 74; Fiona Kouyoumdjian et al, “Health Status of Prisoners in Canada: Narrative Review” (2016) 62:3 *Can Family Physician* 215.

<sup>78</sup> Tarik Qassem et al, “Prevalence of Psychosis in Black Ethnic Minorities in Britain: Analysis Based on Three National Surveys” (2015) 50:7 *Soc Psychiatry & Psychiatric Epidemiology* 1057; Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (Final Report) (Ottawa: OCI, 2013); Ware, Ruzsa & Dias, *supra* note 71; Camille A Nelson, “Racializing Disability, Disabling Race: Policing Race and Mental Status” (2010) 15:1 *Berkeley J Crim L* 1.

<sup>79</sup> Ware, Ruzsa & Dias, *supra* note 71; Erevelles, *supra* note 72.

to them, a reflection of misplaced funding priorities.<sup>80</sup> Despite the stated goal of rehabilitation, services are worse than those available outside of prison – which were already insufficient.<sup>81</sup> Those who have the greatest mental health needs often hide their conditions out of fear of it being used against them, including by impacting their access to release – fears that are understandable since anything discussed with therapists goes into their prison file and prisons are known to disproportionately place mentally ill people in solitary confinement.<sup>82</sup> Upon release, people living with serious mental health issues are offered little support and, as a result, they rarely stay in contact with mental health services and frequently become homeless.<sup>83</sup>

Although section 33.1 is perhaps a minor contributor to the criminalization of mental illness, it shares in it and mirrors the policy approach of criminalizing rather than supporting mentally ill people. The events having led to the charges against Thomas Chan and David Sullivan are unspeakably tragic, and the grave consequences of their actions will reverberate throughout the entire life of those who were implicated, as well as throughout the lives of their families and friends. A whole community suffered, is suffering, and will suffer as a result. But incarcerating two people having experienced grave psychosis against a background of neurological predisposition or suicidality does not serve any penological purpose. If the voluntary intoxication defence is a feminist issue because of its role in sexual and intimate partner violence, it is also one because of its relationship to

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<sup>80</sup> Alexander I F Simpson, Jeffrey J McMaster & Steven N Cohen, “Challenges for Canada in Meeting the Needs of Persons with Serious Mental Illness in Prison” (2013) 41:4 J Am Academy Psychiatry & L 501; Ware, Ruzsa & Dias, *supra* note 71 at 168.

<sup>81</sup> Ware, Ruzsa & Dias, *supra* note 71 at 170.

<sup>82</sup> *Ibid* at 168, 171; Simpson, McMaster & Cohen, *supra* note 80; Patrick White, “Complaint alleges Canada’s prisons agency places mentally ill inmates in solitary confinement too often”, *Globe and Mail* (20 June 2018), online: <[www.theglobeandmail.com/canada/article-complaint-alleges-canadas-prisons-agency-places-mentally-ill-inmate-s/](http://www.theglobeandmail.com/canada/article-complaint-alleges-canadas-prisons-agency-places-mentally-ill-inmate-s/)> [perma.cc/LV6E-N7C4].

<sup>83</sup> Charlotte Lennox et al, “The Management of Released Prisoners with Severe and Enduring Mental Illness” (2012) 23:1 J Forensic Psychiatry & Psychology 67; Rembis, *supra* note 70 at 151; Élizabeth Fleury, “Santé mentale en prison: «Une fabrique d’itinérance»”, *Le Soleil* (16 July 2019), online: <[www.lesoleil.com/actualite/sante/sante-mentale-en-prison-une-fabrique-ditinerance-2a667650d73cac52c096acad48ada5a8](http://www.lesoleil.com/actualite/sante/sante-mentale-en-prison-une-fabrique-ditinerance-2a667650d73cac52c096acad48ada5a8)> [perma.cc/4XP9-M47P]; Margot B Kushel et al, “Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population” (2005) 95:10 Am J Public Health 1747.

the criminalization of mental illness.

### III. WEAKENING CRIMINAL LAW STANDARDS

Two elements must be present to prove a crime: the *mens rea* and the *actus reus*. The *mens rea* (“guilty mind” in Latin) refers to the mental element of the crime: intent, knowledge, negligence, recklessness, etc.<sup>84</sup> The mental element must be linked to the *actus reus*.<sup>85</sup> The *actus reus* (“guilty act” in Latin) refers to the voluntary, physical action or inaction that constitutes the crime.<sup>86</sup> To prove a crime, no matter the crime, both *mens rea* and *actus reus* must be proven beyond a reasonable doubt. In the way these states are understood by courts, automatism and severe intoxication remove both *mens rea* and *actus reus* because a person cannot have the intent required for *mens rea* and, in fact, they do not even have the minimal psychological element to make a physical action ‘voluntary’ in the sense required to prove the *actus reus*.<sup>87</sup> Actions during automatism or severe psychosis are understood as unintentional and involuntary. For as long as it remains the law’s understanding of the scientific fact of automatism and severe psychosis, laws that prohibit the voluntary intoxication defence pose a real risk of carceral expansion. Section 33.1 cannot be considered in isolation: we must also think about how decrying *Sullivan* for disallowing convictions in circumstances where there is no *mens rea* or *actus reus* will impact other areas of the law and lead to even more incarceration across Canada.

We can divide offences into five categories based on how they relate to *mens rea*. Each category is considered ‘graver’ morally than the following ones in the order: (1) subjective *mens rea*, (2) penal negligence, (3) regular negligence, (4) strict liability, and (5) absolute liability. Subjective *mens rea* is the gravest and most common type of offence in criminal law. Subjective *mens rea* requires the defendant to have some sort of subjective mental state like intention, recklessness, knowledge, or willful ignorance. The type of mental state required depends on the offence. Courts presume, as a rule,

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<sup>84</sup> Bryan A Garner, ed, *Black’s Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo “mens rea”. See also *Legally Blonde* (United States: MGM, 2001).

<sup>85</sup> *DeSousa*, *supra* note 19 at 964–65. There does not need to be a perfect symmetry between the *mens rea* and the *actus reus*, however. For instance, foreseeability of the risk of substantial bodily harm suffices to prove manslaughter and foreseeability of death need not be proven. See *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632.

<sup>86</sup> Garner, *supra* note 84, sub verbo “actus reus”.

<sup>87</sup> *Daviault*, *supra* note 6 at 102–03.

that offences require a subjective *mens rea*.<sup>88</sup> The second gravest category after the subjective one is penal negligence. Penal negligence is when someone's act(s) markedly depart from how careful a reasonable person would have been in the same circumstances.<sup>89</sup> The third gravest category is regular negligence, which includes any departure from how a reasonable person would have acted in the circumstances.<sup>90</sup> It is mostly used outside of the criminal law when people sue each other for negligence. The fourth level of offence, strict liability, is closely related to standard negligence.<sup>91</sup> With strict liability, the government only has to prove that the person has done the act (*actus reus*) and they do not have to prove any *mens rea*; the defendant can then get acquitted by showing that they made a factual mistake or acted reasonably in the circumstances.<sup>92</sup> In other words, you are presumed to have been negligent but can try proving that you were not. And then there is the lowest possible level of moral guilt: absolute liability. With absolute liability, the government must only prove the act (*actus reus*) and the defendant cannot even reply that they made a factual mistake or acted reasonably. So far, the law does not recognize offences that do not at least require proving the *actus reus*. If it did, it would be a sixth level and be even lower than absolute liability.

Section 7 of the *Canadian Charter of Rights and Freedoms* protects "the right to life, liberty, and security of the person."<sup>93</sup> As a result, the criminal law must follow a certain logic when it comes to *mens rea*. Imprisonment, the defining characteristic of criminal law, can only be ordered if it is "in accordance with the principles of fundamental justice."<sup>94</sup> Over the years, the Supreme Court of Canada has recognized many principles of fundamental justice directly bearing on *mens rea*. The type of *mens rea* required must be compatible with the stigma and punishment that attaches to the offence. Crimes that are particularly grave and stigmatized, like murder, require a subjective *mens rea*.<sup>95</sup> There are also limits for when different mental states

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<sup>88</sup> *R v ADH*, 2013 SCC 28 at para 23.

<sup>89</sup> *R v Hundal*, [1993] 1 SCR 867, 14 CRR (2d) 19.

<sup>90</sup> *R v Beatty*, 2008 SCC 5 [Beatty].

<sup>91</sup> Strict liability could be described as regular negligence coupled with a rebuttable presumption of negligence.

<sup>92</sup> *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

<sup>93</sup> *Charter*, *supra* note 16, s 7.

<sup>94</sup> *Ibid.*

<sup>95</sup> *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399. The principle has yet to be applied to another offence.

can be substituted for another. For instance, the Supreme Court in *Daviault* said that proving intent to commit sexual assault could not be switched out for proving intent to drink because, depending on circumstances, the former was not always a predictable outcome of the latter.<sup>96</sup> However, proof of intent can generally be replaced by proof of recklessness and proof of knowledge can usually be replaced by proof of wilful ignorance.<sup>97</sup> They are sufficiently close, in moral terms, that replacing one for the other is authorized. Arguably, the most important principle, however, the one that provides perhaps the greatest protection against state oppression among all principles of fundamental justice, is the principle that whenever incarceration is a possible punishment for an offence, that offence must require some sort of *mens rea*.<sup>98</sup> It cannot be an absolute liability offence that only requires proof of the *actus reus*. According to the Supreme Court in *Daviault*, removing the voluntary intoxication defence goes even further, abrogating the need to prove *actus reus* since it only includes voluntary acts and not involuntary ones.<sup>99</sup>

Like other rights guaranteed by the *Charter*, section 7 is not absolute. Once it has been established that a right was interfered with, the government can show that it is the kind of limitation on civil liberties and human rights that is “demonstrably justified in a free and democratic society.”<sup>100</sup> Justification is proven by showing that the law aims at a pressing and substantial objective, is rationally related to that objective, impairs the right(s) as little as possible, and there is proportionality between the positive and negative effects of the law.<sup>101</sup> If the infringement of the right is worse than not meeting the objective, then the law will be unconstitutional. Laws that restrict rights guaranteed by the *Charter* are frequently found to be justified and deemed constitutional as a result of this analysis.

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<sup>96</sup> *Supra* note 6 at 92.

<sup>97</sup> *R v Jorgensen*, [1995] 4 SCR 55, 129 DLR (4th) 510; *Sansregret v The Queen*, [1985] 1 SCR 570, 17 DLR (4th) 577.

<sup>98</sup> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*BC Motor Vehicle*]. Technically speaking, strict liability offences are not considered *mens rea* offences, but I would argue that there is still a substantial amount of *mens rea* involved insofar as errors of fact or having acted reasonably in the circumstances can be used as a defence.

<sup>99</sup> *Supra* note 6 at 102–03.

<sup>100</sup> *Charter*, *supra* note 16, s 1.

<sup>101</sup> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 889, 120 DLR (4th) 12.

Section 7 has been treated a bit differently from most other *Charter* rights when it comes to justifying infringements because you can only violate it by violating principles of fundamental justice – something so important to the justice system that they are considered part of its foundations. Furthermore, incarceration is, by definition, taking away someone’s liberty. The very proposition that an infringement upon liberty that goes against principles of fundamental justice could be “demonstrably justified in a free... society” is peculiar on its face. Can a society ever be free that takes away liberty contrary to principles of fundamental justice?

Judges have shared this suspicion and since the *Canadian Charter* was promulgated in 1982, not a single violation of section 7 has been held justified under section 1 by the Supreme Court of Canada.<sup>102</sup> Although the Supreme Court is open to the possibility of a violation being justified and will still engage in the justificatory analysis, it has also long observed the difficulty of salvaging a breach of section 7.<sup>103</sup> In *Canada (Attorney General) v Bedford*, then-Chief Justice Beverley McLachlin explained:<sup>104</sup>

It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the Charter. The significance of the fundamental rights protected by s. 7 supports this observation.

Even though she expressly stated that it would be possible in some cases, she also affirmed the special status of section 7.<sup>105</sup> What would be required will depend on the context and on the law’s objectives, but it has been suggested that where the law’s objective is expediency, a justification would only be possible in circumstances such as natural disasters, war, epidemics,

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<sup>102</sup> Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2007) (loose-leaf, 5th ed), §38.14(b). Leave to appeal to the Supreme Court of Canada was, however, dismissed in *R v Michaud*, 2015 ONCA 585 despite the Court of Appeal finding that a limitation on section 7 was justified under section 1 of the *Charter*. It is worth noting that the decision expressly states that safety regulations attract lower constitutional scrutiny than criminal laws, so its precedential value in relation to section 33.1 is very low. The decision of the Supreme Court to dismiss leave to appeal is, while interesting, does not have much legal significance.

<sup>103</sup> Although, as Hogg, *supra* note 102 explains, the exercise is sometimes little more than repeating the points raised during the fundamental justice analysis.

<sup>104</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 129 [*Bedford*] [footnotes omitted].

<sup>105</sup> Some commentators have suggested that the decision nonetheless made justification easier to establish. See Hamish Stewart, “Bedford and the Structure of Section 7” (2015) 60:3 McGill LJ 575 at 593.

etc.<sup>106</sup> Where the objective is to combat the risk of perpetrators of sexual assault, intimate partner violence, and other violent crimes being acquitted, the threshold to meet is difficult to estimate but will undoubtedly be very high.

Declaring section 33.1 constitutional would allow for convictions without a *mens rea* reflecting the crime and indeed without a *mens rea* or *actus reus* at all,<sup>107</sup> posing two significant dangers for the ongoing development of the law: it weakens *mens rea* requirements and it weakens principles of fundamental justice unrelated to *mens rea*.

Weakening *mens rea* requirements by making greater room for lower levels of *mens rea* in proving offences or by removing the need for proving *mens rea* altogether has potentially serious consequences. Absolute liability is not enough whenever imprisonment is possible, and strict liability remains largely restricted to regulatory matters.<sup>108</sup> By allowing convictions without *mens rea* under section 33.1, the door is open to allowing convictions with lower levels of *mens rea* for other offences (for example, mere negligence where intent used to be required). The objective of fighting violence against women by ensuring that perpetrators are punished is a weighty and worthy one, but it is far from unique among criminal laws. The positive effects of section 33.1 are very significant but are not exceptional. If courts find these effects to be sufficiently important to outweigh the fundamental requirement of *mens rea*, which goes to the very heart of the criminal justice system, then many other laws running afoul of the principles of fundamental justice could be justified using similar reasoning. Finding a law constitutional creates a precedent. Judges must think about this and so must we when we comment on legal matters.

Lessening prosecutors' burden of proving a higher level of *mens rea* is a risk for people who are poor, homeless, and/or live with mental illness, and it will likely have an incidence on the overincarceration of Black and

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<sup>106</sup> *BC Motor Vehicle*, *supra* note 98 at 518.

<sup>107</sup> While subsection 33.1(1) requires marked departure from how a reasonable person would act – suggesting a penal negligence standard – subsection (2) expressly defines “marked departure” to include aggressive and violent behaviours occurring during automatism or severe psychosis. This is just a roundabout way of creating absolute liability for those who are in a state of automatism or severe psychosis.

<sup>108</sup> Even in the pre-*Charter* landscape, strict liability was largely restricted to what was called “public welfare offences”. See *Beatty*, *supra* note 90 at paras 22–23. These offences carry relatively light sentences: *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 205, 84 DLR (4th) 161.

Indigenous peoples. These groups are disproportionately targeted for offences seen as ‘less grave’ but which still carry the possibility of incarceration, and it would be tempting for the government (who wants to be ‘hard on crime’) to use strict or absolute liability. Women who live at the intersection of multiple vectors of marginalization are particularly at risk because of racial profiling, the feminization of poverty, and the role played by sexism in the developing of mental illnesses.<sup>109</sup> Some penal negligence crimes relate to children and disproportionately apply to women. For instance, it is a crime to fail to provide one’s children with the necessities of life.<sup>110</sup> The recourse to the penal negligence standard of “marked departure from what a reasonable person would do” already indicates an impetus towards making the offence easier to prove for the government.

The impact of weakening *mens rea* requirements is difficult to predict and could bear on practically all aspects of criminal law. Since political will is the principal vector of change and is notoriously fickle, trying to predict what changes would follow may be a fruitless endeavour. I find comfort in the fact that in the last 25 years since section 33.1 was passed, no radical change to the criminal law has been seen, as far as *mens rea* is concerned. But the real risk does not arise unless the constitutionality of section 33.1 is confirmed by the Supreme Court or becomes firmly entrenched in the jurisprudence of appellate courts. Only then would the weakening of *mens rea* requirements be recognized by the law and prone to governmental abuse.

Besides principles of fundamental justice relating to *mens rea*, section 7 of the *Charter* (the right to life, liberty, and security of the person) guarantees an open-ended range of crucial protections. Laws cannot be arbitrary, irrational, vague, or overbroad.<sup>111</sup> People have a right to be tried and punished under the law that was in force at the time that the offence was committed and not be punished under a retroactive law or under the wrong

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<sup>109</sup> It is important to recognize that intersecting vectors of marginalization create unique circumstances that are far more complex than merely “adding up” two forms of discrimination: see Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 *Stan L Rev* 1241; Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10:1 *Berkeley Women’s LJ* 16; Patricia Hill Collins, “Gender, Black Feminism, and Black Political Economy” (2000) 568:1 *Annals Am Academy Political & Soc Science* 41. I cannot recommend getting familiar with intersectionality and Black feminist thought enough.

<sup>110</sup> *Criminal Code*, RSC 1985, c C-46, s 215.

<sup>111</sup> *R v Marmo-Levine*; *R v Caine*, 2003 SCC 74; *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36.

legal provision.<sup>112</sup> Minors are presumed to be less morally guilty than adults for their actions.<sup>113</sup> People have a right to silence that goes beyond those granted by other sections of the *Charter*.<sup>114</sup> Police are obligated to take reasonable steps to preserve evidence, which may then be used at trial.<sup>115</sup> People cannot be convicted of crimes where they acted under severe duress, a situation tantamount to moral involuntariness. This principle was established after a woman was charged for importing heroin into Canada in a context of assaults, sexual harassments, and threats against her mother.<sup>116</sup> And last but not least, it goes against fundamental justice for the effect of a law to be grossly disproportional to the law's objective.<sup>117</sup> The principle of gross disproportionality was used to strike down laws criminalizing sex workers and prevent governments from disallowing safe injection sites.<sup>118</sup> Many of these principles are essential pillars of a just society and have been used to hamper harmful government action.

Governments routinely try to limit or infringe upon human rights and civil liberties for what they believe to be the greater good. The judicial system acts as a safeguard, however imperfect, of these rights and liberties, calling the government to account when it oversteps the proper boundaries of governmental action. Section 7 of the *Charter* and its relative imperviousness to justification under section 1 has been one of the most treasured bastions against government overreach. We live in an era marked by the rise of right-wing antidemocratic populisms rife with misogynistic elements and characterized by the institutionalisation of a neoliberal carceral, (pseudo) feminism, that collaborates in the marginalization of the most vulnerable members of society.<sup>119</sup> Opening the door by weakening some of the most

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<sup>112</sup> *R v Gamble*, [1988] 2 SCR 595, 37 CRR 1. However, if the punishment changed from the time the offence was committed and the time of sentencing, the person has the right to pick the lesser punishment of the two. See *Charter*, *supra* note 16, s 11(i).

<sup>113</sup> *R v DB*, 2008 SCC 25.

<sup>114</sup> *R v Singh*, 2007 SCC 48; *Charter*, *supra* note 16, ss 11(c), 13.

<sup>115</sup> *R v La*, [1997] 2 SCR 680, 148 DLR (4th) 608.

<sup>116</sup> *R v Ruzic*, [2001] 1 SCR 687, 197 DLR (4th) 577.

<sup>117</sup> *Bedford*, *supra* note 104.

<sup>118</sup> *Ibid*; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

<sup>119</sup> Kenneth Roth, "The Dangerous Rise of Populism: Global Attacks on Human Rights Values" (2007) 70 *J Int'l Aff* 79; Rosalie Silberman Abella, "Judicial Independence, Democracy and Human Rights" (2019) 52:1 *Isr LR* 99; Rosalie Silberman Abella, "Freedom of Expression or Freedom from Hate: A Canadian Perspective" (2018) 40:2 *Cardozo L Rev* 503; Erik Voeten, "Populism and Backlashes against International Courts" (2019) *Perspectives Policy* 1; Mimi E Kim, "From Carceral Feminism to

important provisions of the *Charter*, even for very good reasons, is a decision that cannot be taken lightly.

#### IV. CONCLUSION

Far from my mind is the suggestion that the voluntary intoxication defence is without critique. Nor do I wish to take a definitive stance in favour of its existence. As Heather MacMillan-Brown, now a judge on the Saskatchewan Court of Queen's Bench, wrote when *Daviault* came out, it is "impossible to escape questions of policy and competing rights" that spring forward from the voluntary intoxication defence at "a time when Canada is struggling to cope with a plague of sexual violence."<sup>120</sup> Her comments, made 25 years ago, have sadly not lost any of their pertinency.

What I hope to have shown is that the defence is not so terrible of an idea that it can be dismissed offhandedly, without any deeper analysis. The question of whether voluntary intoxication should constitute a defence and under which conditions is a complex one that requires a nuanced balancing between competing moral and policy considerations. As we consider our response to violence against women, a problem of pandemic proportions,<sup>121</sup> we must adopt an intersectional outlook, fuelled by concern for the criminalization of mental illness and attuned to the disproportionate impact of the criminal justice system on Black, Indigenous, trans, queer, and homeless people – those who will bear the brunt of any relaxing of criminal law standards. For lack of a better place to make the remark, I would also like to point out that my earlier suggestion that the voluntary intoxication defence is less problematic than many think because it would have resulted in few acquittals over the last 25 years cuts both ways: the negative impact on sexual assault reporting by victims may outweigh the dangers of criminalizing mental health if very few mentally ill people could benefit from the defence anyway.

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Transformative Justice: Women-of-color, Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cult Diversity Soc Work 219 at 220ff; Chloë Taylor, "Anti-Carceral Feminism and Sexual Assault – A Defense: A Critique of the Critique of the Critique of Carceral Feminism" (2018) 34 Soc Phil Today 29 at 31ff.

<sup>120</sup> MacMillan-Brown, *supra* note 48 at 312.

<sup>121</sup> I use the term consciously, the COVID-19 context having fuelled a disastrous rise in intimate partner violence: see Caroline Bradbury-Jones & Louise Isham, "The Pandemic Paradox: The Consequences of COVID-19 on Domestic Violence" (2020) 29:13/14 J Clinical Nursing 2047.

If good-versus-evil language fails to capture the feminist tensions surrounding the voluntary intoxication defence, the binary choice of maintaining it or abolishing it wholesale will likely also be misleading. These are serious options that must be considered, but they are far from the only ones (as the post-*Daviault* legal scholarship has shown).<sup>122</sup> The Court in *Daviault* itself gestured in that direction, pointing out that it was “always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk.”<sup>123</sup>

Although exploring policy options and making recommendations is beyond the scope of this paper, I would be remiss if I did not point to three options that emerge from the foregoing analysis. First, concerns over the criminalization of mental illness could be partly alleviated by mending the difficult relationship between the voluntary intoxication defence, precluded by section 33.1, and the verdict of not criminally responsible by reason of mental disorder found in section 16 of the *Criminal Code*. The burden of proving that people who do not share your mental disorder or neurological vulnerability would not have fallen into automatism or severe psychosis is prohibitively high and flies in the face of scientific reality, which speaks the language of risk factors, predispositions, and percentages. The evidentiary threshold should be revised to better correspond to this reality. Second, alcohol could be targeted directly. Alcohol is frequently used by perpetrators of sexual assault, was the primary target of post-*Daviault* commentary, and was clearly on the mind of legislators when they adopted section 33.1.<sup>124</sup> Yet, as we have seen, alcohol is also one of the intoxicants for which there is the least evidence of being able to directly cause automatism or severe psychosis. Alcohol could be singled out by outright prohibition by creating a presumption that it does not lead to automatism or severe psychosis or by combining both a prohibition and a presumption – for instance by prohibiting the voluntary intoxication defence where alcohol is the only intoxicant and by creating a presumption that the combination of alcohol and small amounts of other drugs did not cause automatism or severe

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<sup>122</sup> Healy, “Intoxication”, *supra* note 63; Martha Shaffer, “R. v. *Daviault*: A Principled Approach to Drunkenness or a Lapse of Common Sense” (1996) 3:2 *Rev Const Stud* 311; Grant, *supra* note 8. As a prison abolitionist, I would favour approaches that address the problem without recourse to incarceration: see Angela Y Davis, *Are Prisons Obsolete?* (New York, NY: Seven Stories Press, 2003); Kim, *supra* note 119; Taylor, *supra* note 119. However, defending this view is beyond the scope of the paper.

<sup>123</sup> *Daviault*, *supra* note 6 at 100.

<sup>124</sup> Grant, *supra* note 8; Sheehy, *supra* note 47.

psychosis. Third, the government could initiate an expert consensus process to establish an evidentiary baseline regarding which drugs can cause automatism or psychosis under what conditions and leading to what symptoms. The report could then be integrated into the law as a mandatory consideration and serve as a shared language for expert witnesses in voluntary intoxication cases. The three options reflect the dual observations that (1) narrow, targeted limits on the defence are more readily justifiable than broad, categorical ones and (2) no harm is done to the principles of fundamental justice if the defence is only precluded when automatism or severe psychosis (i.e. lack of *mens rea*) are scientifically impossible.

The eagerness with which people have taxed the *Sullivan* decision of antifeminism for declaring section 33.1 unconstitutional and restoring the voluntary intoxication defence for violent crimes obscures the genuine complexity of the topic. We should switch out the narrow feminist lens applied by some in favour of an intersectional feminist lens that engages with the criminalization of mental illness and the importance of maintaining the integrity of principles of fundamental justice for marginalized communities. Doing this adds a layer of richness to our conversations and better equips us to choose from among the available policy options. Whichever one may be best, it is a choice that deserves as nuanced and complex of a reflection as the problem is.

# The Criminalization of Non-Assimilation and Property Rights in the Canadian Prairies

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LAUREN SAPIC

## I. INTRODUCTION

The tragic case of Colten Boushie, a young Indigenous man from Saskatchewan, has become an inflection point in Canadian law due to the intersection of Indigenous rights and property law. Boushie was shot and killed by Gerald Stanley, a white man, at his farm; he was subsequently found not guilty of his murder. Boushie's mother, Debbie Baptiste, was informed of her son's death by the Royal Canadian Mounted Police (RCMP) when they entered the family home in the middle of the night, waking small children by their unannounced entry. When Baptiste fell to the ground due to the overwhelming grief over the news of her son's death, the RCMP accused Baptiste of drinking and told her to "get herself together."<sup>1</sup>

One question that the Colten Boushie case brings sharply into focus is how policies in Canadian property law have privileged white settlers' property rights as a result of the subjugation of Indigenous human rights. This has created a position of "tutelage" under property law for Indigenous peoples, which was adopted when Canada inherited sovereignty and underlying title to Canadian land from previous European powers which had been present in North America.<sup>2</sup> The racist policies of assimilation, which are the foundation of Canadian property laws, have helped to form

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<sup>1</sup> David McDonald, "Colten Boushie And Settlers' Justice" (13 February 2018), online: *The Tyee* <[thetyee.ca/Opinion/2018/02/13/Colten-Boushie-Settlers-Justice/](https://thetyee.ca/Opinion/2018/02/13/Colten-Boushie-Settlers-Justice/)> [perma.cc/9ARW-XADK].

<sup>2</sup> Gina Starblanket & Dallas Hunt, "How Colten Boushie's Death Became Recast as Story of a Knight Protecting His Castle", *The Globe and Mail* (13 February 2018), online: <[www.theglobeandmail.com](https://www.theglobeandmail.com)> [perma.cc/K2CU-44FY].

the legal injustice of the Boushie case; its basis originated in the settler state policy of the “civilization” of Canada’s original inhabitants.

By analyzing how, arguably, the majority of settler-state property law was set up to negate the rights of Indigenous peoples, I intend to emphasize how the concept of defending one’s property has not only allowed Gerald Stanley’s “exculpation from blame”, but also a “tacit justification” of the murder of another human being.<sup>3</sup> What is required to correct this is an overhaul of the Canadian property law system, with a focus on negating the abuse of Indigenous men and the abuse of the property law system itself. To acknowledge these abuses to their fullest extent, however, would be acknowledging the shortcomings of a legal property framework that created a country. The implications in making significant changes in property law going forward are substantial.

### A. “A Man Defending His Property”

On August 9, 2016, Colten Boushie, a member of the Red Pheasant Cree Nation, and four of his friends drove onto Gerald Stanley’s farm, looking for help with a flat tire.<sup>4</sup> Stanley testified that he thought the group was trying to steal an all-terrain vehicle and confronted the occupants of the SUV before returning to the house, where he grabbed a semi-automatic pistol and fired two warning shots in the air, saying that he feared his wife had been run over by the SUV that Boushie and his friends had driven onto the property.<sup>5</sup> Approaching the vehicle with the same gun in his hand, Stanley claimed to reach inside the SUV to turn off the engine and that in the struggle, the gun in his hand “just went off”, shooting Colten Boushie in the back of the head as he sat in the front seat.<sup>6</sup> Stanley testified at trial

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<sup>3</sup> Jake Barrett-Mills, Book Review of *Canadian Justice, Indigenous Justice: The Gerald Stanley and Colten Boushie Case* by Kent Roach, (2019) 5:2 *Transmotion* 113 at 113.

<sup>4</sup> Kent Roach, “Colten Boushie, Gerald Stanley and a case that’s hard to defend”, *The Star* (20 January 2019), online: <[www.thestar.com/news/canada/](http://www.thestar.com/news/canada/)> [perma.cc/E2H8-M3ZJ]; Kent Roach, “Gerald Stanley and Colton Boushie Case” in *The Canadian Encyclopedia* (online: *The Canadian Encyclopedia*, last modified 10 February 2020) [Roach, “Boushie Case”].

<sup>5</sup> Roach, “Boushie Case”, *supra* note 4.

<sup>6</sup> *Ibid.* See also Jason Warick, “‘I just wasn’t thinking straight’: Gerald Stanley cross-examined at his 2<sup>nd</sup> Degree Murder Trial”, *CBC News* (5 February 2018), online: <[www.cbc.ca/news/canada/saskatoon/gerald-stanley-trial-lawyer-defence-case-1.4519655](http://www.cbc.ca/news/canada/saskatoon/gerald-stanley-trial-lawyer-defence-case-1.4519655)> [perma.cc/B58A-L8KT].

that his gun went off accidentally and a “jury of his peers” believed him.<sup>7</sup>

In his opening statement, Mr. Stanley’s lawyer framed the death of Colten Boushie as a man defending his property.<sup>8</sup> Gerald Stanley’s farm and life in the Saskatchewan Prairies, in general, were portrayed as places where one’s home is one’s castle: “for farm people, your yard is your castle. That’s part of the story here.”<sup>9</sup> While the current state of property law in the Prairies was acknowledged during the trial, what went unspoken was the connection in Canadian property law between the development of white settlers’ property rights as the result of the subjugation of Indigenous human rights. Boundaries between the defence of property and self-defence (despite self-defence never being employed by Stanley throughout the trial) became fluid partners throughout the trial and haunted the case, seemingly relieving Stanley of guilt and responsibility without him, or any other white male landowner, giving up “land or power or privilege.”<sup>10</sup> Canada, as a settler state that has undermined Indigenous human rights and continues to punish the non-assimilation of Indigenous individuals, has developed property laws which have unintentionally or intentionally (depending on who you ask) provided one of the leading framing devices for this controversial court case, potentially one of the most controversial in Canadian history. The implications that it exposes are numerous.

The case for property law reform in the Canadian Prairies and, consequently, human rights reform, will be explored in several ways throughout the course of this paper. First, I will explore how settler state policies formed the foundation of Canadian property law as racist policies of assimilation. I will also outline the history of these policies and how they controlled Aboriginal title and formed the justifications for the property regime. Secondly, I will analyze the current regime and legislation supporting these policies of assimilation, as well as Indigenous perspectives on these issues. This will be supported by a history of case law, which has led to the criminal association of non-assimilation with property laws. Lastly, I will explore the cultural impact and the framing of Indigenous

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<sup>7</sup> J Duncan, “The Legal Trial of Gerald Stanley: A Second Look at the Case Through the Lens of Law” (12 March 2018), online (blog): *Robson Crim* <[www.robsoncrim.com/post/2018/03/12/the-legal-trial-of-gerald-stanley-a-second-look-at-the-case-through-the-lens-of-law](http://www.robsoncrim.com/post/2018/03/12/the-legal-trial-of-gerald-stanley-a-second-look-at-the-case-through-the-lens-of-law)> [perma.cc/QW2B-4ETZ].

<sup>8</sup> Starblanket & Hunt, *supra* note 2.

<sup>9</sup> Warick, *supra* note 6.

<sup>10</sup> Eve Tuck and K Wayne Yang, “Decolonization is Not a Metaphor” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 1 at 21.

peoples as “others.” I will also look at how this failure to acknowledge has led to the dominant basis of the Canadian legal system being the protection of white settler property that allows racial discrimination to continue.

The gravity and potential repercussions of the Colten Boushie case have been shown, as it has moved to an international stage. For example, at the United Nations Permanent Forum on Aboriginal Issues, the Boushie case has been presented by members of the Boushie extended family as a human rights infraction that should be investigated.<sup>11</sup> This very human aspect of Canadian property law and its racist history need to be acknowledged in order for change to be implemented. The Colten Boushie case is a microcosm of bigger property law issues in Canada and how they are tied to Canadian law’s legal relationship and treatment of Indigenous peoples under the law, a treatment which demands reform. This is not an “Indigenous issue or a Canadian issue – it is a human-rights issue.”<sup>12</sup>

## II. SETTLER PROPERTY HISTORY IN CANADA AND THE LOCKEAN MOLD

### A. A Brief History of Civilization in Canada

There is a long history of property law in Canada used to justify human rights abuses and disqualify Indigenous peoples’ rights to their land. “French sovereignty in what is now Eastern Canada passed to Great Britain through the Treaties of Utrecht (1713) and Paris (1763). Canada inherited these rights when the Dominion was formed in 1867.”<sup>13</sup> One of the most widespread beliefs about the historical Indigenous concept of property in North America is the belief that Indigenous peoples, upon European settlement, had no concept of property in the Western sense – that is, that they had no concept of property as ownership over the land and property

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<sup>11</sup> The case could not be retried because it was found to lack an error of law to be retried on. See David Giles, “Colten Boushie’s family wants UN to investigate ‘systemic bias’ in Canada’s justice system”, *Global News* (1 May 2018), online: <[globalnews.ca/news/4179976/colten-boushies-family-wants-un-to-investigate-systemic-bias-in-canadas-justice-system/](http://globalnews.ca/news/4179976/colten-boushies-family-wants-un-to-investigate-systemic-bias-in-canadas-justice-system/)> [perma.cc/ES8C-FKPJ].

<sup>12</sup> Kelly Geraldine Malone, “Family of Colten Boushie Speaks at UN Forum”, *The Star* (17 April 2018), online: <[www.thestar.com/news/canada/2018/04/17/family-of-colten-boushie-speaks-at-un-forum.html](http://www.thestar.com/news/canada/2018/04/17/family-of-colten-boushie-speaks-at-un-forum.html)> [perma.cc/YUV2-CXUZ].

<sup>13</sup> Thomas Flanagan, André Le Dressay & Christopher Alcantara, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (London, ON: McGill-Queen’s University Press, 2010) at 27.

that they occupied and possessed.<sup>14</sup> The overwhelming narrative from explorers to the New World has supplemented this sentiment, stating that Indigenous peoples were “savages” and “utter strangers to the distinction of property.”<sup>15</sup>

## B. The Lockean Mold and its Basis for Western Property Law

This belief in the inherent superiority of the Western concepts of property was supplemented by the beliefs of English Philosopher John Locke.<sup>16</sup> The Lockean concept of private property was the basis for the development of property rights under the law from administrators arriving from Europe and it is the basis of most Canadian property law.<sup>17</sup> It also provided a basis for the justifications of the European regimes to take land from Indigenous peoples.<sup>18</sup> In Locke’s concept of property, “every man has a property in his person” or, in other words, every man has a right to property in which they have laboured upon.<sup>19</sup> Locke emphasized the act of agriculture as the prime rite of passage to this proprietary right, and the Lockean concept of property was put to use to justify English colonial domination for centuries to come.<sup>20</sup>

## C. The Policy of “Civilization” and Aboriginal Title

This policy of “civilization” of the settled land of Canada meant, as Flanagan, Dressay & Alcantara put it:

[R]econstructing... [Indigenous peoples'] property rights in a Lockean mode.... Locke’s theory was capricious enough to recognize the property rights of hunting-and-gathering people; indeed, Locke started his train of thought about property with a foraging example - gathering acorns... Later writers in the Lockean tradition, such as Swiss publicist Emer de Vattel, postulated an actual right of agriculturalists

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<sup>14</sup> *Ibid* at 30–31, 42, 60.

<sup>15</sup> James A Clifton, *The Invented Indian: Cultural Fictions and Government Policies* (New Brunswick, NJ: Transaction Publishers, nd) at 145.

<sup>16</sup> David Snyder, “Locke on Natural Law and Property Rights” (1986) 16:4 *Can J Philosophy* 723.

<sup>17</sup> *Ibid*. See also Flanagan, Dressay & Alcantara, *supra* note 13 at 60.

<sup>18</sup> John Douglas Bishop, “Locke’s Theory of Original Appropriation and the Right of Settlement in Iroquois Territory” (1997) 27:3 *Can J Philosophy* 311.

<sup>19</sup> Flanagan, Dressay & Alcantara, *supra* note 13 at 60. See also John Locke & CB Macpherson, *Second Treatise of Government* (Indianapolis, Ind: Hackett, nd) at para 27.

<sup>20</sup> Locke & Macpherson, *supra* note 19 at para 50; Flanagan, Dressay & Alcantara, *supra* note 13.

to take land from hunter-gatherers because they (the farmers) would make better use of it.<sup>21</sup>

Historians have argued, however, that this hunter-gather portrayal of the Indigenous populous upon settlement was a creation to justify furthering this Lockean philosophical ideal.<sup>22</sup>

Flanagan, Dressay & Alcantara further explain that:

Ignorant of the complex array of property rights that... [Indigenous peoples] had evolved for themselves in the New World,... [Europeans] tended to see... [Indigenous peoples] as hunting and gathering on the land but not otherwise owning it - in short, people without property. They saw property rights not as an outgrowth of the [Indigenous]... culture but as something wholly new that would have been introduced to them as part of the civilizing process. [Indigenous peoples]... had no property rights in the present, but they would have to adopt them in the future to become civilized. It was also completely individualistic;... [Indigenous peoples] would have to adopt individual ownership in fee simple as that concept had developed in British law. There was little appreciation of the complex web of communal, family, and individual rights that were already a part of Indigenous hunting and farming cultures. As historian Sarah Carter put it, some colonials believed that private property would help [Indigenous people] better focus their "hopes, interests, and ambitions. Lacking a fixed abode, they could have no notion of proper family life." The introduction of private property would also quell the violent tendencies that colonials believed to be inherent in... [Indigenous] peoples. "Most Canadians believed that private ownership of property and possession would put an end to Indian warfare, which was viewed as an irrational, bloodthirsty sport, perpetuated endlessly because the... [Indigenous peoples] had little property to lose." Government officials, therefore, saw agriculture and private property as necessary elements for Aboriginal peoples to climb out of savagery towards civilization. Government encouraged Christian missionaries to bring religion, education, and Western concepts of farming and property to the "backwards"... [Indigenous peoples].<sup>23</sup>

### III. INDIGENOUS LAW CONCEPTS OF PROPERTY IN CANADA

Scholars find inspiration from Western philosophers who saw property rights as evolving through time in a historical context along with other social institutions, as in the works of David Hume, John Stuart Mill, and Friedrich Hayek.<sup>24</sup> This approach forms the basis of the view of natural

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<sup>21</sup> Flanagan, Dressay & Alcantara, *supra* note 13 at 60 [footnotes omitted].

<sup>22</sup> Eric Dannemaier, "Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine" (2008) 86:1 Wash University L Rev 53.

<sup>23</sup> Flanagan, Dressay & Alcantara, *supra* note 13 at 61 [footnotes omitted].

<sup>24</sup> *Ibid* at 16.

rights to property and supports the Indigenous belief that property rights of Indigenous peoples are always present.<sup>25</sup> However, settler state law has not reflected this belief; indeed, it has been outright repudiated in Canadian courts over the years, in favour of the Lockean interpretation of property rights.<sup>26</sup>

Some Indigenous scholars believe that because Canadian law has been formed through a bijuralist mixture of common and civil law, Indigenous law “has often been overlooked by Canadian courts because of its perceived incompatibility with” the Canadian legal landscape.<sup>27</sup> Because Canadian courts did not rely on Indigenous sources during its creation and characterization of Aboriginal rights under Canadian law, Aboriginal land rights were obstructed and framed from a settler-state viewpoint. Settler law can be seen to embed itself in every attempt to change it.<sup>28</sup> Many sources of Aboriginal evidence, often in the oral tradition, were traditionally rejected under strict interpretation of Canadian evidence law.<sup>29</sup> This resulted in very little protection of Indigenous peoples in their own terms, despite traditions and stories of Indigenous peoples that could have been framed as case law precedents.

In particular, Canadian scholar John Borrows suggests that the traditions and stories of First Nations are analogous to legal precedents because they attempt to provide reasons for broad community principles and criticize deviations from these accepted standards.<sup>30</sup> He also maintains that “common law cases and Aboriginal stories are... similar because both record fact patterns of past disputes and their related solutions... [, while being regarded] as authoritative by their listeners.”<sup>31</sup> Throughout Indigenous stories and histories, there are “natural, moral and cultural sanctions” for non-adherence to community values and principles, much

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<sup>25</sup> Mary L Caldbick, *Locke's Doctrine of Property and the Dispossession of the Passamaquoddy* (Master of Arts, University of New Brunswick, 1997) [unpublished].

<sup>26</sup> *Ibid.*

<sup>27</sup> See e.g. John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ 629 at 629.

<sup>28</sup> Crawford Kilian, “Colten Boushie: A Final Exam We’re Flunking” (11 June 2020), online: *The Tyee* <[theyee.ca/Culture/2019/06/11/Colten-Boushie-Final-Exam/](http://theyee.ca/Culture/2019/06/11/Colten-Boushie-Final-Exam/)> [perma.cc/Q96n-MAHE].

<sup>29</sup> Mary Ann Pylpchuck, “The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources” (1991) 32 *Archivaria* 51.

<sup>30</sup> Borrows, *supra* note 27 at 647.

<sup>31</sup> *Ibid.*

like the common law.<sup>32</sup>

However, where Indigenous stories differ from common law precedents is the way that they are recorded and applied,<sup>33</sup> which can lead to difficulty in allowing Aboriginal law to become a respected source under Canadian common law. Indigenous peoples “use an oral tradition in order to chronicle important information”; non-ceremonial stories can change from one telling to another, which does not seemingly fly in the face of common law precedent.<sup>34</sup> This is justified, however, by stating that modification of these stories and the reinterpretation of many of the stories’ elements recognize that the context of stories are always changing and need to be adopted to the time and place of the listeners. This allows for a constant recreation of Indigenous systems of law.<sup>35</sup>

However, there is always the counterargument that settler state law cannot discern, apply, or accommodate Indigenous legal principles. Moreover, perhaps attempting to allow Aboriginal law to enter a common law system could constitute further assimilation. As a result, many tribes, especially in British Columbia, have created well-defined boundaries for the lands that they own, as well as creating new forms of private property ownership under Aboriginal law.<sup>36</sup> New treaties in British Columbia have resulted in the Nisga’a, Tsawwassen, and Maa-nulth First Nations adopting forms of a Torrens system of property ownership. This is to negate aspects of *The Indian Act*, which itself has created a position where property is not collectively owned by members of the reserve but held in trust by the Crown for Indigenous peoples’ use and benefit.<sup>37</sup>

Because private property cannot be owned by individuals on a reserve, some Indigenous band members argue that property that is not owned is treated accordingly: trashed or neglected in a manner one would not treat one’s owned property.<sup>38</sup> Other scholars, such as Laurie Meijer-Drees, argue

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 648.

<sup>34</sup> *Ibid.*

<sup>35</sup> See generally EJ Dickson-Gilmore, “Finding the Ways of the Ancestors: Customary Change and Invention of Tradition in the Development of Separate Legal Systems” (1992) 34:3/4 *Can J Crim* 479.

<sup>36</sup> See generally Christopher Alcantara, “Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession” (2003) 23:2 *Can J Native Studies* 391.

<sup>37</sup> *Ibid.*

<sup>38</sup> Judith Lavoie, “Housing Issue Muddied by Neglect”, *Times Colonist* (9 February 2009), online: <[www.timescolonist.com/news/local/housing-issue-muddied-by-neglect-1.1641](http://www.timescolonist.com/news/local/housing-issue-muddied-by-neglect-1.1641)>

that the system of reserve “social engineering” implemented after the end of World War II placed Indigenous peoples into a European system of property that had little to do with their history and, therefore, it created a system of paternalistic dependency.<sup>39</sup> Thus, it is important that Canadian judges have access to Indigenous examples of property rights as a counterpoint, as it can be a culturally appropriate way to answer many of the issues that property law poses for Indigenous peoples because of the historical development of Canadian law.<sup>40</sup>

#### IV. HOW CURRENT PROPERTY RIGHTS ARE STILL SHAPED BY EARLY TREATIES AND DISCRIMINATION

Canadian federal government policy has historically implemented legislation with the end goal of having Indigenous peoples “civilized” or assimilated. Indeed, reserves were initially established to provide for the survival and development of Indigenous peoples to adopt a settled and “civilized” way of life, with control and management of the lands vested in the federal government.

##### A. The *British North American Act*

The *British North American Act*<sup>41</sup> was the first document that granted Canada exclusive and extensive control over Aboriginal rights and land. The Act also granted the Crown the unilateral power to extinguish these rights as it saw fit. The assimilation policy continued from the British imperial government before it, which had three distinct prongs: firstly, assimilation through miscegenation and education; secondly, claimed provisions for the protection of Indigenous peoples from extermination (which went unenforced); and thirdly, centralization, where Indigenous peoples were deprived of their land and placed on reserves in order to be more “well maintained.”<sup>42</sup>

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6> [perma.cc/3434-ZKZS].

<sup>39</sup> *Ibid.*

<sup>40</sup> See generally W Pue, “Evolution by Legal Means” in HP Glenn, ed, *Contemporary Law 1994 Droit contemporain* (Montréal: Yvon Blais, 1994) 1.

<sup>41</sup> *Constitution Act, 1867* (UK) 30-31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

<sup>42</sup> David T McNab, *No Place for Fairness: Indigenous Land Rights and Policy in the Bear Island Case and Beyond* (London, ON: McGill-Queen's University Press, 2009) at 20.

The importance of the third prong of The *British North American Act* cannot go underestimated. By centralizing Indigenous peoples and depriving them of their land, the Canadian government was effectively removing Indigenous peoples from a defining part of their culture and identity while placing them in a position of vulnerability.<sup>43</sup> It also placed Indigenous peoples in a property scheme that only the Canadian government could control.<sup>44</sup>

This approach to Canadian property, that excluded Indigenous peoples, lasted until the Supreme Court of Canada ruling in *Delgamukkw v British Columbia* in 1997.<sup>45</sup> While *Delgamukkw* challenged the contention that Aboriginal title had been extinguished in British Columbia, in particular, it did not challenge Canadian sovereignty over all other Canadian lands, and many aspects of *The Indian Act* were redressed in the ruling.<sup>46</sup>

## B. The *Indian Act*

The *Indian Act*<sup>47</sup> is arguably the most important piece of settler-state legislation regarding Indigenous peoples in Canadian legislative history. It enveloped all previous settler-state legislation into one act, and it was formed with the parliamentary intention of lifting “the red man... out of his condition of tutelage and dependence” and to place Indigenous peoples in a place of manhood.<sup>48</sup>

While the legislation’s openly racist intentions speak for themselves, it also created two systems of landholding:

[I]n the first, “non-enfranchised... [Indigenous peoples] could hold lawful possession (life estate) of reserve lands allotted to them by... [an Indigenous] council with a location ticket issued by the superintendent-general. Under the second... [, Indigenous peoples] enfranchised under sections 86 and 88 [of *The Indian Act*] could gain a fee-simple interest to reserve lands, and upon their death, the lands would go to their children in fee simple.”<sup>49</sup>

However, in the Indigenous communities, these were seen as temporary

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<sup>43</sup> *Ibid* at 20–30.

<sup>44</sup> *Ibid*.

<sup>45</sup> [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamukkw*].

<sup>46</sup> *Ibid* at paras 4, 37, 40, 51, 70, 81, 114, 141.

<sup>47</sup> RSC 1985, c I-5 [*The Indian Act*].

<sup>48</sup> Brett Popplewell, “A History of Missteps [Policy Re: First Nations]” (31 October 2010), online: *Social Policy in Ontario* <[spon.ca/a-history-of-missteps-policy-re-first-nations/2010/10/31/](http://spon.ca/a-history-of-missteps-policy-re-first-nations/2010/10/31/)> [perma.cc/49Z6-HXN].

<sup>49</sup> Flanagan, Dressay & Alcantara, *supra* note 13 at 67.

measures designed to assimilate Indigenous “peoples into mainstream society.”<sup>50</sup> Métis families were also initially limited to possessing a maximum of 160 acres for a family of five under section 125 of the *Dominion Lands Act*, as opposed to white settlers, who could gain a free tract of land from between 160 to 320 acres per head in their family.<sup>51</sup> The historical privileging of white European settlers over Indigenous peoples with regards to land ownership was written into Canadian law from the early formation of property law.

Today, most reserves or Indigenous lands are provincial Crown lands and dedicated to a specific purpose under section 18 of *The Indian Act*; band councils are allowed to make some decisions, such as allowing individuals to take possession of certain areas of land on the reserve, but this decision can be overridden by the Minister at any time.<sup>52</sup> Customary rights to land are often undocumented and cannot be enforced in Canadian courts, unlike certificates of possession or leases.<sup>53</sup> This has led to *The Indian Act* becoming a lightning rod for criticism amongst Indigenous communities for its regressive and paternalistic nature of Indigenous peoples not actually owning the land that they live on (with assets on the reserve not being subject to seizure under the legal process and matrimonial property laws not applying to assets on the reserve).<sup>54</sup> Members of Indigenous communities are limited in their ability to own land in fee simple title on reserves. This limitation also precludes Indigenous peoples from owning their homes and leveraging land in equity to invest in business opportunities, which places them at a pointed disadvantage relative to the population at large. The poor quality of property rights on many reserves results in higher rates of poverty, lower property values, and less commercial development, which leads to fewer opportunities for Indigenous individuals and a cycle of social inequality as a result of the property law system.<sup>55</sup>

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<sup>50</sup> *Ibid* at 71.

<sup>51</sup> Canadian Geographic, *Indigenous Peoples Atlas of Canada* (Canada: Canadian Geographic, 2018).

<sup>52</sup> *The Indian Act*, *supra* note 47, ss 18(1)–(2).

<sup>53</sup> TM Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed (Saskatoon, SK: Purich, 2004) at 3.

<sup>54</sup> Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples: A Reality* (Canada: Indigenous Relations Press, 2018)

<sup>55</sup> Fernando M Aragon & Anke S Kessler, “Property Rights on First Nations’ Reserve Land” (2020) 53:2 Can J Economics 460.

According to the Auditor General of Canada, an investment project on reserve can cost up to four to six times more than an investment project not on reserve because investors must first establish tradeable property rights on a reserve in order to do business.<sup>56</sup>

### *C. First Nations Land Management Act*

The *First Nations Land Management Act* (FNLMA) was the first act enacted under federal law in 1999 that gave Indigenous peoples the authority “to create property rights regimes outside of the *Indian Act*.”<sup>57</sup> The FNLMA provided signatory First Nations groups their own ability to create property-right regimes in relation to reserve lands, resources, and environments.<sup>58</sup>

The *Indian Act* provisions relating to land management no longer apply to First Nations bands that have ratified land treaties and have their authority to make their own reserve land allotments. As of April 2013, 35 First Nations bands are operating under their own land codes, and as of April 2014, 30 First Nations bands are developing their own land codes.<sup>59</sup> However, the issue raised is that only part of *The Indian Act* is negated and that only signatories are included. In practice, this means that the negation of *The Indian Act* under law only extends to those who have developed their own land codes.

### **D. Case Law**

Property rights in terms of both legislation and case law did not develop until the late 20th century. Rights that were previously recognized and subject to constitutional and legislative extinguishment have now become powerful, constitutionally protected rights. The Privy Council held in *St. Catherine’s Milling and Lumber Co v R* that Indigenous peoples possessed a

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<sup>56</sup> Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada*, ch 4, Programs for First Nations on Reserves (Ottawa: OAGC, 2011), online: <[www.oagbvg.gc.ca/internet/English/parl\\_oag\\_201106\\_04\\_e\\_35372.html](http://www.oagbvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html)> [perma.cc/VNT7-N7DT].

<sup>57</sup> *First Nations Land Management Act*, SC 1999, c 24; Flanagan, Dressay & Alcantara, *supra* note 13 at 55.

<sup>58</sup> Flanagan, Dressay & Alcantara, *supra* note 13 at 55.

<sup>59</sup> Indigenous and Northern Affairs Canada, *First Nations Land Management: Operational and Developmental First Nations* (Winnipeg: INAC, last modified 23 May 2014), online: <[www.aadnc-aandc.gc.ca/eng/1327165048269/1327165134401](http://www.aadnc-aandc.gc.ca/eng/1327165048269/1327165134401)> [perma.cc/FR9W-G6LX].

“personal and usufructory right, dependent upon the good will of the sovereign” over which they enjoyed Aboriginal Title.<sup>60</sup> While the case of *St. Catherine’s* was the leading case for Aboriginal law for more than 80 years, it was not until *Calder v Attorney General of British Columbia* that Canadian law acknowledged that Aboriginal title to land existed prior to colonialism.<sup>61</sup> The judges participating in the *Calder* decision agreed that Aboriginal title was not dependent upon legislative enactments, executive orders, or treaties.<sup>62</sup> Rather, they agreed that Aboriginal title is a legal right derived from Indigenous peoples’ historic occupation and possession of their tribal lands.<sup>63</sup>

Aboriginal rights also took a monumental leap forward with the enactment of the *Constitution Act 1982*, which stated that existing Aboriginal rights are “recognized and affirmed”,<sup>64</sup> bringing validity to the treaty rights of Indigenous peoples created in Canada between 1701 and 1923. This tentative language was taken by the Supreme Court in *R v Sparrow* and converted into a constitutional guarantee of Aboriginal rights.<sup>65</sup>

However, at this point, we must consider that while the two are often used interchangeably, there is a definite difference between Aboriginal title versus Aboriginal rights. While Aboriginal title consists of exclusive possessory rights to title, Aboriginal rights are the rights to use the land that are guaranteed under section 35 of the *Constitution Act 1982*. This means that even though the acknowledgement of Aboriginal rights under *Sparrow* is an important landmark in Canadian property law, self-governance of the lands for Aboriginal peoples are not guaranteed, even though Aboriginal title as a legal right was first acknowledged in *Calder*.

This was followed in relatively quick procession by *Guerin v The Queen*, which established a *sui generis* right and that the government had a fiduciary duty to Indigenous peoples.<sup>66</sup> However, it was *Delgamukkw* which is said to state the first definitive statement on Aboriginal title in Canada and how this title may be proven.<sup>67</sup> It also stated the justification test for

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<sup>60</sup> *St. Catherine’s Milling and Lumber Co v R*, [1888] UKPC 70 at 55.

<sup>61</sup> *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3rd) 145.

<sup>62</sup> *Ibid* at 390.

<sup>63</sup> *Ibid* at 352.

<sup>64</sup> *Constitution Act*, *supra* note 41, s 35(1).

<sup>65</sup> [1990] 1 SCR 1075, 70 DLR (4th) 385.

<sup>66</sup> [1984] 2 SCR 335, 13 DLR (4th) 321.

<sup>67</sup> *Delgamukkw*, *supra* note 45 at para 114.

infringements of Aboriginal title and set a precedent for Indigenous rights and the use of oral testimony in Canadian courts.<sup>68</sup>

The indeterminacy of these rights was also tackled by the Court in *R v Van der Peet*, which provided a definition of Aboriginal title that was judicially enforceable.<sup>69</sup> The definition was refined in *R v Powley*<sup>70</sup> to accommodate Metis rights and in *Delgamukkw*<sup>71</sup> to accommodate Aboriginal title. Also, in *Delgamukkw*, new rules of evidence were announced to recognize the reality that societies that lacked written records when settlers arrived had to be permitted to prove their claims through oral histories.<sup>72</sup>

In general, the issue of Aboriginal title is an issue for debate only in those areas where treaties have not been signed or where the issue of extinguishment of Aboriginal title is still in question. For example, a large portion of land in British Columbia is not covered by treaties and is, therefore, open to claims based on Aboriginal title. The fundamental objective of the law of Aboriginal title is to reconcile the de facto sovereignty of the Crown with the entitlement of the Indigenous peoples of Canada to the land which they occupied as their traditional homelands before the explorers, traders, and colonists arrived.<sup>73</sup>

However, some Indigenous scholars argue that the preservation of Aboriginal rights is not enough to move forward in guaranteeing Aboriginal rights tied to property for the future.<sup>74</sup> Aboriginal rights simply preserve the past; only the recognition of Aboriginal title gives any assurance of economic and cultural self-sufficiency and independence for Indigenous peoples in the future.<sup>75</sup> Otherwise, if they do not have ties to their traditional homelands, Indigenous peoples will lose their identity as a

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<sup>68</sup> *Ibid* at paras 84, 161–65.

<sup>69</sup> [1996] 2 SCR 507 at para 33, 137 DLR (4th) 289.

<sup>70</sup> 2003 SCC 43.

<sup>71</sup> *Supra* note 45.

<sup>72</sup> *Ibid* at paras 84, 161–65; Richard H Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, SK: University of Saskatchewan, Indigenous Law Centre, 1990) at 15.

<sup>73</sup> Bartlett, *supra* note 72 at 15.

<sup>74</sup> *Ibid*.

<sup>75</sup> Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation” (2010) 26 NJCL 121 at 158.

peoples and their very survival will be at risk, along with any chance of self-sovereignty.<sup>76</sup>

## V. WHY THE CRIMINALIZATION OF NON-ASSIMILATION AND THE GROWTH OF SETTLER CULTURAL IMAGERY IN THE PRAIRIES HAVE BECOME ISSUES WITHIN HUMAN RIGHTS LAW

In her recent book, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody*, Sherene Razack observes that as settlement proceeded westward, Indigenous peoples were marked “materially and symbolically” as bodies who were “not up to the challenge of modern life, a condition that leaves the settler as legitimate heir to the land.”<sup>77</sup>

This myth of the inevitability of Indigenous disappearance allowed settlers to evade responsibility of the negative impacts of colonization by benefitting from Aboriginal proprietary and cultural loss.<sup>78</sup> By having property rights that created a position of tutelage and presenting Indigenous peoples as an unwanted subsection of society, it has created a current state in Canada where Indigenous peoples’ mere presence in society challenges settler-state legislative authority. Canada’s creation of property law, therefore, has created a scheme by which its mere existence places Indigenous peoples in a position of vulnerability.

This creation of legislative inadequacy for Indigenous peoples has led to many historic injustices: the hangings of Metis in the Riel Resistance at Fort Battleford, the ruthless industrialism in the development of the Canadian Pacific Highway, the John A. MacDonald policy of starvation, and the culturally genocidal policies of residential schools, to name but a few.<sup>79</sup>

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<sup>76</sup> *State of the World’s Indigenous Peoples*, UNDESAOR, ST/ESA/328 (2009) 1 at 53, online: <[www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf)> [perma.c c/CCV8-P68X].

<sup>77</sup> Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Ontario: University of Toronto Press, 2015) at 193.

<sup>78</sup> See Figures 1 (“It’s Mine”) and 2 (“The New Homeland”) for propaganda examples on Starblanket & Hunt, *supra* note 2.

<sup>79</sup> The Truth and Reconciliation Commission of Canada concluded in December 2015 in their publication of a multi-volume report that the Indian Residential School System amounted to cultural genocide; this was supported by the definition provided by the UN. See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation*

However, all were justified in terms of creating a nanny state that, under settler authority, allowed Canadian legislation to treat Indigenous peoples as less than fully recognized individuals under law, leading to a history in Canada steeped in distrust, fear, and injustice.<sup>80</sup>

This leads us back to the relationship between Indigenous and non-Indigenous peoples in the Canadian Prairies (in particular Saskatchewan and the responsibility of this relationship for the existence of the Boushie case). “A recent poll indicated that Saskatchewan residents viewed the relationship between Indigenous and non-Indigenous people more negatively than anywhere else in Canada, and 41 per cent of respondents blamed ‘Aboriginal Peoples’ for inequalities and problems” present in their own legal and societal positions.<sup>81</sup> “Saskatchewan was also the home of the last federally funded Indian residential school”<sup>82</sup> and the previous case of Cree trapper Leo LaChance, whose murder in 1991 eerily parallels that of Colten Boushie.<sup>83</sup>

“In 1991, a notorious racist from Prince Albert stood trial for the killing of Cree trapper Leo LaChance. LaChance walked into a pawn shop owned by Carney Nerland, only to be shot in the back and killed by Nerland. Nerland claimed he accidentally fired his rifle” due to mechanical failure or hangfire (a similar justification provided by Gerald Stanley for his “accidental” shooting of Boushie).<sup>84</sup> While Nerland, head of the Church of Jesus Christ Christian Aryan Nations, pled guilty of the lesser charge of manslaughter and was sentenced to four years, people saw it as another

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*Commission of Canada*, Catalogue No IR4-7/2015E-PDF (Canada: TRCC, 2015) at 1; Stephen Ford et al, *The Queens Law Panel On The Stanley Case And Acquittal* Lecture (Faculty of Law, 2018); Canadian Geographic, *supra* note 51; British Columbia, *Building the Railway* (BC: Government of BC, last visited 3 August 2020); Tristin Hopper, “Here is what Sir John A. Macdonald did to Indigenous people”, *National Post* (28 August 2018), online: <nationalpost.com> [perma.cc/6VWV-69UN].

<sup>80</sup> Paul Seesquasis, “The Stanley Verdict And Its Fallout Is A Made-In-Saskatchewan Crisis”, *The Globe and Mail* (12 February 2018), online: <www.theglobeandmail.com/opinion/the-stanley-verdict-and-its-fallout-is-a-made-in-saskatchewan-crisis/article37945105/> [perma.cc/4GTE-79LJ].

<sup>81</sup> The Canadian Press, “David MacDonald: ‘Clearing the Plain’ Continues with the Acquittal of Gerald Stanley”, *National Post* (12 February 2018), online: <nationalpost.com/news/canada/clearing-the-plains-continues-with-the-acquittal-of-gerald-stanley> [perma.cc/L3U6-Z6B3].

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> McDonald, *supra* note 1; The Canadian Press, *supra* note 81.

example of white men getting the benefit of the doubt when it came to the murder of an Indigenous man under the pretense of protecting property.<sup>85</sup> It also did not help the Boushie case because, “[i]n the small world of prairie law, the presiding judge over the Stanley trial was Chief Justice Martel Popescul, who represented... [the defence] in the Nerland trial.”<sup>86</sup> Many deemed it potentially prejudicial that Popescul did not recuse himself and instead assigned himself to a case with shockingly similar fact scenarios.<sup>87</sup> After the Nerland trial, “many rightly called for an inquiry to investigate the extent to which Nerland’s racism was a factor in Lachance’s killing, an inquiry which Popescul sought to block on behalf of the RCMP, arguing that police informants might be exposed.”<sup>88</sup> This led many to question his suitability to objectively preside over the Stanley trial, when Popescul had represented the RCMP in such a similar case involving the murder of an Aboriginal man and the defence of property less than 30 years beforehand.<sup>89</sup>

“Nerland received four years in prison and served three. Stanley is [now] free and gained almost \$90,000 in two days from almost 1,200 people through online crowdfunding.”<sup>90</sup> Both Leo LaChance and Colten Boushie are dead, and people are losing faith in the Canadian legal system as a result. However, people are also turning to international law to provide social equality before the law where Canadian law has failed.

## VI. IS THIS ENFORCED ASSIMILATION?

The protests of Indigenous peoples against the continued existence of the current state of property law and its use to justify the murder of Indigenous men continues to undermine the culture of the settler state itself that was created to force assimilation.<sup>91</sup> The Truth and Reconciliation

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<sup>85</sup> The Canadian Press, *supra* note 81.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Paul Seesequasis, “The Stanley verdict and its fallout is a made-in-Saskatchewan crisis”, *The Globe and Mail* (12 February 2018), online: <[www.theglobeandmail.com/opinion/the-stanley-verdict-and-its-fallout-is-a-made-in-saskatchewan-crisis/article37945105/](http://www.theglobeandmail.com/opinion/the-stanley-verdict-and-its-fallout-is-a-made-in-saskatchewan-crisis/article37945105/)> [perma.cc/ZV2Q-BYHX].

<sup>90</sup> McDonald, *supra* note 1.

<sup>91</sup> See e.g. The protests over the violent arrest of Athabasca Chipewyan First Nation Chief Allan Adam over an expired license plate: Catherine Porter, “Chief Beaten by Police is Longtime Fighter for Indigenous Rights”, *The New York Times* (28 June 2020), online: <[www.nytimes.com/2020/06/28/world/canada/allan-adam-indigenous-alberta.html](http://www.nytimes.com/2020/06/28/world/canada/allan-adam-indigenous-alberta.html)>

Commission, in Call to Action 45, called on the federal government to repudiate the Doctrine of Discovery while implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>92</sup> The Boushie family has now taken their son's case to the United Nations Permanent Forum on Indigenous Issues as a human rights violation.<sup>93</sup> While these steps are important and suggest a more optimistic future, some Indigenous advocates and scholars believe that as long as a bijuralist system that does not acknowledge Indigenous property rights continues to exist, there will not be meaningful legislative movement forward in the near future.<sup>94</sup>

Other international avenues for redress have come under consideration under Article 26 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states that "Indigenous peoples have the rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."<sup>95</sup> This is particularly pertinent considering that the Canadian government initially, upon the creation of the *United Nations Declaration on the Rights of Indigenous Peoples*, refused to endorse the declaration along with the other colonial-based countries such as the United States, Australia, and New Zealand.<sup>96</sup> The Canadian government said that while it supported the spirit of the declaration, it contained elements that were "fundamentally incompatible with Canada's constitutional

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[perma.cc/Y6K6-546]]. RCMP statistics state that 15 of 21 people killed in Manitoba outside of Winnipeg so far this year were Indigenous males. This often leads to gang involvement in order to find a sense of acceptance and belonging and further situations that place Indigenous men in dangerous, life-threatening situations: See Nelly Gonzalez, "Majority of Manitoba homicide victims are Indigenous men, but 'it's not really talked about': advocate", *CBC News* (15 October 2019), online: <[www.cbc.ca/news/canada/manitoba/homicide-rate-indigenous-men-boys-manitoba-rcmp-stats-1.5305897](http://www.cbc.ca/news/canada/manitoba/homicide-rate-indigenous-men-boys-manitoba-rcmp-stats-1.5305897)> [perma.cc/NL45-H6LZ].

<sup>92</sup> *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: TRCC, 2012) no 45.

<sup>93</sup> Malone, *supra* note 12.

<sup>94</sup> See generally Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law" (2016) 61:4 McGill LJ 939; John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19:1 Wash UJL & Policy 198.

<sup>95</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1, art 26(1).

<sup>96</sup> "Working Effectively with Indigenous Peoples: UN Declaration on the Rights of Indigenous Peoples" (14 January 2014), online (blog): *Indigenous Corporate Training Inc* <[www.ictinc.ca](http://www.ictinc.ca)> [perma.cc/FG89-YASC].

framework”<sup>97</sup> (mostly due to the *Canadian Charter of Rights and Freedoms* and Section 35 of the *Canadian Constitution*, which enshrines Aboriginal and treaty rights).<sup>98</sup> However, in May 2016, the Minister of Indigenous and Northern Affairs announced that Canada was now a full supporter of the declaration.<sup>99</sup> Their previous misgivings about enshrinement of Aboriginal rights within Canadian law, as well as Article 26 itself, which was said to allow for the re-opening of historically settled land claims,<sup>100</sup> seem to have dissipated. Now UNDRIP is in practice in British Columbia.<sup>101</sup>

This new recognition is logical. Indigenous peoples within Canada have been found to clearly fit into one of the most cited definitions of Indigenous peoples under international law.<sup>102</sup> As such, there is no reason why Article 26 should not be applied enthusiastically, unless the Canadian government continues to be fearful of these historically “settled” land claims. This definition of Indigenous peoples within Canada fitting into the cited definitions of Indigenous peoples under international law was given by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo. He stated that:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now

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<sup>97</sup> Canada, *Statement by Canada’s New Government Regarding the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: Government of Canada, 12 September 2007), online: <[www.canada.ca/en/news/archive/2007/09/statement-canada-new-governme nt-regarding-united-nations-declaration-rights-indigenous-peoples.html](http://www.canada.ca/en/news/archive/2007/09/statement-canada-new-governme nt-regarding-united-nations-declaration-rights-indigenous-peoples.html)> [perma.cc/GN 9V-J8WX].

<sup>98</sup> Erin Hanson, “UN Declaration on the Rights of Indigenous Peoples” (last visited 24 July 2020), online: *Indigenous Foundations* <[indigenousfoundations.arts.ubc.ca/un\\_de claration\\_on\\_the\\_rights\\_of\\_indigenous\\_peoples](http://indigenousfoundations.arts.ubc.ca/un_de claration_on_the_rights_of_indigenous_peoples)> [perma.cc/2URH-QCRC].

<sup>99</sup> Indigenous and Northern Affairs Canada, *Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples* (News Release) (New York, NY: Indigenous and Northern Affairs Canada, 10 May 2016).

<sup>100</sup> “Canada Votes ‘No’ as UN Native Rights Declaration Passes”, *CBC News* (13 September 2007), online: <[www.cbc.ca/news/canada/](http://www.cbc.ca/news/canada/)> [perma.cc/3G7Y-YDE4].

<sup>101</sup> Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, 2019.

<sup>102</sup> Christopher C Dykes, “Research Guide on Indigenous Peoples International Law” (2009), online: *Hauser Global Law School Program* <[www.nyulawglobal.org/globalex/Res earching\\_Indigenous\\_Peoples\\_International\\_Law.html](http://www.nyulawglobal.org/globalex/Res earching_Indigenous_Peoples_International_Law.html)> [perma.cc/M63K-L6E3].

prevailing in those territories, or parts of them. They form at present non-dominant sectors of society.<sup>103</sup>

The *Universal Declaration of Human Rights* also guarantees the right to private property.<sup>104</sup> This has created a situation where it is beyond debate that the private property and the property of Indigenous peoples are human rights endorsed on an international level.

It is in the international law fora that the legalized removal of Canadian Indigenous children to charter schools met the United Nations definition of a cultural genocide.<sup>105</sup> The Truth and Reconciliation Chair, Senator Murray Sinclair, stated in April 2016, four months before the death of Colten Boushie, that “[i]n many ways, Canada waged war against Indigenous peoples through Law, and many of today’s laws reflect that intent.”<sup>106</sup> The death of Colten Boushie on property that traditionally belonged to his ancestors and the subsequent acquittal of Gerald Stanley only highlights this hypocrisy that is still present in the Canadian property law system.

## VII. CONCLUSION: “THE RIGHT LAND FOR THE RIGHT MAN”

In many early twentieth century advertisements encouraging Western settler life, the Prairies were framed as “The Right Land for the Right Man.”<sup>107</sup> It is important to recognize that perhaps this qualification of “The Right Man” under Canadian law is not as a historical of a concept as one would like to believe.

Property law can no longer be seen as simply property law: it is a manipulation of the legal system that lends a veneer of legitimacy to human rights infractions. Lately, there have been some changes in the current law

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<sup>103</sup> “Indigenous Peoples at the United Nations” (last visited 24 July 2020), online: United Nations Department of Economic and Social Affairs: Indigenous Peoples <[www.un.org/development/desa/indigenouspeoples/about-us.html](http://www.un.org/development/desa/indigenouspeoples/about-us.html)> [perma.cc/2R8L-2639].

<sup>104</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 17(1)–(2).

<sup>105</sup> “Genocide” (last visited 3 August 2020), online: *United Nations Office on Genocide Prevention and the Responsibility to Protect* <[www.un.org/en/genocideprevention/genocid\\_e.shtml](http://www.un.org/en/genocideprevention/genocid_e.shtml)> [perma.cc/XMU6-N3QM].

<sup>106</sup> “The United Nations Declaration on the Rights of Indigenous Peoples” (last visited 24 July 2020), online: *Amnesty International Canada* <[www.amnesty.ca/our-work/issues/indigenous-peoples/the-united-nations-declaration-on-the-rights-of-indigenous-people](http://www.amnesty.ca/our-work/issues/indigenous-peoples/the-united-nations-declaration-on-the-rights-of-indigenous-people)> [perma.cc/G2DF-7P59].

<sup>107</sup> See Starblanket & Hunt, *supra* note 2; Figure Two, *below*.

following the Stanley trial, most notably the C-75 Amendment to preemptory challenges. However, criminal law amendments are only one in several amendments required if Canada truly wishes to reach the heights of international law ideals. These could include another Royal Commission with a broader mandate, yearly reports, further amendment of property law that explicitly affects Indigenous individuals, and the training of law enforcement in culturally sensitive methods.<sup>108</sup> All that said, the racism embedded in our legal system will likely take as long to undo as it was to be created. And, as long as property law is used as justification for the murder of Indigenous men in the Canadian Prairies, the cases of such men such as Colten Boushie and Leo LaChance will be framed as cases of a white man “defending his castle” rather than the killing of yet another young Indigenous man in Western Canada.

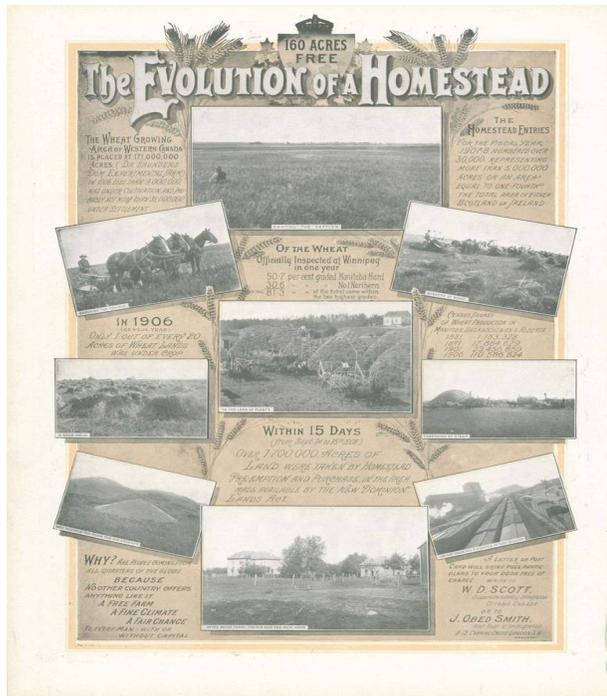


Figure 1 The Evolution of a Homestead (Poster), Canada, Department of Immigration Records (RG 76, vol 273, file 161973).

<sup>108</sup> Kilian, *supra* note 28.



Figure 2 “It’s Mine” CANADA: The Right Land for the Rights Man: Canadian National Railways - The Right Way - ! (ID No 2905070) Winnipeg, Library and Archives Canada (No 1991-230-1).

# The Supreme Court of Canada’s Justification of *Charter* Breaches and its Effect on Black and Indigenous Communities

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E L S A K A K A

## I. INTRODUCTION

Throughout my time in law school, I noticed that the criminal cases covered in my courses very rarely adequately dealt with how racism affected the ways in which the police investigated and arrested Black, Indigenous, and People of Colour (BIPOC).<sup>1</sup> Instead, I observed an expansion of police powers and a frightening trend of justifying *Charter* breaches that ultimately upheld systemic racism in policing – showing that racialized communities have very little recourse in addressing police misconduct.

I found it perplexing that a case like *R v Grant*, which is integral to our understanding of admitting evidence under section 24(2) despite *Charter* breaches, did not pay special consideration to the fact that Grant was Black

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<sup>1</sup> Throughout this paper, I will use the term BIPOC (Black Indigenous, and People of Colour) and focus on the treatment of these communities by the police. While the term “coloured people” was historically used to other, alienate, and discriminate against non-white people, the term BIPOC seeks to humanize and centre the experiences of Black and Indigenous peoples. Furthermore, the term BIPOC emphasizes the anti-Black racism in non-Black communities of colour and anti-Indigenous racism in settler communities that makes the lived experiences of BIPOC very different from those of non-Black and non-Indigenous People of Colour. The use of the term BIPOC is not meant to conflate the complex history of Indigenous peoples with those of Black people, but to highlight the ways in which the police treat these communities in particular. I acknowledge that Indigenous people are members of Nations with claims to territory and a history that pre-dates Canada. See Mahreen Ansari, “What is BIPOC and Why You Should Use It” (18 February 2020), online: *Her Campus* <[www.hercampus.com/school/umkc/what-bipoc-and-why-you-should-use-it](http://www.hercampus.com/school/umkc/what-bipoc-and-why-you-should-use-it)> [perma.cc/KA4A-92YB].

and determined to be suspicious by the police officers with very little rationale.<sup>2</sup> The Court found that the police's conduct was "not deliberate or egregious."<sup>3</sup> I challenge the relevance of whether it was deliberate and disagree with the Court's conclusion that the officers' conduct was not egregious. The judgments in these cases often do not offer any insight into the dangers of granting the police this much power, nor do they acknowledge the dangers that expansion of police powers could pose to BIPOC who have long been subjected to racism and brutalization at the hands of police officers in Canada.

Critical Race Theory is a theoretical framework in the social sciences that examines the interplay of race, law, and power.<sup>4</sup> As such, I believe that it is integral in determining the effect of these justified *Charter* breaches on BIPOC as it pertains to interactions with police. Critical Race Theory proposes that the law is used to preserve white supremacy and racism.<sup>5</sup> Therefore, it is through Critical Race Theory that I will be able to investigate the possibility of dismantling a white supremacist and racist system. If our laws do not strive to protect the most marginalized and over-policed, our legal system will continue to support institutionalized racism. Our courts must do a better job in limiting police powers in order to ensure the safety of all Canadians. I will show through an analysis of historical relations between the police and Black and Indigenous communities, police violations of *Charter* rights, and recent incidences of police violence that the Supreme Court of Canada's justification of certain *Charter* breaches and their erasure of race ultimately places more BIPOC in danger of police violence.

In this paper, I will employ Critical Race Theory in order to undertake an analysis of how multiple Supreme Court of Canada decisions pertaining to *Charter* breaches have allowed for an expansion of police powers that exacerbate the maltreatment of racialized communities by our criminal justice system. Part II of this paper will explore how these cases, which often lack insight into the experiences of Black and Indigenous peoples, lead to an erasure of race as a factor that influences interactions between the police

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<sup>2</sup> *R v Grant*, 2009 SCC 32 at para 5 [*Grant*].

<sup>3</sup> *Ibid* at para 133.

<sup>4</sup> Shanthi Elizabeth Senthe & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) 31:1 Windsor YB Access to Just 1 at 3.

<sup>5</sup> *Ibid* at 2.

and Black<sup>6</sup> and Indigenous communities. The decisions primarily discussed in this paper are *Grant*, *R v Mann*, *R v MacDonald*, and *R v Le*.

In Part III of this paper, I will discuss possible solutions to ensure that the legal system properly engages with race and promotes effective policing that recognizes the lived experiences of BIPOC. In order to compile a list of recommendations that address this issue, I intend to look at the Truth and Reconciliation Commission's Calls to Action as well as other reports published by Indigenous organizations that address the over-policing of Indigenous peoples. I will also incorporate Black Lives Matter Toronto's demands and critiques of the Toronto Police Service with the ultimate goal of articulating how we can ensure that the *Charter* rights of all Canadians are respected.

**Keywords:** Critical Race Theory; BIPOC; racialized; *Charter* breaches; racial profiling; investigative detentions; over-policing; public safety; mental health; race-related data; systemic racism

## A. Backgrounder: Historical Relations Between the Police and Black and Indigenous Communities

Black and Indigenous peoples are some of the most over-represented groups of people in the criminal justice system. Despite their differing histories, the legacy of slavery and the ongoing practice of settler colonialism has resulted in very similar forms of marginalization and oppression for Black and Indigenous communities — including their disproportionate rates of incarceration in federal institutions, over-representation in the child

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<sup>6</sup> Throughout this paper, I make the point of capitalizing 'Black', while I do not do the same with 'white'. The first reason I do so is because 'Black' is a proper name that describes the ethnic origin and ancestry of a group of people. As such, "Black" should be capitalized in the same way that Asian, Hispanic, Arab, etc. are. Furthermore, many Black people describe themselves simply as being Black while the white majority does not necessarily think of themselves in this way. The word 'white' does not describe a shared identity and experience in the same way that 'Black' does. See Kathy English, "Respect, Dignity and Fairness Conveyed in Capital Letters: Public Editor" (26 May 2017), online: *The Star* <[www.thestar.com/opinion/public\\_editor/2017/05/26/respect-dignity-and-fairness-conveyed-in-capital-letters-public-editor.html](http://www.thestar.com/opinion/public_editor/2017/05/26/respect-dignity-and-fairness-conveyed-in-capital-letters-public-editor.html)> [perma.cc/WUX5-S2GV]; Merrill Perlman, "Black and White: Why Capitalization Matters" (23 June 2015), online: *Columbia Journalism Review* <[www.cjr.org/analysis/language\\_corner\\_1.php](http://www.cjr.org/analysis/language_corner_1.php)> [perma.cc/XJ5Y-FQ7Q].

welfare system, and susceptibility to police violence.<sup>7</sup> Paying attention to the ways in which Black and Indigenous communities have been controlled and brutalized by police throughout history sheds insight on how their plight is made worse when the Supreme Court of Canada justifies or fails to address the problematic ways that police engage with these communities.

As of 2012, Indigenous peoples made up just under 4% of the total population of Canada, but approximately 28% of adults sentenced to federal custody.<sup>8</sup> Despite several inquiries and their resulting recommendations, the rates of incarceration for Indigenous peoples has actually increased: 35% for men and 86% for women between 2001–2002 and 2010–2011.<sup>9</sup> Indigenous peoples' criminalization is linked to the immense poverty and social disadvantage inflicted upon the community by a white supremacist system.<sup>10</sup> The polices' relationship with Indigenous communities has been tumultuous since the beginning of colonialism, and Indigenous communities have often dealt with being under-protected as well as over-policed.

There are countless examples of police officers failing to properly investigate crimes committed against Indigenous women, as was noted by The National Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>11</sup> The police have also been responsible for committing heinous acts against Indigenous peoples; often at the direction of the state. For example, the RCMP committed genocide against Indigenous communities when they ripped Indigenous children away from their families and forced them to attend Indian Residential Schools.<sup>12</sup> It was the police that enforced the confinement of Indigenous peoples to reserves, as per the *Indian Act*,

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<sup>7</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax & Winnipeg: Fernwood Publishing, 2017) at 454–55 (Kindle Edition).

<sup>8</sup> Statistics Canada, *Aboriginal Statistics at a Glance: Justice: 2<sup>nd</sup> Edition*, Catalogue No 89-645-X (Ottawa: Statistics Canada, last modified 24 December 2015) at 31, online: <[www.statcan.gc.ca/pub/89-645-x/2015001/justice-eng](http://www.statcan.gc.ca/pub/89-645-x/2015001/justice-eng)> [perma.cc/GQ3B-2YZR].

<sup>9</sup> Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Final Report) (Ottawa: OCI, 2012) at 16.

<sup>10</sup> Leah Combs, "Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*" (2018) 41:3 *Man LJ* 163 at 168.

<sup>11</sup> "Chapter 4: Colonization as Gendered Oppression" in *Reclaiming Power and Place: The Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) 229 at 253.

<sup>12</sup> "RCMP 'Herded' Native Kids to Residential Schools", *CBC News* (29 October 2011), online: [CBC <www.cbc.ca/news/canada/rcmp-herded-native-kids-to-residential-schools-1.992618>](http://www.cbc.ca/news/canada/rcmp-herded-native-kids-to-residential-schools-1.992618) [perma.cc/MZ5X-WLHV].

restricting their mobility unless they received permission from an Indian agent.<sup>13</sup> There are also horror stories that include police dropping Indigenous peoples off at the outskirts of cities in the middle of winter, for what were infamously dubbed ‘starlight tours’, and expecting them to walk back without shoes or socks.<sup>14</sup> Many Indigenous peoples froze to death as a result.<sup>15</sup> The Saskatoon Police attempted to erase the history of ‘starlight tours’ when they removed the section addressing this practice from their Wikipedia page in 2016.<sup>16</sup>

Furthermore, many Indigenous peoples today express feelings that they are more harshly treated by police than their white counterparts. A study conducted by Toronto Aboriginal Support Services in 2011 revealed that 63% of Indigenous respondents believed that “Toronto police are more likely to lay more serious charges against Indigenous accuseds than against non-Indigenous accuseds.”<sup>17</sup> It is no wonder then that the violence perpetrated by police has resulted in a strained relationship with Indigenous communities.

In 2015, the RCMP commissioner, Bob Paulson, admitted before a group of First Nations leaders that there were racists in his police force and vowed to ensure that this would no longer be true.<sup>18</sup> However, a briefing note written for Public Safety Minister, Ralph Goodale, in December, 2017 revealed that the RCMP fatally shot 61 people across Canada from 2007–2017.<sup>19</sup> Of those 61 people, 22 were Indigenous and 12 of the deaths took place on reserve or in an Indigenous community.<sup>20</sup> In the note, the RCMP

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<sup>13</sup> Stephanie Cram, “Dark History of Canada’s First Nations Pass System Uncovered in Documentary”, *CBC News* (19 February 2016) online: <[www.cbc.ca/news/indigenous/dark-history-canada-s-pass-system-1.3454022](http://www.cbc.ca/news/indigenous/dark-history-canada-s-pass-system-1.3454022)> [perma.cc/78EK-VLVZ].

<sup>14</sup> Dan Zakreski, “Saskatoon police removed ‘starlight tours’ section from Wikipedia, student says”, *CBC News* (31 March 2016), online: <[www.cbc.ca/news/canada/saskatoon/saskatoon-police-starlight-tours](http://www.cbc.ca/news/canada/saskatoon/saskatoon-police-starlight-tours)> [perma.cc/K5H5-TKW2].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada” (2018) 51 *UBC L Rev* 159 at 166.

<sup>18</sup> Susana Mas, “Bob Paulson Says he Doesn’t Want Racists Inside RCMP Ranks”, *CBC News* (9 December 2015), online: <[www.cbc.ca/news/politics/first-nations-bob-paulson-racism-mm1w-1.3357406](http://www.cbc.ca/news/politics/first-nations-bob-paulson-racism-mm1w-1.3357406)> [perma.cc/J86J-ULK5].

<sup>19</sup> Colin Freeze, “More Than One-Third of People Shot to Death Over a Decade by RCMP Officers Were Indigenous”, *The Globe and Mail* (17 November 2019), online: <[www.theglobeandmail.com/canada/article-more-than-one-third-of-people-shot-to-death-over-a-decade-by-rcmp/](http://www.theglobeandmail.com/canada/article-more-than-one-third-of-people-shot-to-death-over-a-decade-by-rcmp/)> [perma.cc/U8JT-UCS3].

<sup>20</sup> *Ibid.*

attempted to rationalize the numbers, stating that although the numbers “may appear disproportionately high”, 67% of RCMP detachments serve Indigenous communities.<sup>21</sup> Perry Bellegarde, the national chief of the Assembly of First Nations rightfully characterized the numbers as “totally unacceptable”, especially given the fact that Indigenous peoples make up only around 5% of the overall Canadian population.<sup>22</sup> Unfortunately, the memo did not provide further context on the number of Indigenous peoples the RCMP are responsible for policing because, as the RCMP explained, they do not keep detailed race-based statistics.<sup>23</sup>

This presents another problem. The lack of race-based statistics allows for incidences of police violence against Indigenous peoples to be understated. Past studies on police use of force in Ontario have shown that while in urban areas Black Canadians are over-represented, Indigenous populations are “hugely overrepresented” in rural areas.<sup>24</sup> This is not to say that Indigenous peoples are not also over-represented in urban areas. In Manitoba, where the largest Indigenous urban population is found, 11 out of 19 people killed by police from 2000–2017 were Indigenous.<sup>25</sup>

Matthew Dumas was 18 when he was killed by police.<sup>26</sup> He apparently matched the description given in a 911 call stating that there were “Native-looking” teens involved in an attempted robbery.<sup>27</sup> According to inquest documents, he appeared to be carrying a gun and was behaving suspiciously.<sup>28</sup> When he was approached by police he fled.<sup>29</sup> 30 minutes later, he was shot by police after allegedly confronting them with a weapon that was later revealed to be a screwdriver.<sup>30</sup> Further investigation also determined that he had no involvement in the robbery.<sup>31</sup> Matthew Dumas’

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Kristen Annable, “Most People Who Died in Police Encounters in Manitoba Were Indigenous, CBC Investigation Finds”, *CBC News* (6 April 2018), online: <[www.cbc.ca/news/canada/manitoba/deadly-force-manitoba-indigenous-1.4607383](http://www.cbc.ca/news/canada/manitoba/deadly-force-manitoba-indigenous-1.4607383)> [perma.cc/2632-RN]4].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

family believed that he was a victim of racial profiling.<sup>32</sup> In Winnipeg, Indigenous peoples make up more than 64% of people killed by police, even though they are only 10% of the population.<sup>33</sup> In April 2020, three Indigenous people were fatally shot by police in the span of 10 days: Stewart Andrews, Jason Collins, and a 16-year-old girl named Eisha Hudson.<sup>34</sup>

Canada has never reckoned well with its anti-Blackness. For many Canadians, anti-Black racism is a feature of the distant past or a different place altogether — such as the United States.<sup>35</sup> There is very little acknowledgement of the fact that slave-owners in Canada once held both Black and Indigenous peoples as property.<sup>36</sup> By the mid-1800s, after the abolishment of slavery, textbooks had managed to erase the presence of Black people in Canada.<sup>37</sup> There was no mention of racially segregated schools or the significant Ku Klux Klan membership in Canada.<sup>38</sup> This erasure of Black peoples' histories and experiences in Canada is still prevalent today. In 2016, shortly following the police killing of an un-armed, Somali-Canadian man named Abidrahman Abdi, the president of the Ottawa Police Association told the press that “it was ‘unfortunate’ and that he was ‘worried’ that Canadians would assume race could play a factor in Canadian policing, arguing that those issues were only pertinent in the United States.”<sup>39</sup>

Many scholars, such as Robyn Maynard, argue that Black lives in Canada have been subjected to “structural violence that has been tacitly or explicitly condoned by multiple state or state-funded institutions.”<sup>40</sup> Despite only making up 3% of Canada's population, Black people, in some parts of the country, make up around one-third of people killed by police.<sup>41</sup> Black Canadians are also more heavily targeted for arrest, which offers some explanation for their disproportionate imprisonment in federal institutions — a figure that is three times higher than the number of Black people in

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<sup>32</sup> *Ibid.*

<sup>33</sup> Pam Palmater, “Inquiry Needed into Violence Against Indigenous Peoples” (22 April 2020) online: *Canadian Dimension* <[canadiandimension.com/articles/view/inquiry-needed-into-police-violence-against-indigenous-peoples](http://canadiandimension.com/articles/view/inquiry-needed-into-police-violence-against-indigenous-peoples)> [perma.cc/B3984T93].

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* note 7 at 235–36.

<sup>36</sup> *Ibid* at 280–81

<sup>37</sup> *Ibid* at 283.

<sup>38</sup> *Ibid* at 285.

<sup>39</sup> *Ibid* at 288–89.

<sup>40</sup> *Ibid* at 296–97.

<sup>41</sup> *Ibid* at 305–06.

Canada.<sup>42</sup> Police departments throughout Canada have been involved in the racial profiling of Black people for decades. A 2003 study of students found that a third of Black students who had not been involved in criminal activity have been stopped by police, in comparison with a tenth of their white counterparts.<sup>43</sup>

Additionally, the Toronto Police Department is notorious for ‘carding’ Black people: the practice of “amassing the names, personal information, and movements of millions of people using ‘contact card’ stops for largely non-criminal encounters.”<sup>44</sup> Young, Black teenagers in Montreal have reported being told by police to disperse when two or more of them are gathered together, with scholars analyzing this as Black existence in public spaces being viewed as inherently criminal.<sup>45</sup> Racial profiling has been described as a form of violence that restricts Black peoples’ ability to move freely and without fear in public spaces.<sup>46</sup>

It is important to contextualize this history because it explains how frequently Black and Indigenous peoples are likely to be racially profiled by police and their apprehension in either complying with police or their likelihood to forego their *Charter* rights for the sake of self-preservation. This is highly significant as one begins to assess the behaviour of police and the accused in many *Charter* cases.

## II. EFFECTS OF THE LAW ON BLACK AND INDIGENOUS COMMUNITIES

### A. *Grant* and *Mann*: Racial Profiling and Investigative Detentions

*Grant* and *Mann* both involved Black and Indigenous accused. Although, at times, in each case, the Supreme Court did make some mention of the race of the accused, it does not adequately deal with how racial profiling factors into the polices’ choice to arbitrarily detain each accused and, therefore, how this impacts the *Charter* rights of the accused. Racial profiling is the practice of targeting people mainly on the basis of their race, and it rests on the assumption that particular racial groups are

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<sup>42</sup> *Ibid* at 307–08.

<sup>43</sup> *Ibid* at 1956–57.

<sup>44</sup> *Ibid* at 1961–62.

<sup>45</sup> *Ibid* at 1948.

<sup>46</sup> *Ibid* at 1945–62.

more prone to criminality.<sup>47</sup> In order to properly engage with the Charter breaches in these cases, which the Supreme Court failed to fully do, one must analyze the racial dimensions of investigative detentions.

On November 17<sup>th</sup>, 2003, in the Greenwood and Danforth area of Toronto, a young Black man named Donnohue Grant was stopped by three police officers because he behaved in a way that “aroused their suspicions.”<sup>48</sup> The officers were in the area for the purpose of monitoring and maintaining a safe student environment during the lunch hour, given that the area contained four schools and had a history of student assault, robberies, and drug offences.<sup>49</sup> As two of the officers, Worrell and Forde, had driven past Grant, they noticed that “the appellant ‘stared’ at them in an unusually intense manner and continued to do so as they proceeded down the street, while at the same time ‘fidgeting’ with his coat and pants.”<sup>50</sup>

The comments made by the officers regarding Grant’s behaviour are quite subjective, which honestly is to be expected. Police should be able to think on their feet and react quickly to a possibly dangerous situation. It is comprehensible that police are being relied upon to trust in their intuition and the experience that they have acquired while on the job. However, this intuitive decision making becomes problematic when it is rooted in racial biases and manifests in racial profiling, carding, and the over-policing of predominantly Black communities.

The problem lies in the fact that when police officers point out suspicious behaviour, this behaviour can also be deemed rather innocuous when analyzed through a “race-neutral lens.”<sup>51</sup> For example, a handshake between two Black men in a high crime area may be interpreted as a drug transaction when the same might not be said about two white men in the same situation or otherwise.<sup>52</sup> Furthermore, for a Black person who experiences or has an awareness of the history of police officers engaging in harassment of Black communities, it would be understandable that this Black person would want to avoid an approaching officer. Their evasiveness

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<sup>47</sup> David M Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall LJ 145 at 149 [Tanovich, “Profiling”].

<sup>48</sup> *Grant*, *supra* note 2 at paras 4-5.

<sup>49</sup> *Ibid* at para 4.

<sup>50</sup> *Ibid* at para 5.

<sup>51</sup> David M Tanovich, “The Colourless World of Mann” (2004) 21:6 CR Art 47 at 3 (WL).

<sup>52</sup> *Ibid*.

— “intense eye contact” or “fidgeting” — could be read as suspicious.<sup>53</sup> While the Supreme Court recognized the issues of evasiveness in *Grant*, it only discussed the issue within the context of detention, without holding the police accountable for engaging in racial profiling.<sup>54</sup>

Although the Court is able to engage in a complex analysis about whether a racialized person feels that they have been detained, it is disappointing that they seemingly refuse to hold police accountable for their actions. In fact, the Court in *Grant* actually states that “there was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices.”<sup>55</sup> Furthermore, Chief Justice McLachlin went on to say that while the police conduct was not in conformity with the *Charter*, it was not abusive.<sup>56</sup> I vehemently disagree. When people are marginalized and vulnerable to consistent harassment by police, the *Charter* can often be their only way to ensure that their rights are upheld. To say that the police’s conduct was not abusive completely disregards the lived experiences of Black people who consistently have their rights violated by the police. While the police may be a source of protection for many, it can be a completely different scenario for those who are Black.

It is honestly incredible how our courts continuously avoid scrutinizing whether the actions of police are racially motivated. Instead, there are many instances where the courts choose to focus on some other ground for discrimination because of an apparent apprehension to discuss racist policing. For example, in *R v W(K)*, two police officers who had approached a group of four men chose to focus their investigatory gaze on the two Black youth and let the two white men walk away, even though the two white men were known to them as drug dealers.<sup>57</sup> There was no discussion of the race of the Black accused who were detained. Rather, the trial judge focused on age as a prohibited ground for discrimination and spoke about how youth were “particularly vulnerable to unjustified street level detentions and accompanying searches.”<sup>58</sup> While this is true, race is also a factor that warrants discussion and, perhaps, was more the reason for their detention.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 2 at paras 154–55.

<sup>55</sup> *Ibid* at para 133.

<sup>56</sup> *Ibid.*

<sup>57</sup> 2004 ONCJ 351 at para 5.

<sup>58</sup> *Ibid* at 64.

It is unclear why there is so much apprehension in the courts to discussing racial profiling. Tanovich suggests that it may be that counsel perceive judicial hostility towards such arguments.<sup>59</sup> But studies reveal that racial profiling arguments are not being raised regardless of who is presiding.<sup>60</sup> It is of the utmost importance that the courts start engaging in these conversations in order to hold police officers accountable and prevent further street harassment of BIPOC by police. Truthfully, however, this should not be done at the expense of a client's likelihood of having a successful trial. Another explanation for why these arguments are not being brought forth could be that many white lawyers lack the cultural competency to recognize when race is a factor in a case.<sup>61</sup> Often times, in today's racial climate, racism is not overt. As such, white people who are not racialized have difficulties recognizing when race is at play in a case.

This calls for appropriate cultural competency training so that lawyers can truly meet the needs of their clients and ensure that their clients have a fair trial. However, it may also be the case that highly competent criminal lawyers, who are usually sensitive to social and civil liberty issues like racial profiling, are having a difficult time factoring race and racial profiling into a framework of analysis under section 9 of the *Charter*.<sup>62</sup> Evidently, it was Grant's racialized characteristics and the surrounding circumstance that provoked the police's suspicion. This is but one example of how police discretion to stop and question people can produce racial inequality in the number and nature of such stops.<sup>63</sup>

The officers in *Grant* testified that they had approached Grant with the purpose of determining whether he was a student at one of the schools in the area or if he was headed to one of these schools.<sup>64</sup> The third officer, Gomes, who was dressed in uniform and parked at the end of the street, approached Grant asking him "what was going on" and requested his name and address.<sup>65</sup> Given that carding is common practice, it follows that the accused either did not know that he had to comply or chose to comply because he already felt detained. In response to the officer's request, Grant

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<sup>59</sup> David M Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38:6 CR Art 84 at 3 (WL) [Tanovich, "Erasure"].

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 4.

<sup>62</sup> *Ibid.*

<sup>63</sup> Benjamin L Berger, "Race and Erasure in *R v Mann*" (2004) 21:6 CR Art 58 at 58.

<sup>64</sup> *Supra* note 2 at para 5.

<sup>65</sup> *Ibid* at para 6.

handed over his provincial health card.<sup>66</sup> The officer then observed Grant to be acting nervously and adjusting his jacket, which prompted him to ask Grant to “keep his hands in front of him.”<sup>67</sup> At some point later, the two officers who had driven by Grant decided to join Gomes in his interrogation of Grant.<sup>68</sup> The exchange that followed revealed that Grant had a small bag of marijuana and a loaded firearm in his possession.<sup>69</sup> Subsequently, the officers arrested and searched the appellant, seizing the marijuana and the loaded firearm.<sup>70</sup>

The issues in *Mann* were determining whether the police had a power under the common law to detain individuals for investigative purposes and, if so, whether they had the power to search, incident to such investigative detentions.<sup>71</sup> Investigative detention is “a common law ancillary police power, which allows for police to temporarily detain a person suspected of criminal wrongdoing, with less than the reasonable and probable grounds required for an arrest.”<sup>72</sup> However, investigative detentions are still to be “premised upon reasonable grounds[,]... on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence.”<sup>73</sup> The analysis of the legitimacy of an investigative detention can be further complicated when one considers the influence of race. The Supreme Court’s lack of analysis in *Mann* to this regard paints an unrealistic picture of the events that unfolded.

On December 23, 2000, shortly before midnight, two police officers were alerted to a break and enter occurring in a neighbourhood near downtown Winnipeg.<sup>74</sup> The person committing the break and enter was suspected by the witness to be “Zachary Parisienne” and was described as being “a 21-year-old Aboriginal male, approximately five feet eight inches tall, weighing about 165 pounds, clad in a black jacket with white sleeves.”<sup>75</sup>

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at para 7.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* at para 8.

<sup>71</sup> *R v Mann*, 2004 SCC 52 at para 2 [*Mann*].

<sup>72</sup> C Tess, “Policing the Racialized: Is Investigative Detention a Race-based Practice?” (4 November 2018), online: *CanLii Connects* <[canliiconnects.org/en/commentaries/64717](http://canliiconnects.org/en/commentaries/64717)> [perma.cc/SZ5T-3WJX].

<sup>73</sup> *Mann*, *supra* note 71 at para 34.

<sup>74</sup> *Ibid* at para 4.

<sup>75</sup> *Ibid.*

When the officers reported to the scene of the crime they observed a person walking casually along the side-walk who they believed matched the description of the suspect “to the tee.”<sup>76</sup> This individual, who turned out to be Phillip Mann, was stopped by the police and asked to identify himself.<sup>77</sup> The police proceeded to search Mann, reaching into his pockets and finding a small plastic bag containing 27.55 grams of marijuana, a number of small plastic baggies, two Valium pills, and a treaty status card confirming the appellant's identity.<sup>78</sup> Mann was subsequently charged with possession for the purpose of trafficking marijuana contrary to section 5(2) of the *Controlled Drugs and Substances Act*.<sup>79</sup> At the Supreme Court of Canada, Mann was acquitted because the search was found to fall outside of what could be deemed permissible.<sup>80</sup> Although the officer searching Mann had felt a soft object in his pocket, he was not permitted to go beyond the pat-down search and reach into Mann's pocket because there was no basis to do so.<sup>81</sup> This was found to breach Mann's section 8 *Charter* right against unreasonable search and seizure and the evidence was excluded under section 24(2) of the *Charter*.<sup>82</sup> However, the Court ultimately held that the police were empowered to detain Mann for investigative purposes and search him for protective purposes.<sup>83</sup>

The issue with the Supreme Court's decision in *Mann* is that it reads as though there is no awareness of the social science pertaining to the racial dimensions of investigative detentions: that it effectively erases the racial aspects of the legal issue.<sup>84</sup> The Court should have recognized how ignoring race in this way actually offends the equality values embodied in the *Charter* because it does not consider racial discrimination.<sup>85</sup> When one examines the history of police violence and racial profiling, it becomes understandable that Indigenous peoples would feel pressured to comply with the police's demands. One example of how doing otherwise could go horribly wrong is the story of JJ Harper, an Indigenous leader from

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<sup>76</sup> *Ibid* at para 5.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 5(2).

<sup>80</sup> *Ibid* at para 3.

<sup>81</sup> *Ibid* at para 9.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid* at para 3.

<sup>84</sup> Berger, *supra* note 63 at 59.

<sup>85</sup> *Ibid* at 60.

Manitoba, who was shot and killed after he refused to cooperate with a police officer's demands to see his I.D.<sup>86</sup> Because of stories like these, many Black and Indigenous families instruct their children on how to act when approached by police so as to not have their movements misinterpreted as dangerous or suspicious. Furthermore, the Court opted out of the opportunity to articulate the different ways in which racial profiling can occur. For instance, racial profiling can rarely be proven by direct evidence because determining whether it occurred requires inference from the circumstances.<sup>87</sup> It can occur even in circumstances where a police officer is not rude or hostile.<sup>88</sup> Had the Court actually considered the substantial racial dimensions of investigative detentions, the analysis might have been very different. Both *Grant* and *Mann* have shown that investigative detentions have significant racial effects.<sup>89</sup>

### **B. *R v MacDonald* and the “Safety of the Public”**

There are also cases involving white accused that can still have profound negative consequences for BIPOC. On December 28<sup>th</sup>, 2009, the police were called to MacDonald's apartment because of a noise complaint.<sup>90</sup> When the first police officer knocked on MacDonald's door and asked him to turn his music down, he swore at her and slammed the door shut.<sup>91</sup> The other police officer attempted to get MacDonald to answer the door by knocking on it, kicking it, and also shouting that he was from the Halifax Regional Police.<sup>92</sup> MacDonald finally opened the door – only by about 16 inches.<sup>93</sup> One of the officer's, noticing something “black and shiny” in MacDonald's right hand, asked MacDonald what it was that he was hiding behind his leg, but MacDonald did not respond.<sup>94</sup> In order to get a better look, the police officer pushed the door open a few inches further and

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<sup>86</sup> Tanovich, “Erasure”, *supra* note 59 at 5.

<sup>87</sup> Omar Ha-Redeye, “Using Systemic Racism for Exclusion of Evidence” (13 February 2017), online: *CanLii Connects* <[canliiconnects.org/en/commentaries](http://canliiconnects.org/en/commentaries)> [perma.cc/ZCQ8-Q2YD].

<sup>88</sup> *Ibid.*

<sup>89</sup> Berger, *supra* note 63 at 58.

<sup>90</sup> *R v MacDonald*, 2014 SCC 3 at para 4 [*MacDonald*].

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at para 5.

<sup>93</sup> *Ibid* at para 6.

<sup>94</sup> *Ibid.*

discovered that MacDonald was holding a loaded restricted firearm.<sup>95</sup> MacDonald was subsequently charged with numerous offences pertaining to his possession of the restricted firearm.<sup>96</sup>

At the Nova Scotia Court of Appeal, it was held that while warrantless entry into a home is *prima facie* illegal, the Supreme Court's decision in *Mann* supported the "police power to search without a warrant where the safety of the public or the police is at stake."<sup>97</sup> This was determined to be the case in *MacDonald* because the police were acting within their general scope of authority by addressing the noise complaint, and they were determined to have acted reasonably in pushing the door open to see what MacDonald was hiding.<sup>98</sup> The Supreme Court of Canada affirmed this decision and also found that where a police officer has reasonable grounds to believe that a safety search is necessary for public safety and conducted reasonably, there is no section 8 *Charter* violation.<sup>99</sup>

The decision in *MacDonald* puts many Canadians' section 8 *Charter* right against unreasonable search and seizure greatly at risk. While the police officers were lawfully present and carrying out their duties, it should not be said that they acquired the power to intrude into MacDonald's home.<sup>100</sup> The officer who pushed open the door only stated that he saw something "black and shiny" in MacDonald's hand, not that he reasonably suspected that MacDonald was holding a firearm.<sup>101</sup> In the opinion of Justice Beveridge at the Nova Scotia Court of Appeal, this was "more akin to hunch or suspicion than reasonable grounds to believe."<sup>102</sup> Furthermore, the polices' actions go far beyond the polices' implied license to approach the door of a residence and knock, as established in *R v Evans*.<sup>103</sup> It can therefore be argued that the polices' actions infringed on MacDonald's section 8 *Charter* right. The overly broad application of police powers in this case can have immense consequences for BIPOC.

Determining whether a safety search is reasonably necessary falls on three factors; "the importance of the performance of the duty to the public

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<sup>95</sup> *Ibid* at paras 7-8.

<sup>96</sup> *Ibid* at para 9.

<sup>97</sup> *Ibid* at para 15.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at paras 24, 35.

<sup>100</sup> *Ibid* at para 21.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid*.

<sup>103</sup> *R v Evans*, [1996] 1 SCR 8 at para 21, 131 DLR (4th) 654 [*Evans*].

good, the necessity of the interference with individual liberty for the performance of the duty, and the extent of the interference with individual liberty.”<sup>104</sup> However, many instances have occurred in Canada where it is evident that police are not able to ensure the safety of individuals for the public good. Although protection of life and safety is supposed to lie at the very core of the existence of the police as a social entity,<sup>105</sup> the police have consistently failed in this regard when conducting wellness checks where the subject is a Black person with mental health issues. Intervention by the police in cases like these has frequently resulted in Black people being brutalized or murdered by police.

The police have shown over and over again their incompetence when engaging with people who are in midst of a difficult mental health episode. In Edmonton, Monica Biar, a woman of South Sudanese descent, expressed her regret in calling the police for help with her 24-year-old mentally ill brother because it resulted in him being viciously tackled and arrested by the police.<sup>106</sup> Monica had called the police a few weeks prior when her brother had a mental episode, and she expressed that police were peaceful, kind, and took her brother to the hospital.<sup>107</sup> The second time that Monica called for help with her brother, things were very different. Video of the arrest showed that the police assaulted and threatened to shoot him.<sup>108</sup> In regard to the incident, the police spokesperson stated that Monica’s brother had attacked the police, which was the reason they became violent.<sup>109</sup> Monica and her family disputed this claim, and video from the incident showed that her brother appeared to be surrendering by putting his hands up, which also impeded his ability to follow the polices’ direction to lie on his stomach.<sup>110</sup>

Other similar incidences have occurred throughout Canada. In Winnipeg, a 43-year-old South Sudanese man named Machuar Madut was shot and killed when police responded to an emergency call about a man

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<sup>104</sup> MacDonal, *supra* note 90 at para 37.

<sup>105</sup> *Ibid* at para 43.

<sup>106</sup> Jonny Wakefield, “Sister Questions Violent Arrest of Brother Captured on Video”, *Edmonton Journal* (29 March 2019), online: <[edmontonjournal.com/news/local-news/sister-questions-violent-arrest-of-brother-captured-on-video](http://edmontonjournal.com/news/local-news/sister-questions-violent-arrest-of-brother-captured-on-video)> [perma.cc/KTE8-66BD].

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid*.

with a hammer who was causing a disturbance.<sup>111</sup> Madut was struggling from mental health issues relating to being separated from his family and was upset over a rent dispute he was having with his landlord.<sup>112</sup> There is no doubt that neighbours were frightened by his behaviour, especially the neighbours whose apartment he was breaking into.<sup>113</sup> However, there were major concerns about the appropriateness of the polices' actions. Members of the South Sudanese community questioned why a mobile crisis unit was not called instead of the police.<sup>114</sup>

In Toronto, a South Sudanese man named Andrew Loku was shot and killed by police in an encounter that lasted seconds.<sup>115</sup> He was only 45 years old.<sup>116</sup> Andrew Loku was also suffering from mental health issues and used a hammer to pound at the walls and doors in his apartment building's hallway in order to express his frustration with the noise that had impeded his ability to sleep for months.<sup>117</sup> He was described by family and friends as a gentle man who was "ceaselessly helpful" to the other tenants in his building and even acted as the superintendent for two months.<sup>118</sup> He had also had a difficult life that caused him to have some sort of mental illness, likely post-traumatic stress disorder.<sup>119</sup> His work with the Red Cross in war-torn South Sudan led to his abduction by rebel groups who believed that he was siding with the government.<sup>120</sup> They beat and tortured him.<sup>121</sup> His suspected post-traumatic stress disorder caused him to hear bullets even

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<sup>111</sup> "Chief medical examiner calls inquest into death of South Sudanese man shot by police", *CBC News* (18 November 2019), online: <[www.cbc.ca/news/canada/manitoba/chief-medical-examiner-inquest-death-south-sudanese-man-shot-winnipeg-police-1.5363950](http://www.cbc.ca/news/canada/manitoba/chief-medical-examiner-inquest-death-south-sudanese-man-shot-winnipeg-police-1.5363950)> [perma.cc/DS6D-GQRN].

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> "It's devastating': South Sudanese condemn fatal police shooting of man with mental health issues" *CBC News* (25 February 2019), online: <[www.cbc.ca/news/canada/](http://www.cbc.ca/news/canada/)> [perma.cc/W7RU-YVAR].

<sup>115</sup> Richard Warnica, "The life and bloody death of Andrew Loku: Toronto police officer's face 'went white as a ghost' after shooting", *National Post* (17 July 2015), online: <[nationalpost.com/news/toronto/the-life-and-bloody-death-of-andrew-loku](http://nationalpost.com/news/toronto/the-life-and-bloody-death-of-andrew-loku)> [perma.cc/34XA-N9T9].

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

while he slept.<sup>122</sup> The lawyer representing his family told a coroner's inquest that Andrew Loku did not need to die, and that the police "shot him because they let their fear of a Black man with a hammer (8.5 metres) away overcome what should have been a compassionate and humane response."<sup>123</sup> One of the apartment building's tenants, the last non-police officer to see him alive, wondered if Andrew Loku even had a chance to drop the hammer before he was shot and if the police had even tried to talk him down.<sup>124</sup> Black Lives Matter Toronto responded to this act of violence by staging a protest at a meeting of the Toronto Police Services Board.<sup>125</sup> Rodney Diverlus, a co-founder of the group, described the multitude of issues that Black people in Toronto were facing at the hands of police, including carding, surveillance, physical violence, and death.<sup>126</sup>

These incidences demonstrate the risk of granting police the power to further infringe on a person's section 8 *Charter* right under the pretense of conducting a safety check. It is clear that in many incidences, the police are unqualified to do so. Unlike MacDonald, the Black men just mentioned did not have guns. Given the history of policing of racialized people, it is not far-fetched to presume that the police would be more threatened by a Black man with a hammer than a white man with a gun. These cases also demonstrate how vulnerable new immigrant communities are to police violence. Speaking from experience, there are many people in new immigrant communities who have had traumatic experiences that have led them to seek refuge in Canada. These traumatic experiences can manifest in serious mental health issues and substance abuse problems. Furthermore, it could be argued that immigrants in certain areas are particularly vulnerable to police violence because they were not racialized prior to entering Canada and do not have the lived experience of existing in a white supremacist society to help them navigate their interactions with police. Police should be required to take cultural competency training to properly protect and assist new immigrants who lack an understanding of the system or, in contrast, those who may be apprehensive towards police because of

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<sup>122</sup> *Ibid.*

<sup>123</sup> "Officers Shot at Andrew Loku in 'Fear of Black Man With a Hammer, Family's Lawyer Says", *CBC News* (26 June 2017), online: <[www.cbc.ca/news/canada/toronto/loku-inquest-closing-arguments-1.4178077](http://www.cbc.ca/news/canada/toronto/loku-inquest-closing-arguments-1.4178077)> [perma.cc/8MZD-ZLXX] [CBC News, "Loku"].

<sup>124</sup> Warnica, *supra* note 115.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

their experiences with authority in the sometimes-war-torn countries from which they originate.

### C. *R v Le* and the “Reasonable Person”

*Le* shows that there has been some progression in how the Supreme Court views the vulnerability of racialized people in their interactions with the police. In this 2019 case, the Asian accused, Tom Le, was in the backyard of a townhouse with three other young, racialized men, all of whom were Black.<sup>127</sup> The yard was enclosed by a waist-high fence, and the young men appeared to be doing nothing wrong.<sup>128</sup> Without warning, a warrant, or consent, two police officers who had been walking by entered the yard and began to question the young men about “what was going on, who they were, and whether any of them lived there.”<sup>129</sup> The police demanded documentary proof of identity from all of the young men in the yard.<sup>130</sup> When Le told the police officer questioning him that he had no documentary proof of identity on him, the police officer asked what he was carrying in his satchel.<sup>131</sup> This prompted the accused to flee.<sup>132</sup> Le was subsequently pursued, arrested and found to be in possession of a fire arm, drugs and cash.

While the Supreme Court would not decide definitively on whether or not there was a section 8 *Charter* violation, they did find that there was an arbitrary detention contrary to section 9 of the *Charter* starting at the point when the police entered the yard and made contact without proper authorization.<sup>133</sup>

Absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request.<sup>134</sup>

This illustrates the vulnerability of the young men who the police interrogat-

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<sup>127</sup> *R v Le*, 2019 SCC 34 at para 1 [*Le*].

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at para 2.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid* at para 33.

<sup>134</sup> *Ibid* at para 26.

ed. The police had no legal authority to force the young men to adhere to their demands.<sup>135</sup> Hence, the young men were not legally required to comply with the police.<sup>136</sup> But, because of the police's authority, the young men felt pressured to comply.

This case also begs the question of how we define the reasonable person as articulated in the analysis of whether psychological detention would arise in this case.<sup>137</sup> The idea of a "highly artificial 'reasonable person,' who is much more assertive in encounters with police officers than is the average citizen" was discussed in *Grant*.<sup>138</sup> But, it is clear that this model of the 'reasonable person' is based on a rather privileged, possibly upper-class, white man who can afford to behave in this way. In *Le*, the Supreme Court acknowledged that being a member of a racialized community is an important consideration when assessing when a detention occurred because the people of these communities cannot so easily disregard police directions.<sup>139</sup> Therefore, the question is "how a reasonable person of a similar racial background would perceive the interaction with the police."<sup>140</sup>

The dissent in *Le* viewed the police as acting respectfully and mistakenly entering the yard, which shows how even though the majority and dissent had similar understandings of what happened, they interpreted the events quite differently because of the different subjective factors that the witnesses described in their evidence.<sup>141</sup> While this was the dissenting view, it represents how judges can be out of touch when it comes to the lived experiences of racialized people. The mistake of police entering a yard without proper authorization cannot be taken so lightly when their actions can have such a profound impact on the people that they interrogate. Another issue of contention was whether the officers' tone was aggressive or respectful, which shows how different people "may have different understandings of things like tone and body language than the police

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<sup>135</sup> *Ibid* at para 28.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Supra* note 2 at para 169.

<sup>139</sup> *Supra* note 127 at para 72.

<sup>140</sup> *Ibid* at para 75.

<sup>141</sup> Steph Brown, "Setting the Scene: R v Le and the Importance of Context in s. 9 Analysis" (29 October 2019), online: *The Court.ca* <[www.thecourt.ca/setting-the-scene-r-v-le-and-the-importance-of-context-in-s-9-analysis/](http://www.thecourt.ca/setting-the-scene-r-v-le-and-the-importance-of-context-in-s-9-analysis/)> [perma.cc/MA6G-UP3M].

officers, and this is further complicated by factors such as the race or stature of the individual.”<sup>142</sup>

The polices’ entitlement in this case is also indicative of a culture that is more grounded in control than it is in protecting people. The police went far beyond acting within their duty when they entered the backyard, even though the young men “appeared to be doing nothing wrong”, told them where to place their hands, and proceeded to impose their beliefs about the young men’s ‘inherent’ criminality when they demanded information from them.<sup>143</sup> There was no reason that these young men should have ever been approached in a private yard and harassed by police. The actions of the police in *Le* demonstrate and perpetuate a mentality that confines racialized peoples’ existence to the spaces deemed appropriate by the police and, therefore, the state.

Sherene Razack writes about how “the official story of who Canadians are and who they are not, performed in Canadian courtrooms, parliament, media, classrooms, and elsewhere, is a story that depends on bodies of colour, both ideologically and materially.”<sup>144</sup> This means creating a dichotomy where bodies of colour are characterized as degenerate and uncivilized, while the dominant group is applauded for their heroism and ability to “correct and discipline people of colour all the while maintaining that racism does not exist.”<sup>145</sup> This ideology is at the root of the racial profiling and the arbitrary investigative detentions of BIPOC. Whether or not police officers themselves are white is irrelevant. Police officers are an extension of the state and, therefore, they function in the interests of the dominant group. It is in the interests of the dominant group to control the ‘othered’ groups who are stereotyped as being more prone to engage in criminal activity.

The law also functions in this way – upholding systemic racism under the guise of neutrality. The steadfast adherence to universal and “objectively-applied liberal social values” has the effect of dismissing the real lived experiences of BIPOC because it renders invisible the violence which is inherent in the regulation of Black and Indigenous bodies.<sup>146</sup> In order to

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Le*, *supra* note 127 at para 34.

<sup>144</sup> Sherene H Razack, “Making Canada White: Law and the Policing of Bodies of Colour in the 1990s” (1999) 14:1 *Can JL & Soc’y* 159 at 161.

<sup>145</sup> *Ibid* at 161, 166.

<sup>146</sup> Jennifer J Nelson, “The Space of Africville: Creating, Regulating and Remembering the Urban ‘Slum’” (2000) 15:2 *Can JL & Soc’y* at 164.

rectify these inequalities, it is important to consider context-specific details and do away with the assumption that legal actions are always carried out with fairness and objectivity.<sup>147</sup>

Dismantling the oppressive components of our legal system cannot be done without acknowledging the role that colonization plays in policing the bodies of Indigenous peoples. For example, the *Indian Act* was used to regulate the movements of racially mixed people in order to maintain the privileges that had been allotted to white people.<sup>148</sup> Allowing their free movement between white spaces and ‘Indian spaces’ was seen as a threat to the colonial project, which was “highly dependent on policing identity categories and ensuring that the boundaries between the reserve and white space remained secure.”<sup>149</sup> These methods have not disappeared. Instead, they have morphed into subtler behaviours that have, in some instances, come to include other groups of non-white people.<sup>150</sup> The construction of golf courses over the burial grounds of Mohawk people, the internment of Japanese-Canadians into work camps in British Columbia, and the destruction of Africville in Halifax are but a few examples that illustrate how Canada’s history is marred with accounts of white people benefitting from the violent subordination of Indigenous and racialized peoples.<sup>151</sup> Recognition of this history contextualizes how police conduct in many of these *Charter* cases is egregious and, at the macro-level, deliberate.

In so many of these *Charter* cases, the courts consistently fail to acknowledge how justifying some of these *Charter* breaches or avoiding discussions about racial profiling actually emboldens police to disrespect the rights of racialized people, therefore putting racialized people in danger. Hopefully, the future will see more insightful cases like *Le*. However, this one decision will not undo the many others that have expanded police powers and will not guarantee that all Canadians are treated fairly under the law.

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<sup>147</sup> *Ibid.*

<sup>148</sup> Sherene H Razack, “Law, Race and Space: The Making of White Settler Nation” (2000) 15:2 *Can JL & Soc’y* 1 at 5.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid* at 6–7.

### III. RECOMMENDATIONS

With the exception of statistics on Indigenous peoples in the corrections system, there is very little race-related data concerning the social characteristics of victims or offenders.<sup>152</sup> Therefore, it is very difficult to ascertain the numbers of different groups being processed in Canada's criminal justice system.<sup>153</sup> While it is true that many minority groups at first opposed the collection of justice statistics based on race, — concerned that this would be used to justify discriminatory policies — many minority groups now recognize the importance of collection and publication of this data in order to advocate against racial discrimination in the criminal justice system.<sup>154</sup> Other potential dangers of releasing race-related data are that this may lead to more stereotyping of a group and that police may use these statistics to justify increased policing of minority areas.<sup>155</sup> However, it has been shown that banning these types of statistics have “not shielded minorities from becoming criminalized in the public eye.”<sup>156</sup> For example, a poll conducted by the *Toronto Star* showed that respondents believed that twice as many visible minorities had criminal records, while minorities were actually underrepresented among those with a criminal record.<sup>157</sup> Therefore, releasing race-relevant statistics could help dispel some of these myths about the level of criminal involvement by members of minority groups.

Another argument against race-related statistics is that, since race is a social and biological construct, the social sciences research should not engage with it because it would only serve to legitimize the concept of race.<sup>158</sup> This is an irresponsible and over-simplistic argument. Although race is a social construct, many racialized people would attest to the fact that they experience the very real consequences of being a racialized person. Collecting race-related statistics could help racialized groups prove that they have been targets of racial profiling, a strategy that was successful for Black and Hispanic people in the United States.<sup>159</sup>

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<sup>152</sup> Akwasi Owusu-Bempah and Paul Millar, “Research Note: Revisiting the Collection of ‘Justice Statistics by Race’ in Canada” (2010) 25:1 Can JL & Soc’y 97 at 98.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid* at 97.

<sup>155</sup> *Ibid* at 100.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid* at 100–01.

<sup>158</sup> *Ibid* at 101.

<sup>159</sup> *Ibid* at 101–02.

The inquest into Andrew Loku's death resulted in a series of recommendations — recognizing that the actions of the police were inappropriate, especially in light of the fact that in the hour leading up to his death, six other people had interacted with Loku and were able to calm him down without using a weapon.<sup>160</sup>

The recommendations proposed by the inquest focused on “addressing [the] implicit bias and the intersection between race and mental health.”<sup>161</sup> The inquest recommended requiring the police to collect data for every incident where officers use force in regard to “perceived race, gender, and whether the person was believed to be in crisis.”<sup>162</sup> Furthermore, they proposed that the police chief “conduct a structural review and analysis to ensure the force has a clear policy on serving and protecting racialized people and those with mental health issues, and reinforce it through continuous training.”<sup>163</sup> The Inquest also recommended that police officers be better trained in de-escalation tactics, as well as equipping front-line officers with stun guns, suggesting that this could have saved Andrew Loku's life.<sup>164</sup>

In order to properly hold police officers accountable for racial profiling, our courts must also move away from the belief that an officer's intentions are deeply relevant to the extent of the harm done. In *Grant*, Chief Justice McLachlin argued that the police officers' actions were not “deliberate nor egregious.”<sup>165</sup> I would argue that this does not matter at all because for a person whose *Charter* rights are being breached, the impacts are the same. For example, Black men are often racially profiled while driving because of a police officer's conscious or unconscious beliefs that Black men are most often the perpetrators of drug or weapons crimes.<sup>166</sup> This is such a common occurrence that the apparent offence that warrants this criminal investigation has been dubbed “driving while Black” and police officers can often hide their true intent behind conducting racial profiling by premising it on their statutory power to regulate traffic and vehicle safety.<sup>167</sup> It makes no difference to BIPOC whether police officers intend or do not intend to

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<sup>160</sup> CBC News, “Loku”, *supra* note 123.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Supra* note 2 at para 133.

<sup>166</sup> Tanovich, “Profiling”, *supra* note 47 at 149.

<sup>167</sup> *Ibid.*

be racist, especially when they can so easily hide behind another reason for violating their rights. The impacts of racism are felt the same, regardless of whether or not there was an intention to be racist. One must also consider that many people hold biases that they have failed to unpack and unlearn. Therefore, the subjective intentions of the police are not a relevant point of discussion when determining whether or not a person's *Charter* rights were violated. Furthermore, the violation of a *Charter* right because of racism is most definitely egregious. It is alienating, degrading, and stands in opposition of the values championed by the *Charter*.

David Tanovich argues that devising enhanced *Charter* standards, through “the development of an equality-based conception of arbitrary detention”, may be what is necessary in order ensure equality and compliance with the *Charter*.<sup>168</sup> Most of the *Charter* violation cases that come before the court are the ones where the accused has actually been found in possession of contraband. As such, the courts are rarely involved in the cases of *Charter* violations where people have done absolutely nothing wrong.<sup>169</sup> Furthermore, many accused people plead guilty because of various pressures and, therefore, they forgo their right to challenge the constitutionality of the conduct of the police.<sup>170</sup> For these reasons, there should be more checks and balances implemented in our legal system to determine whether or not a detainment was constitutional, rather than allowing police to have such wide discretionary powers. The data supports the claim that this is a much bigger issue than what is actually coming before the courts, which is why courts must recognize the racial dynamics of every case that comes before them when it involves the potential *Charter* violations against a Black or Indigenous person by the police. This could be done by requiring the court to engage in a more complex analysis to establish whether a police officer had a ‘reasonable suspicion’ given that a ‘reasonable suspicion’ is a low standard of belief that depends on an officer’s experience and may be distorted by unconscious racism.<sup>171</sup>

Another strategy could be to enhance the way that these issues are litigated in court. Seeing as we are now more aware of the systemic racism that police engage in, we must also understand that it is very difficult for Black and Indigenous accused to prove that the police are engaged in racial

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* at 176.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at 183.

profiling, especially since the police are adept at making sure that their notes and testimonies meet expected standards of conduct, even if they are hiding behind false pretenses.<sup>172</sup> It would be helpful then, in certain circumstances, to place the evidentiary burden of proof for a section 9 violation on the Crown to establish that a detainment was not motivated by race.<sup>173</sup> The police cannot be presumed in all situations to be acting in an unbiased manner and with the goal of promoting public safety – not with the overwhelming evidence that they are consistently harassing people from Black and Indigenous communities. Although the police may argue that their interactions were consensual, a Black or Indigenous person who has repeatedly been harassed by police would likely feel otherwise.

The Truth and Reconciliation Commissions Calls to Action 27 and 28 call for both lawyers and law students to be trained in cultural competency of Indigenous clients, focusing on intercultural competency, human rights, conflict resolution, and anti-racism.<sup>174</sup> Given that the research has shown that lawyers are either apprehensive about bringing forth racial profiling arguments where relevant or they are unable to because of ignorance, it is important that courses in cultural competency actually properly equip lawyers and future lawyers to properly address the distinct needs of their clients.

The reality is that the *Charter* is only invoked where contraband is found, which means that many of the other cases of racial profiling and arbitrary detention go unchecked. Even then, if counsel is inept and if an accused person does not have a full grasp of their rights under the law, the violation may fly under the radar. Therefore, it is crucial that the courts take their duty to uphold the rights of Canadians seriously by condemning all actions of police brutality and racial profiling committed by police, no matter how difficult or uncomfortable. Our legal system has a responsibility to acknowledge the ways in which race plays into police interactions in order to not further marginalize the already marginalized.

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<sup>172</sup> *Ibid* at 181.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: TRCC, 2012) no 27–28.

#### IV. CONCLUSION

While some progress has been made in recent years concerning the acknowledgment by the Supreme Court of the lived experience of BIPOC as it pertains to their interactions with police, there is quite a long way to go in ensuring that police officers have a reasonable, non-racist basis for investigative detentions. Additionally, the recent deaths of BIPOC by police show how the expansion of police powers, by condoning *Charter* breaches, can put BIPOC in danger of police who often lack proper training and may hold conscious or unconscious racial biases.

The court must make a real, concerted effort to contextualize the lived experiences of BIPOC so that judges have the insight necessary to determine whether or not police actions are motivated by race. This can be aided by the use of statistics, but primarily lies in being cognizant of the power dynamics that BIPOC often face when interacting with the police. Tackling this immense issue head-on means rethinking the way these cases are adjudicated.

For racial profiling to be eradicated, there must be a collaborative effort between the police, the government, and the judiciary to address systemic racism. Black and Indigenous accused are at a significant disadvantage because of police perceptions. Our courts must be willing to fully engage with the racial dimensions of police interactions with Black and Indigenous peoples, while consistently and steadfastly holding the police accountable for violating the rights of all individuals. If not, our courts run the risk of continuing to give the police unfettered power and control over Black and Indigenous peoples, further compounding the oppression that these communities have experienced for centuries.



# Moms in Prison: The Impact of Maternal Incarceration on Women and Children

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KATY STACK\*

## ABSTRACT

This article examines the impact of maternal incarceration on women and children in a case-study format. The author's former clients provide insight into their experiences while incarcerated in federal prison, their re-entry into society upon their release, and the impact of their incarceration on their children. Their children then provide their perspective on visiting their mothers in prison and how their mother's incarceration impacted their lives. Statistics are discussed regarding the impacts of maternal incarceration in the United States and Canada. Finally, suggestions are provided for ways to lessen the impact of maternal incarceration on children and more effectively support drug-addicted parents.

## I. INTRODUCTION

Our society has slowly been waking up to the reality that far too many citizens are being incarcerated for non-violent crime. Millions of children are being exposed to this reality as rates of incarceration for non-violent crime have skyrocketed since the 1980s. In 1980, 40,900 Americans were incarcerated; by 2017, that number rose more than ten-fold to 452,964.<sup>1</sup> Many people are being incarcerated for drug use and drug dealing, which often go hand in hand. Women are being imprisoned at

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\* J.D., M.S. The author would like to thank her former clients, Jamie and Lindsey, as well as the children who participated in the interviews for this article.

<sup>1</sup> "Criminal Justice Facts" (December 2019), online: *The Sentencing Project* <[www.sentencingproject.org/criminal-justice-facts/](http://www.sentencingproject.org/criminal-justice-facts/)> [perma.cc/PH8L-3USV] [The Sentencing Project, "Facts"].

higher rates than ever before: the rate of incarcerated women has increased by 750% since 1980 in the United States,<sup>2</sup> while in Canada, the population of women in federal prison has increased by 37% in the past ten years.<sup>3</sup>

Many of the women being imprisoned have young children and are their children's primary caregiver. There are more than 2,700,000 children with an incarcerated parent in the United States.<sup>4</sup> About half of these children are under ten years old. One in nine African American children have an incarcerated parent, while one in 57 white children do.<sup>5</sup> In Canada, Indigenous women are vastly over-represented in prisons, making up 42% of the prison population despite being only 5% of the Canadian population.<sup>6</sup> The impact on the person being sentenced to prison is considered in great detail during the sentencing process in both countries, but the impact on their children is often overlooked, leading to unforeseen generational trauma in many cases.

This article examines the impact of incarceration on women and their children through a case-study format. First, two mothers who have been federally incarcerated for drug crimes are interviewed regarding their history, their crime, their time behind bars, and how their relationship with their children has been impacted by their prison sentence. Then, the children of those two mothers provide their perspective on having an incarcerated mother and how they have adjusted to their mother's release from prison. The benefits and detriments of child visitation with incarcerated parents are then examined, as are the differences between the visitation process in the United States and Canada. The mothers and

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<sup>2</sup> "Incarcerated Women and Girls" (6 June 2019), online: *The Sentencing Project* <[www.sentencingproject.org/publications/incarcerated-women-and-girls/](http://www.sentencingproject.org/publications/incarcerated-women-and-girls/)> [perma.cc/TA6L-QWT2].

<sup>3</sup> Vicky Mochama, "Treatment of Women in Canadian Prisons a Human Rights Travesty", *The Star* (4 January 2018), online: <[www.thestar.com/opinion/star-columnists/2018/01/04/treatment-of-women-in-canadian-prisons-a-human-rights-travesty.html](http://www.thestar.com/opinion/star-columnists/2018/01/04/treatment-of-women-in-canadian-prisons-a-human-rights-travesty.html)> [perma.cc/7CFL-PJ9X].

<sup>4</sup> "Children and Families of the Incarcerated Fact Sheet" (2014) at 1, online (pdf): *Rutgers University National Resource Center on Children & Families of the Incarcerated* <[nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf](http://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf)> [perma.cc/VGQ8-E4YG] [Rutgers, "Fact Sheet"].

<sup>5</sup> *Ibid.*

<sup>6</sup> Public Safety Canada, *Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge* (News Release) (Ottawa: PSC, 21 January 2020), online: <[www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx](http://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx)> [perma.cc/7MUY-ASM6] [PSC, *Federal Custody*].

children then provide suggestions for how to help maintain the integrity of families while parents are incarcerated. Finally, potential policy changes in the United States and Canada are examined as methods for reducing the trauma of maternal incarceration on children.

## II. THE MOTHERS

### A. Lindsey

Lindsey was incarcerated on December 3, 2016 for possession and distribution of methamphetamine. Lindsey was a methamphetamine addict who got mixed up with a dangerous group of people. Her boyfriend/dealer was importing meth from Las Vegas, Nevada and had a penchant for shooting at people who disagreed with him. He shot at Lindsey after an argument in their bedroom, the bullet missing her head by less than an inch. Shortly after shooting at her, Lindsey's boyfriend threatened to harm her 9-year-old son if Lindsey did not accompany him on a drug run to Las Vegas. She went. During the trip, they were in a car accident during a snowstorm that debilitated their vehicle. Rather than calling a tow truck, her boyfriend set the car on fire and shot at it multiple times. Her boyfriend picked up five pounds of meth while in Las Vegas, and although Lindsey had little to do with it, she was legally on the hook for drug distribution.

Lindsey and her boyfriend were indicted federally in Butte, Montana shortly thereafter, and she was sentenced to 36 months in prison on March 17, 2017. She was sent to a Federal Prison Camp at Alderson, West Virginia, which happens to be the same prison where Martha Stewart spent her time in custody. While in custody, Lindsey completed the 500-hour Residential Drug and Alcohol Program ("RDAP"), got her GED, and worked 20–25 hours per week as a carpenter. Lindsey completed every program available to her at the prison, including parenting classes, mental health treatment, and even recreational sports like volleyball.

Lindsey's son Robbie<sup>7</sup> was taken by Child and Family Services the day before she was incarcerated. Robbie was placed with his father, who also struggled with chemical dependency. Lindsey was terrified that she would lose her parental rights while in prison. She contacted her lawyer daily and did everything she could to maintain her parental rights and ensure Robbie's safety. With a lot of determination and a little luck, Lindsey

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<sup>7</sup> Names have been changed as needed for confidentiality.

retained her parental rights during the two years that she was in custody and obtained physical custody of her son shortly after returning to Montana from prison. This is particularly noteworthy when one considers the federal and Montana laws presuming that a parent's rights should be terminated if their child is in foster care for 15 out of 22 months.<sup>8</sup>

Lindsey could not have maintained her parental rights without the assistance of her attorney. In Canada, many parents are not provided with court-appointed counsel when their children are removed from their custody.<sup>9</sup> The Ontario Office of Attorney General stresses that parents should have a lawyer due to the complexity of child removal cases, but parents are not appointed counsel automatically as they are in Montana and most of the United States.<sup>10</sup> Parents in Canada must retain their own counsel or they can apply for counsel through Legal Aid. As many of the parents in child removal cases are indigent, and Legal Aid resources are overburdened, many parents are forced to navigate the court system on their own. If children are removed due to the parent's incarceration, maintaining parental rights becomes even more difficult.

## B. Jamie

Jamie is a 35-year old mother to Sophie, aged 12. On November 10, 2016, Jamie was sentenced to 40 months in federal prison for possession and distribution of methamphetamine. Jamie was dating a man who was selling large amounts of meth in Northwestern Montana. One snowy night, Jamie and her boyfriend were arguing in a borrowed car. Her boyfriend got out of the car, and she took off down the highway. The car got stuck in the snow, and a highway patrolman arrived on scene. Jamie voluntarily gave the officer marijuana that was in the vehicle and told him she did not know what else might be in the car because it was not hers. She was arrested for possession of marijuana, and the vehicle was seized.

Upon a search, a large quantity of meth and several guns were found in the car. Jamie was on the hook for the drugs and the guns even though it

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<sup>8</sup> See Mont Code Ann § 41-3-604(1) (2019); Adoption and Safe Families Act of 1997.

<sup>9</sup> Canadian Association of Elizabeth Fry Societies (CAEFS), Native Women's Association of Canada (NWAC), "Women and the Canadian Legal System: Examining Situations of Hyper-Responsibility" 26:3/4 Can Women Studies 94, online <[cws.journals.yorku.ca/index.php/cws/article/viewFile/22118/20772](http://cws.journals.yorku.ca/index.php/cws/article/viewFile/22118/20772)> [perma.cc/C9SE-QXNC].

<sup>10</sup> Ontario, Ministry of the Attorney General, *What You Should Know About Child Protection Court Cases* (Report) (last modified 23 May 2018), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/child\\_protection.php](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/child_protection.php)> [perma.cc/KB86-GV7E].

was not her car and she did not know what was in there. She knew that her boyfriend dealt drugs and carried guns and that knowledge, along with being in a vehicle full of drugs and guns, was enough to land her in federal prison.

Jamie was initially sent to Waseca Federal Correctional Institution in Minnesota. Waseca is a medium security federal prison. Although Jamie had no prior felonies, she had three Driving Under the Influence of Alcohol convictions and an outstanding misdemeanor theft warrant when she went to prison. This led to her “points”, or security classification, being high enough for the Bureau of Prisons (BOP) to send her to a medium security facility, despite her never spending more than a night or two in jail prior to her arrest.

In Canada, the classification system for designating female prison inmates has come under scrutiny because it is the same designation system that was designed for male inmates – it has never been altered to accommodate for the differences presented by female inmates.<sup>11</sup> Some critics argue this leads to more women being sent to maximum-security prisons than is necessary.<sup>12</sup> This is particularly true for Indigenous women, who are vastly over-represented in the Canadian Women’s prisons.<sup>13</sup> As was stated previously, but is worth repeating, Indigenous women make up 42% of the Canadian prison population although they make up just 5% of the entire Canadian population.<sup>14</sup> Indigenous peoples are incarcerated at six or seven times the national average.<sup>15</sup> Despite many policy changes directed at addressing this overrepresentation, rates of Indigenous incarceration continue to rise, while the national incarceration average declines in Canada.<sup>16</sup> Substance abuse treatment is one of the key areas being examined as part of this effort.

Jamie has struggled with substance abuse from a young age. She believes that her drug use began as an attempt to numb the pain she felt after being abused while her mother was in prison. Jamie’s mother went to prison in Montana when Jamie was 6 years old and served approximately three years.

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<sup>11</sup> Mochama, *supra* note 3.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> PSC, *Federal Custody*, *supra* note 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

Jamie visited her mother frequently and recalls staying overnight with her mother while she was in prison:

I remember going into the prison and staying with my mother for a weekend with my little sister. We got to bring a few things of food that we wanted, and it was a room, a big jail cell room, with a queen-sized bed and a little kitchenette. We still had to go stand out there at count time, we got counted with everybody in there, we were in there with criminals, but we still got to spend time with our mother. It was amazing. We got to walk to a little ice cream shop... The hardest part was leaving. Coming from the life I came from, it wasn't scary at all. They were all women, they were all nice. They were getting help... They had a big barbeque that weekend and we played volleyball and badminton.<sup>17</sup>

This remarkable memory begs the question: is visitation between incarcerated parents and children at prison beneficial for children? If so, could these visits occur overnight, like Jamie and her sister's visit in the 1990s?

### III. IS IT GOOD FOR CHILDREN TO VISIT THEIR PARENT IN PRISON?

Some parents do not want their children to see them in the orange jumpsuit and handcuffs. This can be a product of their own shame or an effort to protect their children's innocence. The vast majority of parents, however, desperately want to see their children while they are in prison and do everything in their limited power to make it happen. But are these visits good for the kids?

The answer, as usual, is that it depends. It depends on two primary factors: (a) the environmental setting of the prison and visitation process and (b) the parental attachment between parent and child.<sup>18</sup> The visits also depend on having an adult willing to bring the child to visit in the first place.

#### A. Transportation to Visits

The majority of prisoners are housed far away from their families, with 62% of state parent-inmates and 84% of federal parent-inmates housed

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<sup>17</sup> Interview of Jamie (11-20-19) 18:45-20:45.

<sup>18</sup> US, Department of Justice, "It's Not All Cupcakes and Lollipops": An Investigation of the Predictors and Effects of Prison Visitation for Children during Maternal and Paternal Incarceration, by Melinda Tasca, Doc No 248650 (May 2014), online: < [www.ncjrs.gov/pdffiles1/nij/grants/248650.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/248650.pdf) > [perma.cc/5JWV-U777] [Tasca, *Prison Visitation*].

more than 100 miles from their residence.<sup>19</sup> Most prisons are not accessible by public transportation, so families must drive long distances for parental visitation. And once there, many prisons have a punitive process that visitors, including children, must endure to see their incarcerated loved ones. The outside of the prison is often surrounded by tall gates covered with barbed wire and watch towers, depending on the security level of the prison facility.

Admission into the prison can be a laborious process; nearly all prisons require visitors, including children, to provide identification such as birth certificates and photo ID to be an approved visitor. Some facilities only allow parents or guardians to bring children to visit, which is problematic when a child's only parent is the person that they are trying to visit in prison. Once admitted, nearly all prisons have invasive search procedures, requiring the child to remove their shoes, belts, and coats, walk through a metal detector, and possibly be patted down by a guard. Most prisons have strict dress codes and will not allow entry if the codes are not obeyed, meaning some families may travel many hours to see a loved one, only to be turned away for wearing the wrong clothing. Jamie recalls her daughter having to drive to the nearest store to buy new pants after she was turned away from a visit in Arizona for wearing jeans with holes in them.

## B. Visit Environment

The environment in which the visitation takes place is a key factor for how the child will react to visiting a parent in prison. Once the child finally arrives at the visitation room, the room itself can cause distress. Many visitation rooms are windowless, echoing, concrete rooms with tables, vending machines, and posted guards who monitor physical contact between the inmate and child. All of the inmates in a given prison often have visitation at the same time, so the rooms can be crowded and noisy. Some facilities do not allow "contact visits" so children must speak to their parent through a telephone separated by a glass wall.

Needless to say, the setting of most prison visitation rooms is not ideal for maintaining or rekindling a healthy parent-child bond. 69% of children were reported to have negative emotional reactions to visiting their incarcerated parents by caregivers.<sup>20</sup> For the 31% of children who had a positive reaction to visiting their parent, most visited at minimum security

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<sup>19</sup> Rutgers, "Fact Sheet", *supra* note 4 at 2.

<sup>20</sup> Tasca, *Prison Visitation*, *supra* note 18 at 106.

facilities that had more family-sensitive rooms and protocols.<sup>21</sup> One of the persistent themes was that “food visits”, or visits where family was permitted to bring food and eat with the inmate, were strongly associated with positive reactions from the visiting child.

### C. Parent-Child Bond

Expectedly, children who have strained or limited parental relationships exhibit more negative responses to visiting their parent in prison than children who have good relationships with their incarcerated parent.<sup>22</sup> Many incarcerated parents have mental health and/or chemical dependency issues that damaged their relationship with their child prior to their incarceration. These situations, where the parent-child bond is lacking prior to incarceration, result in more behaviors from children after visits, including anxiety, crying, tantrums, and behavioral regression.<sup>23</sup>

Jamie believes that it is crucial for children to maintain contact with their incarcerated parent – both for the parent’s and the child’s well-being. Jamie was permitted in-person visitation with her daughter from 8-3 on Saturdays, Sundays, and some holidays. This occurred after she was transferred to a minimum-security federal prison in Phoenix, Arizona, after serving nearly one year at Waseca. Interestingly, Jamie was allowed to take a greyhound bus from Minnesota to Arizona for her transfer on a furlough status.

Jamie agreed with what is reflected in the literature – that the method used to welcome (or not welcome) visitors at the prison made a huge difference in how children react to visiting their incarcerated parent: “The visitation system at the camp was great for the people coming in because they were not treated like inmates, they were treated like family members.... We were able to hug, kiss, hold hands.”<sup>24</sup>

Jamie’s visitation room was one big room, and she was allowed to hug and kiss her daughter and spend the entire time with her if possible. Other inmates visited their family at the same time in the room, and guards were posted inside and outside the visitation area. There were not any activities or games to play with the children, so younger children often became bored

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<sup>21</sup> *Ibid* at 108–09.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at 115.

<sup>24</sup> Interview of Jamie, *supra* note 17, 17:00-17:30.

quickly during visits. Not Sophie though. Jamie said Sophie would sit with her as long as she allowed and would get upset when it was time to leave.

In Montana, the Montana Women's Prison has Kid's Day one Saturday per month, when parents who are participating in the Prison's parenting program can have supervised visitation with their children to promote child-bonding and reunification efforts.<sup>25</sup> However, all children must be brought to the prison by a parent or guardian according to the Prison's policy manual. As such, it is unclear how children who are in foster care or living with other relatives are permitted to visit.<sup>26</sup> The parent is required to provide a copy of the child's birth certificate and proof of guardianship prior to any visits as well.<sup>27</sup>

#### D. Parenting in Prison

Interestingly, Canadian facilities permit young children to remain with their mothers in provincial prisons, where women who receive sentences of less than two years reside.<sup>28</sup> Children under the age of four can stay with their mothers in federal prisons in Canada, but the mother-baby program permitting this is rarely used.<sup>29</sup> In 2007, a woman named Lisa Whitford gave birth to a child while awaiting trial for manslaughter in Canada. Lisa was an Indigenous woman who was a victim of domestic violence and suffered from substance abuse issues.<sup>30</sup> Lisa was sentenced to a four-year prison term and, through zealous advocacy by her counsel, was able to utilize the mother-baby program and bring her child with her to federal prison in Vancouver.<sup>31</sup> The United States has no such law permitting children to remain with their mothers in prison.

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<sup>25</sup> Montana Department of Corrections, *Montana Women's Prison Recovery & Re-entry Program* (last visited 15 January 2020), online: <cor.mt.gov/Adult/MWP#rr> [perma.cc/6KEQ-MYGP].

<sup>26</sup> Montana Department of Corrections, Montana Women's Prison, *Visitor Information Pamphlet* (last visited 20 January 2020), online: <cor.mt.gov/Portals/104/MWP/MWP Visitation%20Pamphlet%203-24-15.pdf> [perma.cc/7JS9-33RR].

<sup>27</sup> *Ibid.*

<sup>28</sup> Rebecca Johnson, "Mothers, Babies and Jail" (2008) 8:1 U Md LJ Race, Religion, Gender & Class 47 at 51

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid* at 49.

<sup>31</sup> *Ibid* at 51.

### E. Phone and Video Contact with Children

Jamie was permitted 300 minutes of phone time per month while in prison, or about ten minutes per day. She paid \$3.00 for every 15 minutes of phone time and could only make calls at certain times. To use her full phone time, she had to pay \$60.00 per month. While that may sound like a reasonable amount, consider what Jamie was paid for the various jobs that she held while in prison: \$35/month for doing labour-intensive concrete work or \$30/month for sorting recycling. Thus, Jamie's entire monthly salary paid about half of what her monthly phone bill would cost.

Consider also that inmates must pay for everything apart from the most basic of necessities with their own money, including, until recently, feminine hygiene products. It was not until August 2017 that a federal law was passed in the United States requiring the BOP to provide women with feminine hygiene products while incarcerated.<sup>32</sup> So, many inmates have had to choose between speaking to their children or having products necessary for basic human health and dignity. Those unfortunate women who do not receive financial support from outside the prison cannot even earn enough to use their full phone time.

The only contact Lindsey had with her son while she was incarcerated was weekly phone calls and letters. She did not speak to her son for ten months after she was taken into custody because his father refused her calls. She had to go through her attorney and get a court order requiring his father to allow her to speak with Robbie. She wrote him weekly and sent the letters to Child and Family Services, who was supposed to provide the letters to Robbie after reviewing them. She found out after her release that Robbie never received any of her letters.

Similar to Jamie, Lindsey's phone calls cost about \$3.00 per 15 minutes, so two phone calls used up her entire month's paycheck. Lindsey was paid \$5.25 per month for her work as a carpenter. Allowing free calls to family members would go a long way toward helping inmates maintain family connections, Lindsey says. Many of Lindsey's fellow inmates had no one helping them financially, and they felt hopeless and had a hard time engaging in the rehabilitation programs because it all felt pointless when no one on the outside cared about them. This was particularly true for women who lost their parental rights.

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<sup>32</sup> US, Bill S 1524, *Dignity for Incarcerated Women's Act of 2017*, 115th Cong, 2017.

Both Lindsey and Jamie reported that video or Skype calls were allowed at their prisons, but the setup process was too onerous for their families to be able to use it. The child or guardian is required to set up a Skype account and follow the prison's protocols for video calls, and neither Jamie nor Lindsey were able to have video contact with their children. All of the women and children interviewed believed that video calls would help maintain the parent-child connection better than telephone calls, and they hoped that the prisons would find a way to make the process more user-friendly.

#### **IV. RE-ENTRY AND REUNIFICATION WITH CHILDREN**

Jamie was set to get out of prison in January 2019 and enter a halfway house in Phoenix for six to nine months. The halfway house was designed to help Jamie reintegrate into society by helping her find employment, housing, and reestablish visitation with Sophie. That release did not happen though. Jamie explained that her release paperwork was misplaced somewhere along the chain of command within the Bureau of Prisons, and when it was redone and set to be processed, the U.S. government shut down. This led to lengthy delays during which time Jamie got into a verbal altercation with another inmate, and she was sent to FCI Dublin in California.

At Dublin, Jamie had no family nearby and no way to look for housing or employment prior to her release, which would occur in Arizona. Jamie was finally released to a halfway house in May 2019, and she was at the halfway house for two weeks before finishing her time on house arrest. Jamie did not receive any assistance with finding employment or housing during this time and did not receive any help toward reunifying with Sophie.

Lindsey was released from FPC Alderson in West Virginia on July 9, 2018 and took a 76-hour bus ride back to Great Falls, Montana. She lived at the Great Falls Prerelease for four months upon her release. During that time, she got a job at Great Harvest Bread Company, did aftercare chemical dependency treatment, and found housing. Lindsey did not have as difficult a time finding housing or employment as she anticipated. She attributed this to the low unemployment rate and willingness of the people in Great Falls to give people with criminal records a chance, as well as the tax breaks businesses can receive for employing felons.

Lindsey believes that maintaining custody of her son and the RDAP program are two primary reasons for her success. The other key to her successful reentry was that she did not return to her hometown of Butte, Montana upon her release. Lindsey lived in Butte for most of her life, and she was released to the Great Falls Prerelease, where she stayed for four months. Nearly all of the other inmates Lindsey knows who returned to their hometown upon release have relapsed and ended up back in prison. Federal felons are almost always placed on supervised release after release from prison, and they must follow strict rules governed by a federal probation officer for many years in order to stay out of prison.

Lindsey thinks making a fresh start in a new city is critical to staying clean and out of prison: “People, places, and things. Do not go back to them because you will not make it. There is a 99% chance that you will not make it out. And that’s scary. That is scary. A lot of the women I graduated RDAP with are back in prison because they went home. Because they went home.”<sup>33</sup>

Lindsey was apprehensive about leaving the Prerelease and half-jokingly told people she was not ready to leave after four months. She left, though, and her son Robbie came to live with her. She is still working at Great Harvest Bread Company one year later and is happier than she has been in a long time: “It has to do with myself and Robbie and the boys (her two older children). I’m more focused on that, and I’m happy now. Whereas, before, I was not happy because I was using (methamphetamine) every day. And now, I’m happy and I have a good life. I know what it’s like to be sober.”

## V. CHILDREN’S PERSPECTIVE

Sophie, Jamie’s daughter, provided her perspective on visiting her mother at the prison. Her grandfather typically brought her to the prison for visits, and she recalled having to fill out a form, leave her wallet and keys outside, and go through a screening process before entry. Sophie loved visiting Jamie and said that “visits made me happier but it was hard to say goodbye.” She was allowed to do phone calls with Jamie as well, but said that the cost was prohibitive and made it hard to stay in contact with her mom as much as she would have liked. Sophie said she would have stayed

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<sup>33</sup> Interview of Lindsey (1-6-20) 21:30-21:53.

the night at the prison with her mom if that was an option: “anything to be with my mom.”

Sophie has struggled with substance use and disciplinary issues during her mother’s absence. Approximately 30% of children whose parents are incarcerated end up in prison themselves, and Jamie is desperate to break the cycle with Sophie. Jamie is working on getting custody of Sophie, but she has been struggling to maintain her sobriety and attended an inpatient treatment program for 30 days as part of her supervised release program. Despite these struggles, Jamie remains hopeful: “I’m the most hopeful person you’ll ever meet. I know that things are going to get better. But I have to put in the work.”

Lindsey’s son was never able to visit her while she was in prison. Before she was sentenced, his father refused to bring him to the jail to see Lindsey. After Lindsey was placed in West Virginia, the trip across the country was not feasible. Robbie enjoyed talking to his mom on the phone, but often felt abandoned when weeks would go by without a phone call. Robbie did not realize that his father was screening calls from Lindsey and he never received the letters she wrote him. Robbie and Lindsey were both very emotional when they were finally reunited at the bus terminal in Montana after over two years. “It was emotional. He cried, I cried, his dad cried, his dad’s friend cried.”<sup>34</sup> Lindsey’s son is still living with her in Great Falls, and their bond remains strong despite the two-year break in contact.

## VI. REDUCING THE IMPACT OF INCARCERATION

Jamie and Lindsey both agreed that reducing the price of phone calls or allowing free calls for immediate family would help maintain the parent-child relationship while parents are incarcerated. Simplifying the process for video calls was another recommendation for improved relationships. Treating visitors like family rather than inmates goes a long way toward allowing children to relax and enjoy their visit as well. Prisons can ensure security with metal detectors while still allowing children to bring gifts, toys, or food to visits to help normalize the environment.

Making the visitation room comfortable, allowing for some level of privacy, contact visits, and allowing the parents and children to share food are all other ways to make visits less stressful on children. Placing parents in prisons or facilities close to home is one of the crucial steps to allowing for

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<sup>34</sup> *Ibid*, 19:15-19:25.

visitation to occur in the first place. This is simply not feasible in many federal cases, however. There are no federal prisons in Montana, or many other states, so it is impossible to keep federal inmates close to home in many cases. These are all considerations courts, legislators, and voters need to keep in mind when making policy decisions on criminal justice issues and including the children of incarcerated people needs to be part of the analysis.

Eliminating the law-presuming termination of parental rights if children are in foster care for 15/22 months would be another step toward maintaining the integrity of families. Proponents of the law cite to the importance of permanency for children. However, many children are removed because of their parent's drug use and incarceration for drug crimes. The time it takes for the parent's criminal case to be processed and for the parent to successfully complete a treatment program is frequently longer than 15 months. Thus, many parents successfully complete drug treatment only to have permanently lost their children upon their release. While permanency for children is important, 15 months simply is not long enough for many parents to get the help they need to successfully parent.

These are all thoughtful suggestions worthy of attention and action. Perhaps, though, we should first ask the question of whether all of these people need to go prison in the first place. Is it possible as a society to go back to the days where prison is used as a last resort for only the most violent and irredeemable among us? Or must we continue to use prisons as a housing place for the mentally ill and chemically dependent?

## **VII. POSSIBLE ALTERNATIVES TO INCARCERATION**

The Sentencing Project sets forth several potential methods for reducing incarceration for non-violent offenders:

- Eliminating mandatory minimum sentences and cutting back on excessively lengthy sentences by setting a maximum length for non-violent offenses.
- Shifting resources to community-based prevention and treatment for substance abuse.
- Investing in interventions that promote strong youth development and respond to delinquency in age-appropriate and evidence-based ways.
- Examining and addressing the policies and practices, conscious or not, that contribute to racial inequity at every stage of the justice system.

- Removing barriers that make it harder for individuals with criminal records to turn their lives around, including eliminating the box requiring felon-status notification on housing and employment applications.<sup>35</sup>

Many states, including Montana, and Canadian provinces are slowly implementing these methods in an attempt to reduce incarceration rates. The impetus for the reduction is often based on budget issues rather than more humanitarian notions, but the effect is the same. The federal government in the United States, however, is moving in the opposite direction of late and more and more non-violent drug offenders are being sentenced to ten-year mandatory minimum sentences. Jamie and Lindsey could easily have received mandatory minimum sentences if not for a couple lucky breaks. Courts, legislators, prison officials, and voters should keep in mind children like Sophie and Robbie when deciding how best to deal with drug-addicted, non-violent offenders. While drug abuse is certainly a huge societal concern, locking away addicts for years does not appear to be solving the problem. Instead, it is costing society billions of dollars and tearing apart families in often irreparable ways. Investment of those dollars in treatment facilities and treatment courts would go a long way toward keeping families together and hopefully breaking the cycle of incarceration.

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<sup>35</sup> The Sentencing Project, "Facts", *supra* note 1.



# The Privacy Paradox: *Marakah*, *Mills*, and the Diminished Protections of Section 8

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MICHELLE BIDDULPH\*

## ABSTRACT

The Supreme Court of Canada’s decision in *R v Marakah* is a landmark decision under section 8 of the *Charter*, as it extended constitutional protection to some electronic communications that are no longer in the control of the sender. In other words, the presence or absence of control is no longer determinative.

This article challenges the understanding of *Marakah* as a progressive decision, suggesting that *Marakah* has created a privacy paradox. By significantly expanding the scope of section 8 of the *Charter*, the Court in *Marakah* has created a right that is both extremely broad and practically illusory. In order to deal with the practical challenges resulting from the decision in *Marakah*, this article suggests that courts will deal with *Marakah* by diluting current principles under section 8 in order to avoid absurdities and undesirable results.

The Supreme Court’s majority decision in the 2019 decision of *R v Mills* illustrates the privacy paradox. Unable to rely on the accused’s lack of control over communications as a determinative factor, the majority in *Mills* abandoned decades of jurisprudence under section 8 of the *Charter* to reach its desired result. The new concept of privacy as “relationship-based” places courts in the business of conducting a post facto assessment of which relationships are entitled to privacy.

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As shown by *Marakah* and *Mills*, those who seek progressive and idealistic development of *Charter* principles through Supreme Court jurisprudence should be careful what they wish for. The most well-intended decision can have very unintended results.

**Keywords:** privacy; text messages; judicial reasoning; precedent; *Charter of Rights and Freedoms*; Supreme Court of Canada

## I. INTRODUCTION

In *R v Marakah*,<sup>1</sup> a majority of the Supreme Court held that the sender of a text message may retain a reasonable expectation of privacy in the message despite the absence of control over the use of the message by the recipient, thereby precluding the police from accessing that text message without prior judicial authorization. This reasonable expectation of privacy would prevent all unauthorized searches and seizures of the message, whether on the sender's device, the recipient's device, or some other locale.

The issue in *Marakah* seemed deceptively simple. After all, if the police cannot search an accused person's phone without a warrant to obtain incriminating text messages that the accused person has sent, why should the police be able to achieve that exact same result by searching the recipient's phone without a warrant? On policy grounds, the answer was clear. But the implications of that answer, as shown by *Mills*, are troubling.

This article suggests that the effect of the majority's decision in *Marakah* was to create what I have termed as a privacy paradox. The majority's decision created a section 8 right that was, paradoxically, extremely broad and practically illusory. It created an extremely broad section 8 right because the sender of information can always claim a subjective intention to shield that information from the prying eyes of the state, regardless of whether the recipient of the information has any legal obligation to keep that information confidential. Based on the majority's reasoning in *Marakah*, it is difficult to imagine a scenario where that subjective expectation of privacy is not objectively reasonable because control is no longer a predominant factor in assessing the objective reasonableness of that expectation of privacy. Unmoored from the concept of control, it appears that, based on *Marakah*, a truly credible subjective expectation of privacy in an electronic

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<sup>1</sup> 2017 SCC 59 [*Marakah* 2017].

communication sent to another individual<sup>2</sup> will almost automatically result in that subjective expectation being objectively reasonable.

But this expansion creates a paradox. By finding that virtually everyone holds a reasonable expectation of privacy in their electronic communications sent to a designated recipient, the majority implied in *Marakah* that the police will always require prior judicial authorization or must conduct a lawful, warrantless search in order to view those communications on the third party's device. The majority suggested that these problems can be addressed by the existing principles governing warrants, warrantless searches, and section 24(2) of the *Charter*.<sup>3</sup> However, if a court were to truly apply these principles to communications in the possession of third parties, two results are likely: either the courts will be forced to dilute the protections of section 8 of the *Charter* for all, or else the privacy right established in *Marakah* becomes meaningless. In other words, by expanding the scope of section 8 of the *Charter*, the majority's decision may have rendered this right less meaningful.

After setting out the privacy paradox created by *Marakah*, I suggest that the existence of this privacy paradox is demonstrated by Justice Brown's majority<sup>4</sup> opinion in *R v Mills*.<sup>5</sup> His opinion attempts to rein in *Marakah* by adopting a results-oriented approach to the objective reasonableness of Mr. Mills' expectation of privacy, finding no objectively reasonable expectation of privacy without actually applying the test set out in *Marakah*. He justified this through a "relationship-based" understanding of a reasonable

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<sup>2</sup> There is, of course, no suggestion here that a claimed subjective expectation of privacy in any electronic communication would automatically be objectively reasonable. For example, a person who tweets to their followers on Twitter could not credibly claim a subjective expectation of privacy in the information that the accused intentionally broadcast publicly. Similarly, an email sent to multiple people, rather than one designated recipient, may lose any credible claim to a subjective expectation of privacy. To avoid becoming mired in the conceptual difficulty with group communications and expectations of privacy, I have limited my analysis to the two-party communication situation which was at issue in both *Marakah* and *Mills*, as it is this situation that is most common in section 8 cases and will likely pose the most problems for accused persons and law enforcement.

<sup>3</sup> *Marakah* 2017, *supra* note 1 at paras 46–53.

<sup>4</sup> It is something of a misnomer to describe Justice Brown's opinion as the majority, given that the Court was unanimous in dismissing the appeal. However, as Justice Brown's opinion gathered the largest number of concurrences, I have termed it as the majority in this article for ease of reference.

<sup>5</sup> 2019 SCC 22 [*Mills*].

expectation of privacy, which acts as a proxy for the notion of control that was rejected in *Marakah*. I show why this approach is inconsistent with the Court's prior case law and appears to abandon the content-neutral approach to section 8 which has been consistently affirmed by the Supreme Court since the *Charter's* inception.

The purpose of this article is not to chart the future course of section 8 of the *Charter*, nor to provide a theoretical analysis of the concepts of privacy that the Supreme Court has espoused in either *Marakah* or *Mills*. Others have written extensively on these topics and I cannot claim to improve their ideas.<sup>6</sup> Instead, this article is about how well-intended judicial decisions can have very unintended results. The Court's decision in *Marakah* appeared to display a rather myopic understanding of the implications of its reasoning: the majority rejected any suggestion that its decision could have any broader negative implications for section 8 of the *Charter* in general.<sup>7</sup> Similar assertions were made by the majority opinion in *Mills*.<sup>8</sup> Yet proclaiming a decision to be narrowly confined to the facts of the case, with no broader jurisprudential meaning, does not necessarily make it so. Like it or not, Supreme Court decisions tend to have major precedential effect.<sup>9</sup> By

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<sup>6</sup> Other authors have done a commendable job of theoretically analyzing *Marakah* and, to a lesser extent, *Mills*. For academic commentary on these decisions, see: Steven Penney, "Consent Searches for Electronic Text Communications: Escaping the Zero-Sum Trap" (2018) 56:1 *Alta L Rev* 1; Ryan Mullins, "*R v Jarvis*: An Argument for a Single Reasonable Expectation of Privacy Framework" (2018) 41:3 *Man LJ* 77; Simon Stern, "Textual Privacy and Mobile Information" (2018) 55:2 *Osgoode Hall LJ* 398.

<sup>7</sup> See e.g. *Marakah* 2017, *supra* note 1 at paras 49–53, responding to criticisms laid out in Justice Moldaver's dissenting opinion.

<sup>8</sup> Justice Brown took a similar approach in responding to criticisms from Justice Martin's dissent in *Mills*, rejecting the assertion that the narrow reasoning in his opinion could have broader negative effects. See *Mills*, *supra* note 5 at para 30.

<sup>9</sup> Indeed, it appears that since *Mills* lower courts have relied on it to deny section 8 protections to unsavoury or abusive communications emanating from the accused. See e.g. *R v Heppner*, 2019 MBPC 73 at para 8 [*Heppner*] (holding that the accused's expectation of privacy in his email communications with the complainant, a vulnerable person, was not objectively reasonable because she was a vulnerable person); *Estrella Llana c R*, 2019 QCCQ 3012 at para 37 (relying on *Mills* to hold that, despite the statement at para 50 of *Marakah*, *supra* note 1 that the police require a warrant to view private communications even where they are voluntarily disclosed, there is no objective expectation of privacy in a communication to a victim that is voluntarily provided to the police). At the time of writing (May 2020), there does not appear to yet be an appellate decision directly considering the correctness of a lower court's application of *Mills* in this context. I have not considered the decisions applying *Mills* in the context of the new section 278.92 of the *Criminal Code* and a complainant's reasonable

blinding itself to the precedential effect of *Marakah*, the Supreme Court ended up with *Mills*. And by blinding itself to the precedential effect of *Mills*, the Supreme Court may have unwittingly set itself down a path that will result in diluted privacy protections for all.

## II. THE DECISION IN *R v MARAKAH*

### A. The Facts

In mid-2012, the Toronto Police Service began an investigation into persons who had legally purchased firearms over a short period of time. This investigation led them to Andrew Winchester, who had purchased 45 firearms over a six-month period. Information from a confidential informant implicated Mr. Marakah in the investigation. The police obtained four search warrants: one for Mr. Winchester's apartment; one for Mr. Winchester's girlfriend's apartment; one for Mr. Winchester's vehicle; and one for Mr. Marakah's apartment.<sup>10</sup> Mr. Winchester was arrested, and an iPhone was seized from his front pocket incident to arrest. It was not searched at the scene of the arrest. The police then searched Mr. Winchester's apartment and car and found a number of firearms.<sup>11</sup> Both of the accused's phones were seized and sent to the Tech Crimes division for further analysis, though no warrants were obtained in respect of the searches of either phone. Tech Crimes extracted the information from both phones and provided them to the police.<sup>12</sup> Numerous text messages between Mr. Marakah and Mr. Winchester were found on both phones, which implicated both Mr. Marakah and Mr. Winchester in firearms trafficking.<sup>13</sup>

### B. The Supreme Court Judgement

Mr. Marakah appealed as of right to the Supreme Court of Canada,

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expectation of privacy in records sought or held by the accused, as the interests of the accused in protecting privacy against the state are vastly different from the interests of a sexual assault complainant in protecting privacy against the accused. The comparison between the application of *Mills* to section 8 claims by the accused and the application of *Mills* to privacy claims under section 278.92 is fascinating, but ultimately outside the scope of this article.

<sup>10</sup> *R v Marakah*, 2014 ONSC 7580 at para 10 (*Voir Dire* Judgment).

<sup>11</sup> *Ibid* at para 14.

<sup>12</sup> *Ibid* at paras 20–21.

<sup>13</sup> *R v Marakah*, 2016 ONCA 542 at para 1.

which ultimately allowed his appeal.<sup>14</sup> Chief Justice McLachlin wrote for the majority, with Justices Abella, Karakatsanis, and Gascon concurring. Justice Rowe wrote a separate concurring opinion, while Justice Moldaver dissented, with Justice Côté concurring.

Chief Justice McLachlin held that Mr. Marakah had a reasonable expectation of privacy in the text messages that were found on Mr. Winchester's phone. She stated that the subject matter of the search was not Mr. Winchester's phone, nor the contents of that phone. The subject matter of the search was, instead, Mr. Marakah's "electronic conversation" with Mr. Winchester.<sup>15</sup> Mr. Marakah had a direct interest in the subject matter of the search, given that he was a participant in the electronic conversation.<sup>16</sup> He also had a subjective expectation of privacy in the subject matter of the search, as he had testified as to his subjective expectation that the contents of the conversation would remain private.<sup>17</sup> The only issue to be determined was whether his subjective expectation of privacy was objectively reasonable.

Chief Justice McLachlin considered three factors that were relevant to assessing whether Mr. Marakah's expectation of privacy was objectively reasonable: (1) the place of the search; (2) the private nature of the subject matter; and (3) control over the subject matter. With respect to the first factor, she stated that, regardless of whether the "place" of the search is characterized as a metaphorical "chat room" between two individuals or as the physical device through which the messages are accessed or stored, "it is clear that the place of the text message conversation does not exclude an expectation of privacy."<sup>18</sup>

With respect to the second factor, the private nature of the information, Chief Justice McLachlin noted that "the focus is not on the actual content of the messages the police have seized, but rather on the potential of a given electronic conversation to reveal personal or biographical information."<sup>19</sup> She stated that text message is an extremely discrete form of communication "capable of revealing a great deal of personal information" and that it is, therefore, "reasonable to expect these private interactions – and not just the

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<sup>14</sup> *Ibid* at para 87. He was convicted after trial and a majority of the Court of Appeal for Ontario dismissed his appeal, with LaForme JA dissenting.

<sup>15</sup> *Marakah* 2017, *supra* note 1 at para 17.

<sup>16</sup> *Ibid* at para 21.

<sup>17</sup> *Ibid* at para 23.

<sup>18</sup> *Ibid* at para 30.

<sup>19</sup> *Ibid* at para 32.

contents of a particular cell phone at a particular point in time – to remain private.”<sup>20</sup>

Finally, with respect to the third factor – control – Chief Justice McLachlin held that a person does not lose control over information for the purpose of section 8 “simply because another person possesses it or can access it.”<sup>21</sup> Even though Mr. Marakah accepted the risk that, by sharing information with Mr. Winchester, the information could be disclosed to third parties, this did not mean that Mr. Marakah ceased to have control over the information. Instead, Chief Justice McLachlin held that “[b]y choosing to send a text message by way of a private medium to a designated person, Mr. Marakah was exercising control over the electronic conversation” and the risk that Mr. Winchester could have disclosed it did not negate the reasonableness of his expectation of privacy “against state intrusion.”<sup>22</sup> Chief Justice McLachlin concluded that Mr. Marakah did have a reasonable expectation of privacy in the electronic conversation, held that the evidence ought to be excluded under section 24(2), allowed the appeal, and entered acquittals on all counts.<sup>23</sup> Justice Rowe, concurring, agreed with Chief Justice McLachlin that Mr. Marakah had a reasonable expectation of privacy in the impugned text messages. However, he echoed some of Justice Moldaver’s concerns regarding the policy implications of this decision. Justice Rowe ultimately stated that all of these policy concerns could not be resolved within the confines of this case but warned that “principle and practicality must not be strangers in the application of s. 8.”<sup>24</sup>

Justice Moldaver wrote a lengthy dissent. He agreed that text message conversations are inherently private in nature, such that the police’s decision to view the text messages on Mr. Winchester’s phone amounted to a search for the purpose of section 8.<sup>25</sup> However, the question of whether a search has occurred is different from the question of whether a person has standing to challenge the legality of that search. He held that Mr. Marakah lacked standing to challenge the legality of the search of the text messages because Mr. Marakah lacked a reasonable expectation of privacy in them. This was because, in his view, Mr. Marakah lacked any control over those

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<sup>20</sup> *Ibid* at paras 35–37.

<sup>21</sup> *Ibid* at para 41.

<sup>22</sup> *Ibid* at para 45.

<sup>23</sup> *Ibid* at paras 72–73, 82.

<sup>24</sup> *Ibid* at para 89.

<sup>25</sup> *Ibid* at para 106.

text messages.

The notion of control was central to Justice Moldaver's dissent. He stated that, in assessing standing, control "plays an integral role" in defining the strength of the connection between the claimant and the subject matter of the search.<sup>26</sup> This remains integral in the context of informational privacy because of "the ease with which information can change from private to public in nature, depending on the context."<sup>27</sup> An individual need not demonstrate absolute control over the information in order to demonstrate a reasonable expectation of privacy, but, in Justice Moldaver's view, the individual must retain some measure of control over that information in order to retain a reasonable expectation of privacy in it.<sup>28</sup>

Control may also be constructive in nature: for example, a legal obligation of confidentiality imposed on the recipient of information vests constructive control in the individual from whom that information originated. Thus, a client retains constructive control over information shared with a lawyer, or a patient retains constructive control over private information shared with their physician. However, Justice Moldaver held that such constructive control does not exist "where the information in question is under the exclusive control of another person[, as] an interest in the subject matter and a personal relationship with that person does not suffice."<sup>29</sup> He, therefore, found no section 8 breach and would have dismissed the appeal.<sup>30</sup>

### III. THE PRIVACY PARADOX

The majority decision in *Marakah*, which found that the sender of a communication retains a reasonable expectation of privacy even in the absence of control over the communication, creates a paradox. The plurality decision in *Mills*, authored by Justice Brown and ultimately followed by lower courts,<sup>31</sup> illustrates this paradox. The privacy paradox rests on two premises: first, the majority decision in *Marakah* vastly expanded the scope of section 8 of the *Charter*; and second, by doing so, it will dilute the

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<sup>26</sup> *Ibid* at para 122.

<sup>27</sup> *Ibid* at para 125.

<sup>28</sup> *Ibid* at paras 127-29, 133.

<sup>29</sup> *Ibid* at para 142.

<sup>30</sup> *Ibid* at paras 199-200.

<sup>31</sup> See *supra* note 9.

protections of section 8 of the *Charter*. The majority's reasons significantly expanded the scope of section 8 with respect to the types of communications that now attract a reasonable expectation of privacy, as well as the circumstances in which a reasonable expectation of privacy remains in information that has already been communicated.

This massive expansion of the scope of section 8 creates significant difficulties for law enforcement and confusion for courts. In order to give effect to this newly-expanded right while avoiding absurd consequences, courts will be forced to either: (1) water down the current understanding of reasonable and probable grounds in the preparation of search warrant materials; (2) dilute the current tolerance for warrantless searches; or (3) relax the current rules for admission of unconstitutionally-obtained evidence. This watering-down does not exist solely in the third-party text message context: if courts begin to weaken the current protections of section 8 of the *Charter* to avoid absurd policy consequences from the *Marakah* decision, those protections are weakened for all aspects of section 8. The result is that expanding the scope of section 8 for Mr. Marakah weakens its protective strength for all.

Assuming that a reasonable expectation of privacy generally exists where information is communicated in an electronic form to a third party with no legal obligation of confidentiality on the part of a third party – therefore applying to text messages, emails, and other electronic messages – significant practical problems will result. I have identified two factual scenarios that are likely to commonly arise, and I will use these examples to demonstrate the practical problems and impractical solutions that *Marakah* has created. To the extent that these scenarios have been considered in the post-*Marakah* case law, I will outline the approach that courts have tried to take to resolve them.

### A. Voluntary Disclosure by the Recipient

First, there is the scenario where the recipient of an electronic communication voluntarily discloses that communication to the police. This commonly occurs in sexual assault or domestic violence cases, where the complainant provides the police with text messages from the accused: for example, where the complainant confronts the accused with an allegation of sexual assault in a text message and the accused responds with

an apology.<sup>32</sup> It is also quite common in charges of uttering threats or criminal harassment, where text messages or written communications from the accused to the complainant constitute the offence.<sup>33</sup> If the recipient of a communication voluntarily discloses that communication to the police, what should the police do?

The majority in *Marakah* declined to answer the question of whether a third party's decision to volunteer a communication to the police affected the sender's reasonable expectation of privacy, though the majority's logic suggests that the sender must still retain a reasonable expectation of privacy in that communication.<sup>34</sup> The majority's decision is premised on the holding that the absence of control over what a third party does with the communication does not mean that there is an absence of a reasonable expectation of privacy in that communication. This assumes that the reasonable expectation of privacy must subsist regardless of what the third party actually does with the information, as the reasonable expectation of privacy exists in the communication itself, not in the written record of that communication on the recipient's device.<sup>35</sup> To conclude otherwise would, in fact, tie the reasonable expectation of privacy to some element of the sender's control over the recipient's device.

This is consistent with the approach that the Supreme Court has taken to other information in the possession of third parties. Thus, for example, an individual does not lose their expectation of privacy in their IP address even where that information is voluntarily provided by the internet service provider to the police.<sup>36</sup> A person whose blood is seized by a medical professional at a hospital does not lose their reasonable expectation of privacy in that blood because the medical professional voluntarily gave the

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<sup>32</sup> See e.g. *R v JFD*, 2017 BCCA 162; *R v Burton*, 2017 NSSC 3 (*Voir Dire* Ruling).

<sup>33</sup> Examples of these types of cases are abound. For an example of uttering threats by text message, where the text message was voluntarily provided by the complainant to the police, see *R v Meadus*, 2013 NLTD(G) 108. For an example of a case of criminal harassment by text message, where the messages were voluntarily provided by the complainant to the police, see *R v Wenc*, 2009 ABCA 328 (a sentence appeal but one where the complainant had provided the police with 308 harassing emails and 48 text messages that the accused had sent to her).

<sup>34</sup> As the majority suggests that the police ought to obtain a warrant before viewing text messages that are voluntarily disclosed to them. See *Marakah* 2017, *supra* note 1 at para 50.

<sup>35</sup> *Ibid* at para 37.

<sup>36</sup> *R v Spencer*, 2014 SCC 43 at paras 66–67 [*Spencer*].

blood to the police.<sup>37</sup> The reasonable expectation of privacy, once it is found to exist, can only be ceded by the voluntary actions of privacy-holder<sup>38</sup> or by a lawful search or seizure.<sup>39</sup> Once the reasonable expectation of privacy crystallizes, it can ordinarily only be destroyed by the actions of the privacy-holder or the lawful actions of the state. It is not affected by the actions of private third parties.

One might understandably object to my characterization of the reasonable expectation of privacy that was established by the majority in *Marakah*. After all, the Supreme Court's jurisprudence has generally established that reasonable expectation of privacy is context-specific and determined based on an assessment of the "totality of the circumstances" in any given case.<sup>40</sup> Further, the reasonable expectation of privacy ought to be assessed against state intrusion and determined at the time that the police seek to conduct a search. Just because there was a reasonable expectation of privacy in *Marakah*, where Mr. Winchester did not voluntarily disclose the text messages to the police, does not mean there would be a reasonable expectation of privacy in another case: for example, where the recipient does voluntarily disclose the messages to the police. In every case, the reasonable expectation of privacy must be assessed against the factors recited in *Tessling*, including the place of the search and "whether the information was already in the hands of third parties."<sup>41</sup> This means that, in some cases, there may not be a reasonable expectation of privacy in the contents of one's communications.

While this objection to my characterization is certainly valid, the problem is that this objection is not consistent with the majority's reasoning in *Marakah*. At no point did the majority assess the reasonable expectation of privacy against the state's interest in viewing the messages, nor the legality of the search of Mr. Winchester's phone. It was only after Mr. Marakah's reasonable expectation of privacy was found that the Court went on to consider whether the search of Mr. Winchester's phone was reasonable.<sup>42</sup>

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<sup>37</sup> *R v Dymont*, [1988] 2 SCR 417, 55 DLR (4th) 503 [*Dymont*].

<sup>38</sup> See e.g. *R v Patrick*, 2009 SCC 17 [*Patrick*]. The accused had a reasonable expectation of privacy in his garbage but was found to have abandoned that expectation of privacy by placing his garbage in an area accessible to the public (and therefore to the police).

<sup>39</sup> *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 160–62, 11 DLR (4th) 641.

<sup>40</sup> *R v Tessling*, 2004 SCC 67 at paras 31–32 [*Tessling*], citing *R v Edwards*, [1996] 1 SCR 128 at para 45, 132 DLR (4th) 31.

<sup>41</sup> *Tessling*, *supra* note 40 at para 32.

<sup>42</sup> See *Marakah* 2017, *supra* note 1 at paras 56–57.

In other words, the reasonableness of Mr. Marakah's expectation of privacy was completely divorced from the reasonableness of Mr. Winchester's expectation of privacy in his own phone and messages. The two had no influence on each other. If the majority's reasoning in *Marakah* is faithfully followed, it means that the sender's reasonable expectation of privacy must be assessed before considering the manner in which the police access that information from the recipient. The manner in which that information is accessed has no bearing on whether the reasonable expectation of privacy exists. Instead, it only informs the justifiability of state intrusion on that reasonable expectation of privacy.

If the reasonable expectation of privacy exists in the communication rather than "the contents of a particular cell phone at a particular point in time",<sup>43</sup> it must continue to exist in the communication even if the third party decides to disclose that communication to the state or the world. Consent to a search means the waiver of one's own right to be free from unreasonable search and seizure; a person cannot waive another's right.<sup>44</sup>

To conclude otherwise would, in fact, tie the expectation of privacy to the contents of a particular cell phone at a particular point in time, being the point in time prior to the disclosure of the communication to the police. Otherwise, it would massively expand the scope and meaning of consent in the context of search and seizure by allowing a third party to waive an individual's reasonable expectation of privacy without that individual's knowledge. This then leads to the question that was left relatively unanswered by the majority's reasons in *Marakah*: if the sender of a communication has a reasonable expectation of privacy in that communication regardless of what the recipient does with it, what should the police do with a communication that is voluntarily provided to them?

The cases that considered this issue following the release of *Marakah* but prior to the release of *Mills* were split.<sup>45</sup> Some courts found that there was no reasonable expectation of privacy in inherently criminal

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<sup>43</sup> *Ibid* at para 37.

<sup>44</sup> See Glen Luther, "Consent Search and Reasonable Expectation of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada" (2008) 41:1 UBC L Rev 1 at 2.

<sup>45</sup> As my thesis is that *Mills* significantly dilutes privacy protections, my interest in examining how courts apply an ostensibly progressive decision in *Marakah* led me to exclude decisions that were released after *Mills* and that can rely on *Mills* for their reasoning.

communications. For example, in *R v Patterson*,<sup>46</sup> the question was whether the accused, who was charged with child luring, had a reasonable expectation of privacy in Facebook messages that he had sent to the victim, who had voluntarily disclosed those messages to the police. The Court found that the accused had no “direct interest” in the messages that he had sent to the victim, as “those messages constitute the *actus reus* of the offence of child luring.”<sup>47</sup> It stated that “the constitutional rights which protect our privacy have never gone so far as to permit an accused to claim privacy in respect of his own criminal offences.”<sup>48</sup> The Court found that there was no objectively reasonable expectation of privacy in the messages, largely due to the nature of the messages.

At the other end of the spectrum is the British Columbia Provincial Court’s decision in *R v Devic*.<sup>49</sup> In that case, the accused exchanged email communications with an anonymous person on Craigslist, who was a member of an organization called “Creep Catchers” and who was posing as an underage female. The Court applied *Marakah*, finding that the accused had a diminished expectation of privacy given that he was conversing with someone that he did not know. The Court further found that the recipient’s voluntary disclosure of the messages to the police did not provide the police with lawful authority to seize those messages. The Court stated that “allowing the police to accept the communications from the recipient in the present circumstances would effectively allow the recipient, a third party, to waive the privacy right of the sender in favour of the police”, which was inconsistent with *Marakah* and the Supreme Court’s decision in *R v Cole*.<sup>50</sup> The Court found a section 8 breach but admitted the messages under section 24(2).<sup>51</sup>

A third example is the British Columbia Supreme Court’s decision in *R v Phagura*.<sup>52</sup> In that case, the complainant had attended at the police station and alleged that she had been assaulted by the accused. She showed

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<sup>46</sup> 2018 ONSC 4467. It is important to note that this case was decided prior to the Supreme Court’s decision in *Mills*.

<sup>47</sup> *Ibid* at para 13.

<sup>48</sup> *Ibid*.

<sup>49</sup> 2018 BCPC 318 [*Devic*]. See also *R v Rafferty*, 2018 ONCJ 881, in the context of text messages found on a deceased person’s phone which was voluntarily provided to the police.

<sup>50</sup> *Devic*, *supra* note 49 at paras 44–45; *R v Cole*, 2012 SCC 53.

<sup>51</sup> See *R v Devic*, 2018 BCPC 321.

<sup>52</sup> 2019 BCSC 1638.

the police text messages on her phone from the accused and the police took photographs of those messages. The Crown sought to introduce them at trial, and the accused relied on *Marakah* in an attempt to exclude them.<sup>53</sup> The Court concluded that the accused lacked an objectively reasonable expectation of privacy in the messages because there was no evidence to show that the complainant similarly expected that the messages would be kept private.<sup>54</sup> In the alternative, the Court reasoned that the police ‘search’ was authorized by law because it was premised on the consent of the complainant.<sup>55</sup> In other words, the Court suggested that where the police view private information with the consent of the person who received that information, the police have conducted a search that is authorized by law.

On the academic side, Steven Penney has suggested that a search of an electronic conversation can be justified through the third-party consent doctrine. Just as in cases of shared spaces and territorial privacy, the recipient of a communication bears an equal privacy interest in the contents of that electronic conversation. Where the recipient makes an informed and voluntary decision to waive their privacy right in that conversation, this decision ought to be determinative of section 8 issues, even where the accused has made no such waiver.<sup>56</sup> While this is a sensible solution that, if accepted, could erase the privacy paradox altogether,<sup>57</sup> the suggestion of the majority in *Marakah* was that the issue of voluntary disclosure ought to be dealt with through the issuance of a warrant to search the device. I will therefore explore the feasibility of the suggested solution in *Marakah* in order to demonstrate the paradox that *Marakah* created.

## B. The Possibility of a Warrant

The majority in *Marakah* suggested that the police could deal with the difficulty of voluntary disclosure of a communication by the recipient by simply obtaining a warrant to view this communication.<sup>58</sup> However, the

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<sup>53</sup> *Ibid* at paras 3–5.

<sup>54</sup> *Ibid* at para 51.

<sup>55</sup> *Ibid* at para 62.

<sup>56</sup> Steven Penney, “Consent Searches for Electronic Text Communications: Escaping the Zero-Sum Trap” (2018) 56:1 *Alta L Rev* 1 at 15–16.

<sup>57</sup> However, this solution is inconsistent with the premises of *Marakah*. I discuss this further below in analyzing whether a valid search of the recipient’s device constitutes a valid search of the sender’s communications.

<sup>58</sup> *Marakah* 2017, *supra* note 1 at para 50, “a breach can be avoided if the police obtain a warrant prior to accessing the text messages.”

majority provided no guidance on how, exactly, the police could get that warrant; simply saying that it is possible does not make it so. In a scenario where the police would be seeking to obtain a warrant to view a sender's communication on a third party's device, the police would have presumably learned of the existence of the communication in one of four ways: by actually viewing it on the third party's device; by having the third party read the text out to them; by soliciting a screenshot of the text message from the third party; or by relying on a third party's assertion that the text, in fact, exists, but without disclosing its contents. Having learned of this information in one of these ways, the police would have difficulty drafting an adequate Information to Obtain (ITO) that satisfies the current law under section 8 of the *Charter*, leading to both redundancies and absurdities.

First, the police would not be able to rely on the fact that they viewed a text message on the recipient's device in order to obtain a warrant to view that text message. It is well-established that, in assessing whether sufficient grounds exist to obtain a warrant, the police are not entitled to rely on information obtained through an unlawful search or seizure.<sup>59</sup> If there is a reasonable expectation of privacy in a communication in the possession of the recipient, the police would be conducting an unlawful search by viewing that communication in the absence of prior judicial authorization.<sup>60</sup> This means that if the police were to view the text message then attempt to obtain a warrant to seize that text message, the police would be precluded from relying on their knowledge of the contents of that text message when attempting to obtain a warrant to read that text message. If the police cannot rely on their knowledge of the existence of the text message in order to obtain a warrant to view the text message, how can the police satisfy a judge that they have reasonable and probable grounds to believe that a search of the communication would provide relevant evidence?

Perhaps the solution is to have the complainant read the text message out loud or send a screenshot of it to the police, who could then recite it in the ITO and establish the requisite grounds to obtain the warrant to actually view the text message. The police would not have technically "searched" the communication by viewing it directly on the recipient's device, but this seems to be an unduly formalistic understanding of the privacy right

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<sup>59</sup> *R v Grant*, [1993] 3 SCR 223 at 251, [1993] 8 WWR 257 [*Grant*].

<sup>60</sup> This was, indeed, the suggestion of the majority in *Marakah* 2017, *supra* note 1 at para 50. The majority suggested that prior judicial authorization was the solution.

recognized in *Marakah*. It would, indeed, be inconsistent with the holding in *Marakah* because it would imply that the privacy right, in fact, inheres in the written record of the communication rather than the communication itself. It would permit the police to rely on an oral account of that communication rather than viewing the written version, thereby implying that the reasonable expectation of privacy only exists in the written version. If the privacy right inheres in the communication itself, the privacy right must subsist regardless of the means by which the recipient might seek to disseminate that communication to others. The police cannot skirt this reasonable expectation of privacy in the communication by asking the complainant to disclose its contents in verbal rather than written form. This would render the privacy right virtually meaningless. Again, this would mean that the police could not rely on their knowledge of the contents of the communication in demonstrating that they have reasonable and probable grounds to believe that the communication affords relevant evidence.

There is one more potential solution: the police could also simply aver that the third party disclosed the existence of a communication in their possession and that they believe that the communication is evidence of an offence (without knowledge of its contents). While this would be permissible, several cautions must be borne in mind. First, the complainant would presumably be required to describe, in some measure of detail, why the communication is relevant evidence of an offence: for example, that it contains a threat, constitutes harassment, contains an apology, provides evidence of timing, or something else. Otherwise the police would be seeking to intrude on a reasonable expectation of privacy with no justification for why such an intrusion is necessary. Section 487 of the *Criminal Code*<sup>61</sup> requires the justice to be satisfied that the place to be searched “will afford evidence with respect to the commission of an offence” before a search warrant may be issued. Similarly, the general warrant provision in section 487.01 of the *Criminal Code* requires the judge to be satisfied that the “information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing” sought to be authorized by the general warrant.<sup>62</sup> Simply asserting that a communication exists without disclosing that communication’s relevance to a potential criminal offence may not be sufficient to establish

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<sup>61</sup> RSC 1985, c C-46, s 487(1)(b).

<sup>62</sup> *Ibid*, s 487.01(1)(a).

reasonable and probable grounds. There must, therefore, be some level of detail about the contents of the communication.

Where the detail provided by the complainant includes some sort of description of the contents of the communication – for example, where it contains threats – the description of those contents is hearsay for the purpose of the police affiant. The police are circumscribed in their ability to rely on hearsay evidence in an ITO and, depending on the circumstances, hearsay may not be sufficient to establish reasonable and probable grounds.<sup>63</sup>

Further, officers would need to have the foresight to prevent the complainant from showing or reading the communication to them in order to preserve their ability to rely on the hearsay evidence of the complainant in the ITO. This is because the police are required to be full, frank, and honest in an ITO, and the expectance of truthful disclosure is “axiomatic.”<sup>64</sup> If the police were to simply aver to the existence of a text message and attempt to rely on hearsay evidence without disclosing the fact that the police had, in fact, viewed that text message, the police would not meet the threshold of full and frank disclosure.<sup>65</sup>

Courts can deal with this issue in one of two ways. First, a court could assess the validity of the ITO in the same manner that it would assess the validity of any other ITO: by excising any information gathered from an unlawful search and then assessing whether the ITO discloses sufficient grounds for the issuance of a warrant.<sup>66</sup> If the affiant referred to the content of the text message in the ITO or the fact that they viewed the text message, this information would be excised and the ITO would likely be insufficient to establish reasonable and probable grounds to obtain a search warrant to view what the police have already viewed. If the affiant did not refer to the content of the text message in the ITO, made full and frank disclosure, and

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<sup>63</sup> *R v Debot*, [1989] 2 SCR 1140 at 1169–70, 37 OAC 1.

<sup>64</sup> *R v Szilagyi*, 2018 ONCA 695 at para 59 citing *R v Araujo*, 2000 SCC 65 at para 46 [Araujo].

<sup>65</sup> See *Araujo*, *supra* note 64 at paras 46–47. The ordinary remedy for a failure to make full and frank disclosure in an ITO is to excise the misleading evidence of the affiant or diminish the reliability of the affiant’s information. This may lead to the warrant being quashed as invalid. See e.g. *R v Newman*, 2014 NLCA 48 at para 51; *R v Farrell*, 2013 BCSC 2534 at paras 31–34; *R v Uppal*, 2017 ABQB 373 at para 54.

<sup>66</sup> *Grant*, *supra* note 59 at 251–252. This was the approach taken by the Ontario Court of Appeal in *R v Ritchie*, 2018 ONCA 918 at paras 14–17, with respect to ITOs for search warrants for certain financial records and the accused’s apartment.

somehow relied on enough hearsay evidence from the complainant to be satisfied of its relevance, a court would be required to assess whether the hearsay evidence, taken alone, is sufficient to establish reasonable and probable grounds. While hearsay is commonly used in ITOs, the hearsay information must be properly sourced in order to be deemed adequate. This generally means that the affiant must identify the source of the information – in this scenario, the complainant – as well as any other relevant information that may bear on the source’s credibility.<sup>67</sup>

Regardless of which route is taken, the outcome is potentially undesirable from a policy perspective. It creates needless and impossible burdens for the police as they seek to obtain prior judicial authorization to view something that they have already viewed or to know something that they already knew. The warrant is both unnecessary and potentially unobtainable. It is unnecessary from a practical perspective because, by and large, the police will have already viewed the text message as a result of the recipient’s voluntary disclosure. The requirement for prior judicial authorization to lawfully view what the police have already lawfully<sup>68</sup> viewed seems formalistic, redundant, and virtually impossible: how can one obtain prior authorization to do what has already occurred? The warrant becomes almost unobtainable because, based on the current law applicable to ITOs, the police may be unable to refer to sufficient information about the communication in order to establish that they have reasonable and probable grounds to view that communication. Even if they rely only on hearsay information, they will be found to have failed to make full and frank disclosure if they do not disclose that they have already viewed, i.e. “searched”, the communication that they seek to search.

Courts could avoid the undesirable policy outcomes by affirming that an ITO that refers to the contents of a text message or the mere existence of a text message is sufficient to establish reasonable and probable grounds to view that text message. However, this route could have troubling implications. If police are entitled to refer to the content of a text message in seeking judicial authorization to view that text message, an exception to

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<sup>67</sup> See e.g. *R v Vaz*, 2015 BCSC 728 at paras 15–16; *R v KP*, 2011 NUCJ 27 at para 83; *R v Sparks*, 2015 NSSC 233 at paras 10–11; *R v Patterson*, 2014 NSPC 101 at para 20; *R v Pontes*, 2014 BCPC 19 at para 12.

<sup>68</sup> From the perspective of the complainant’s privacy interest, which would have been ceded by voluntary disclosure to the police.

the strong rule set out in *Grant*<sup>69</sup> has been created. For the first time, police would be entitled to refer to information gathered in an unlawful search or seizure to demonstrate that they have reasonable and probable grounds to conduct a search or seizure. While the exception might seem innocuous given the subject matter and the absurdity of the alternative, the fact remains that it would establish the first chink in a long-standing rule protecting against state invasions of privacy. This is troubling.

Courts could also avoid these undesirable policy outcomes by permitting more hearsay evidence in an ITO for a text message search or seizure than would be permitted in other scenarios, given the absurdity of a finding that the police lack reasonable and probable grounds to believe that something they have already viewed contains relevant evidence. Courts may also be more forgiving of the failure to make full and frank disclosure with respect to the reliance on hearsay evidence in this scenario. But if more hearsay evidence is permitted in the text message scenario or if the requirement to make full and frank disclosure is relaxed, the same would presumably apply in other scenarios as well: there is no special warrant for text message searches and seizures,<sup>70</sup> and any judicial rulings on the sufficiency of hearsay evidence in this context apply to other types of searches and seizures authorized by similar warrants. If reliance on hearsay in ITOs becomes more acceptable in order to avoid the absurdities created by *Marakah*, more warrants will presumably be granted. Depending on whether courts confine this increased reliance on hearsay only to the text message context, this has the potential to lead to more warrants being granted based on less reliable evidence, ultimately justifying increased state intrusion on privacy. The crystallization of Mr. Marakah's privacy right may ultimately diminish the privacy rights for all.

### C. Lawful Search of the Recipient's Device

The third scenario that is likely to arise is the situation where the police have lawful authority to search the recipient's device — for example, where the police obtain a warrant for that search — but where the police have not

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<sup>69</sup> *Supra* note 59.

<sup>70</sup> Unlike the special provisions for things such as production orders and wiretap authorizations, a warrant to search an electronic device and seize communications found on the device is an ordinary warrant under section 487 of the *Criminal Code*. See e.g. *R v Talbot*, 2017 ONCJ 814. The principles that apply to obtaining a warrant to search a cell phone would, therefore, apply to other warrants obtained under that same section of the *Criminal Code*.

obtained prior judicial authorization to search the sender's communications that reside on that device. This scenario would generally arise in areas like organized crime and drug trafficking. For example, imagine a drug trafficking investigation where the police obtain a warrant to search the phone of a street-level trafficker that they have arrested. At the time of the warrant, the police have no knowledge of what is on the trafficker's device; they are simply searching for evidence of drug trafficking. The police search the phone and discover a trove of communications sent from the directing mind of the trafficking operation to the street trafficker. What can the police do with those communications? If they were obtained through an unlawful invasion of the directing mind's privacy rights – even though they were obtained through a lawful search of the street trafficker's device – they may be inadmissible in the eventual trial of the directing mind, even though they would be admissible against the street-level trafficker. As set out above, once the communications are discovered, the police will have difficulty obtaining a warrant to view those communications.

This scenario raises many of the same problems as the voluntary disclosure scenario. Based on the Court's reasoning in *Marakah*, the lawfulness of the search of the recipient's device should have no bearing on the lawfulness of the search of the sender's communication.<sup>71</sup> As a result, the police would end up with the same problem of requiring both an unnecessary and unobtainable warrant to view what they have already lawfully viewed. This is untenable.

It could perhaps be argued that, since the reasonable expectation of privacy inheres in the conversation between the two participants and not the communication from the sender, a valid search of one party's participation in that conversation ought to amount to prior judicial authorization to search that conversation as a whole, and therefore justifies the search of the sender's communication.<sup>72</sup> However, this argument, if accepted, would render the majority's decision in *Marakah* virtually meaningless.

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<sup>71</sup> *Marakah* 2017, *supra* note 1 at paras 56–57. This was framed in terms of a concession by the Crown, but in the context of the *voir dire* judge's ruling that the search of Mr. Winchester's phone was not a valid search incident to arrest.

<sup>72</sup> *Ibid* at para 57. This argument could perhaps find its source in the majority's conclusion that "the evidence was obtained by an unreasonable search of the electronic conversation" between the two participants, thereby implying that the evidence is the conversation as a whole rather than Mr. Marakah's communications.

If the reasonable expectation of privacy inheres in the conversation as a whole and the police can validly search and seize it by lawfully searching only one participant's device, the sender's reasonable expectation of privacy becomes tied to the recipient's reasonable expectation of privacy, such that a lawful intrusion on the recipient's expectation of privacy amounts to a lawful intrusion on the sender's expectation of privacy.<sup>73</sup> Even if the sender expected the communications to be private and the police had no suspicion that communications from the sender existed when they obtained a warrant or otherwise lawfully searched the recipient's device, the police would nevertheless be lawfully entitled to seize the communication and the Crown could adduce it as evidence against the sender. This is because a lawful intrusion on the recipient's participation in the conversation would *prima facie* result in a lawful intrusion on the sender's participation in that conversation. This would effectively mean that, if the police had validly searched Mr. Winchester's phone incident to arrest rather than waiting several hours to conduct the search,<sup>74</sup> there would have been no breach of Mr. Marakah's section 8 right.

This argument implicitly equates the justifiability of state intrusion on the recipient's privacy right with the justifiability of state intrusion on the sender's privacy right. It revives the notion of control but transfers it from the reasonable expectation of privacy analysis to the justifiability of state intrusion analysis. Even though the sender's reasonable expectation of privacy is unaffected by the absence of control over the communication on the third party's device, the state would, on this argument, be entitled to intrude on the sender's reasonable expectation of privacy because it has lawful authority to intrude on the recipient's reasonable expectation of privacy. The sender's absence of control over their communications on the recipient's device becomes determinative with respect to the justifiability of the state's intrusion on that reasonable expectation of privacy. If this was indeed the case, the right recognized by the majority in *Marakah* becomes virtually meaningless. For even if an accused has a reasonable expectation of privacy, the permissibility of state intrusion on that reasonable expectation of privacy ultimately depends on the reasonable expectation of

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<sup>73</sup> This was the holding of the British Columbia Court of Appeal in *R v Pelucco*, 2015 BCCA 370 at para 49.

<sup>74</sup> *Ibid* at para 65, in the context of the majority's analysis under section 24(2) of the Charter.

privacy of the recipient. For all its sound and fury, the majority's judgment would signify nothing.

Prior to the release of *Mills*, these predictions could be validly criticized as speculative or hyperbolic. One could have legitimately argued that courts would not twist, alter, or undermine well-established section 8 principles in order to avoid absurd or undesirable policy consequences. The problem with this argument, however, is that the privacy paradox has been essentially proven by *Mills*. In the Supreme Court's first major digital privacy decision following *Marakah*, a majority of the Court indeed altered and undermined well-established jurisprudence in order to achieve a desired outcome: a finding that an accused person did not have a reasonable expectation of privacy in his online communications with a fictitious child. Once *Mills* is understood as an attempt by the Court to avoid the implications of *Marakah*, the privacy paradox becomes apparent. By expanding the scope of section 8 in *Marakah*, the Court unwittingly set on a path that would undermine section 8 protections for everyone.

#### IV. THE PARADOX IN ACTION: *R V MILLS*

The Court's 2019 decision in *Mills* concerned an undercover police officer posing on Facebook as "Leann Power", a fourteen-year old girl in St. John's, Newfoundland.<sup>75</sup> "Leann" received a Facebook message from Mr. Mills, who identified himself as being 23 years old. He sent her several messages and emails over the next few months, which included a photograph of his penis as well as the eventual arrangement of a meeting in a public park.<sup>76</sup> When Mr. Mills showed up in the park for the scheduled meeting, he was arrested and charged with one count of child luring. The issues that brought the case to the Supreme Court of Canada were whether the officer ought to have obtained authorization under section 184.2 of the *Criminal Code* to conduct the sting operation, as well as whether the search and seizure of the communications through a screen-grab tool that created a permanent record of them violated section 8 of the *Charter*.<sup>77</sup>

The Supreme Court split four ways in dismissing the appeal and upholding the conviction. Justice Brown, writing for Justices Abella and Gascon, found that Mr. Mills did have a subjective expectation of privacy,

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<sup>75</sup> *Mills*, *supra* note 5 at para 5.

<sup>76</sup> *Ibid* at paras 5-7.

<sup>77</sup> *Ibid* at para 7.

as he regularly instructed Leann to delete their messages. When she commented on a Facebook post that he had made, he immediately deleted it and then messaged her to say that he did not want his mother to see her comments. Mr. Mills' unsolicited photograph of his penis was accompanied with a warning to "delete this after you look at it!"<sup>78</sup> The evidence was clear that he subjectively intended that their conversations would remain private.<sup>79</sup>

But Justice Brown found that this subjective expectation of privacy was not objectively reasonable for three principal reasons. First, Mr. Mills was communicating to someone who he believed was a stranger and a child. There is an inherent difference between a relationship involving an adult and an unknown child and other types of relationships, given the inherent vulnerability of children to sexual crimes.<sup>80</sup> Second, this was a situation where the police knew the nature of the relationship between the declarant and the recipient in advance, as the police were posing as the recipient. In his view, the true normative nature of a section 8 privacy interest is not in the thing searched or seized, but in the nature of the relationship between the parties subjected to state surveillance.<sup>81</sup>

Third, he found that the subjective expectation of privacy was objectively unreasonable because of the nature of the investigative technique used. The police knew from the outset that the accused's relationship with the child was fictitious and, therefore, that no section 8 concerns would arise from them reviewing the accused's communications with that child.<sup>82</sup> Unlike *Marakah*, the police were not intruding on an established relationship between two persons. In this case, they created and controlled the relationship.<sup>83</sup> He also found that this distinguished it from the situation in *Duarte*, where the police surreptitiously recorded a conversation between an undercover informer and the accused.<sup>84</sup> He,

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<sup>78</sup> *Ibid* at para 18.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* at paras 22-23.

<sup>81</sup> *Ibid* at paras 25-26. How he reconciles this with non-relationship-based cases such as *Patrick*, *supra* note 38 and *Tessling*, *supra* note 40 remains unexplained.

<sup>82</sup> *Ibid* at para 27.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* at para 28. He did not explain why this situation was distinguishable from *Duarte* other than to conclusively say that it was so. Presumably, he meant that the creation of a permanent electronic record of the communication through the use of the screen grab tool was different from the recording of a conversation between an accused and an undercover officer or police informer.

therefore, concluded that there was no reasonable expectation of privacy, no section 8 breach, and, because no “private communication[s]” were intercepted, no breach of section 184.2 of the *Criminal Code*.<sup>85</sup>

Justice Karakatsanis, writing for herself and Chief Justice Wagner, reached the same conclusion through a different route. In her view, there was no search or seizure and, therefore, section 8 of the *Charter* was not engaged at all. She relied on statements from *Duarte*, distinguishing conversations between undercover officers and accused persons from the recording of those conversations, stating that no search or seizure occurs where an accused person unwittingly chooses to speak to an undercover officer.<sup>86</sup> She found no distinction between a verbal conversation and a written one, stating that section 8 also would not be triggered if an accused unwittingly wrote a letter or passed a note to an undercover officer.<sup>87</sup> No authority was cited for this proposition. She distinguished this from the situation in *Duarte*, as the person speaking to an undercover officer has no knowledge that they are being recorded. In the case of electronic communications, the “speaker” knows that they are being recorded because the speaker is intentionally creating that record.<sup>88</sup>

Justice Karakatsanis further held that the use of the screen grab tool to create screenshots of the electronic communications did not amount to a search or seizure. She found no reasonable difference between the state preserving the communications by using a screen grab tool, tendering the screenshots into evidence and simply tendering a laptop or phone with the communications open into evidence.<sup>89</sup> She tempered the implications of

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<sup>85</sup> *Ibid* at paras 32–34.

<sup>86</sup> *Ibid* at paras 42–43; *R v Duarte*, [1990] 1 SCR 30, 65 DLR (4th) 240 [*Duarte*].

<sup>87</sup> *Mills*, *supra* note 5 at para 45.

<sup>88</sup> *Ibid* at para 48.

<sup>89</sup> *Ibid* at para 56. How the latter approach could be reconciled with the Crown’s disclosure obligations is unclear, given that the Crown cannot disclose to the defence an open laptop or cell phone. Perhaps defence counsel could attend the police station and simply view the conversation on the laptop or cell phone (as occurs in some jurisdictions with sensitive child pornography materials), but without touching or altering the conversation to preserve continuity. Perhaps, since there is no prohibition on the disclosure of unconstitutionally-obtained evidence, the Crown could disclose the screenshots to the defence but tender the evidence on the laptop; thereby potentially infringing section 8 by taking a screenshot and formalistically avoiding the effect of that infringement by tendering the laptop instead of the screenshot. The point being that legitimizing the police’s ability to take and adduce screenshots by analogy to a practice

her conclusion by stating that this does not mean that undercover, online police operations will never intrude on a reasonable expectation of privacy, given technological advancements.<sup>90</sup>

Justice Moldaver, writing alone, stated that he concurred with the reasons of both Justices Brown and Karakatsanis and would dismiss the appeal.<sup>91</sup>

Finally, Justice Martin, writing alone, would have dismissed the appeal but on different grounds. She accepted that Mr. Mills had an objectively reasonable expectation of privacy in his online communications. Justice Martin saw no normative difference between *Duarte* – decided at a time where the only technological possibility for creating a record of a conversation was to record a verbal conversation – and the facts of *Mills*. Both situations involved state access to the electronic record of a conversation. The fact that the participant in an electronic communication knows that there is an electronic record of the conversation is not determinative, as the expectation of privacy is not about the record itself but rather about the possibility of state access to that record.<sup>92</sup>

Justice Martin saw no determinative significance to the fact that the declarant creates the permanent record themselves when communicating through electronic means. This is because “awareness that one’s conversation is documented does not necessarily negate the objective reasonableness of the expectation that the state will not access that documentation.”<sup>93</sup> However, she acknowledged that the significance of this element can shift depending on the type of communication at issue: for example, letters and notes rather than spontaneous electronic conversations.<sup>94</sup>

Justice Martin then critiqued many of the premises and conclusions in the reasons of Justices Brown and Karakatsanis. She challenged Justice Karakatsanis’ reliance on the analogy between verbal conversations and electronic conversations with undercover officers, noting that the possibility for mass surveillance exists in the electronic sphere in a way that it cannot exist in the real world. Further, the anonymity afforded by the internet

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that is not currently done is unwieldy, potentially impossible, and not a particularly convincing point.

<sup>90</sup> *Ibid* at para 57.

<sup>91</sup> *Ibid* at paras 66–67.

<sup>92</sup> *Ibid* at paras 90–91.

<sup>93</sup> *Ibid* at para 97.

<sup>94</sup> *Ibid* at para 102.

enables the police to create numerous, richly textured, and believable false identities in order to conduct as much surveillance as they wish. This is a possibility that simply does not exist in the context of actual undercover officers performing physical operations, and the analogy to undercover participants in verbal conversations is therefore flawed.

She then critiqued the conclusions of Justice Brown regarding the impact of the nature of the relationship and the content of the communications on the objective reasonableness of an expectation of privacy. Justice Martin viewed the new criterion of the nature of the relationship as a proxy for the rejected concept of “control”, based on a risk analysis that has been repeatedly rejected in the Supreme Court’s prior section 8 jurisprudence.<sup>95</sup> Further, the fact that the individual is engaged in illegal activity ought to be irrelevant to the section 8 analysis, as the Court has repeatedly state that section 8 is content-neutral and unconcerned with whether it is sheltering legal or illegal behaviour.<sup>96</sup> She found no legitimate reason to exclude relationships between adults and children from the section 8 analysis, noting that section 8 has been found to protect activities of adults in the context of digital or internet-based sexual crimes involving children.<sup>97</sup>

Justice Martin ultimately concluded by finding that it is objectively reasonable for members of society to expect that the state will only access recordings of their private conversations — electronic or otherwise — with judicial authorization. She therefore found a section 8 breach but would have admitted the evidence under section 24(2).<sup>98</sup>

## V. PROVING THE PARADOX

Understanding *Mills* as an example of the privacy paradox in action requires one to attempt to reconcile *Mills* and *Marakah*. This is no easy task. Outside of Justice Martin’s opinion in *Mills*, the two decisions are like ships passing in the night. Indeed, it appeared that Justice Brown’s majority decision in *Mills* attempted to grapple with the implications of *Marakah* by, essentially, ignoring it completely. For example, Justice Brown dismissed the claim that Mr. Mills had an objectively reasonable expectation of privacy in

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<sup>95</sup> *Ibid* at para 110.

<sup>96</sup> *Ibid* at para 118.

<sup>97</sup> *Ibid* at para 120.

<sup>98</sup> *Ibid* at paras 133, 149-55.

the messages without even applying the test for assessing the objective reasonableness of an expectation of privacy.<sup>99</sup> The test for assessing the objective reasonableness of an expectation of privacy in electronic communications, as affirmed in *Marakah*, involves the assessment of four factors: the place of the search; the private nature of the information; control; and other policy considerations.<sup>100</sup> Justice Brown appeared to skip the first three factors and jump straight to policy considerations, concluding that it is not objectively reasonable for adults to expect privacy in their online conversations with children who are strangers to them.

The majority in *Marakah* held that the possibility of police interception cannot be considered when determining a reasonable expectation of privacy.<sup>101</sup> For the majority in *Mills*, this possibility of police “interception” through police participation in the conversation was, in fact, determinative of the reasonableness of Mr. Mills’ expectation of privacy. This is because, though Mr. Mills was unaware that he was conversing with a police officer, the police knew that he was conversing with a police officer.<sup>102</sup> The fact that the police were always aware that Mr. Mills was not communicating with an actual child was determinative of the objective reasonableness of his expectation of privacy. In effect, it was because the messages were directly “intercepted” by the police that Mr. Mills could not reasonably expect that the messages would be kept private from the state.

The Court’s decision in *Marakah* recognized that a person who engages in electronic conversations may reveal details about their activities, relationships, and identities that they would never reveal to the world at large, while expecting privacy in doing so.<sup>103</sup> Control over electronic communications is exercised when one determines for oneself “when, how, and to what extent information about them is communicated to others”,<sup>104</sup> regardless of who those others might be. For the majority in *Mills*, the

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<sup>99</sup> Justice Brown did not assess any of these factors in the context of the objective reasonableness of the expectation of privacy, instead focusing only on the nature of the relationship between Mr. Mills and the recipient and the particular investigative technique used. He did not mention the place of the search, the private nature of the information, or control in his assessment of the objective reasonableness of Mr. Mills’ expectation of privacy.

<sup>100</sup> *Marakah* 2017, *supra* note 1 at para 24.

<sup>101</sup> *Ibid* at para 34.

<sup>102</sup> *Mills*, *supra* note 5 at paras 24, 27, 29, 44–45, 48, 50–52.

<sup>103</sup> *Marakah* 2017, *supra* note 1 at para 36.

<sup>104</sup> *Ibid* at para 39, quoting Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at 7.

identity of the “other” was determinative, as the accused could not reasonably expect privacy when he bore the risk of communicating with a stranger,<sup>105</sup> especially when he believed that stranger was a child. The content of Mr. Mills’ messages and his expressed desire for privacy appeared irrelevant to the majority’s assessment of the objective reasonableness of his expectation of privacy. While the Court in *Marakah* assessed the reasonable expectation of privacy from the perspective of the accused, the majority in *Mills* assessed that expectation from the perspective of the police.

While this is not a case comment on *Mills*, my argument that the majority’s reasons are an example of the privacy paradox in action requires some elaboration on why I view the majority’s reasoning as an erroneous departure from the Court’s prior case law. This is because the paradox is premised on the assumption that courts would ignore or water down well-established principles under section 8 in order to avoid absurdities flowing from the conclusion in *Marakah*. It is thus necessary to analyze the errors in the majority’s reasons to establish this premise.

With respect to Justice Brown’s reasons, he did not apply the well-established factors from *Tessling*, *Patrick*, and *Marakah* with respect to the assessment of an objectively reasonable expectation of privacy. In *Tessling*, Justice Binnie directed judges to assess a variety of factors to determine whether an asserted expectation of privacy was objectively reasonable, including the place of the search; the subject matter of the search and whether it was in public view or had been abandoned; whether the information was already in the hands of third parties; the intrusiveness of the police technique in relation to the privacy interest; whether the use of surveillance technology was itself objectively unreasonable; and whether the police technique used exposed any intimate details of the person’s lifestyle or information of a biographical nature.<sup>106</sup> Subsequent cases expanded on each of these elements.

In *Mills*, Justice Brown did not assess the place of the search, though this failure might be justified based on the incompatibility of a place-based approach to privacy with digital privacy.<sup>107</sup> He did not assess whether the information was in “public view”, i.e. available for the world to see, or

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<sup>105</sup> *Marakah* 2017, *supra* note 1 at paras 23–24.

<sup>106</sup> *Tessling*, *supra* note 40 at para 32.

<sup>107</sup> *Marakah* 2017, *supra* note 1 at para 28; Stern, *supra* note 6 at 408–12.

whether Mr. Mills attempted or intended to keep it private.<sup>108</sup> Justice Brown also did not assess the private nature of the information nor the potential for Facebook messages and emails to reveal private information. He made no mention of control, although he implicitly found that the absence of control weighed in favour of no section 8 breach, a point that directly conflicts with *Marakah*.<sup>109</sup> In Justice Brown's view, the state's intrusion on Mr. Mills' private conversations was justified because those conversations were not, in reality, private. Instead, Mr. Mills was unwittingly conversing with an agent of the state through a medium that he believed to be private. The fact that he had no confirmation of the identity of the recipient and, therefore, implicitly had no control over what that recipient chose to do with his messages negated the objective reasonableness of his expectation of privacy.

With respect to what should have been assessed in the last three *Tessling* factors, Justice Brown's reasoning becomes rather circular. In essence, he found that Mr. Mills had no reasonable expectation of privacy because of the intrusiveness of the police technique: by duping Mr. Mills into revealing profoundly personal details in a conversation that he believed, expected, and requested to be kept private, any objective reasonableness of Mr. Mills' expectation of privacy was erased.<sup>110</sup> Had the police adopted a less intrusive method to collect evidence of sexual crimes against children – for example, by requesting copies of messages from Facebook that the police believed to contain inappropriate sexual contact between adults and children – the declarants would almost surely have an objectively reasonable expectation of privacy.<sup>111</sup> But because the state was directly involved in the creation of the messages – regardless of whether the author of the messages knew that – the declarant lacked a reasonable expectation of privacy. In effect, the

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<sup>108</sup> This fact was only mentioned in the context of Mr. Mills' subjective expectation of privacy. See *Mills*, *supra* note 5 at paras 18–19.

<sup>109</sup> *Mills*, *supra* note 5 at para 22.

<sup>110</sup> The legality of this tactic in future digital privacy cases may be questionable in light of the Supreme Court's recent decision in *R v Ahmad*, 2020 SCC 11 [*Ahmad*], which provided some tools for adapting the law of entrapment for the digital age. A majority of the Court held that the police must have reasonable suspicion that a particular target is engaged in criminal activity or that criminal activity is occurring in a particular place before the police may provide someone with the opportunity to commit a crime in the targeted place. While *Ahmad* was a dial-a-dope case, it may have a significant effect on future *Mills*-type investigative techniques.

<sup>111</sup> *R v Jones*, 2017 SCC 60 at para 45 [*Jones*].

majority in *Mills* held that the intrusiveness of the police technique destroyed the reasonable expectation of privacy, rather than defining it.

Justice Brown appeared to anchor his reasoning on the concept of a “relationship-based” approach to privacy, sourcing it in the Supreme Court’s decision in *Dyment*.<sup>112</sup> He began by treating this relationship-based understanding as, essentially, a proxy for control. Where information or potential evidence is in the hands of a third party, a reasonable expectation of privacy may nevertheless remain depending on the nature of the relationship between the source of the information and the third party. Thus, a doctor is expected to keep a patient’s bodily samples private;<sup>113</sup> an internet service provider is statutorily and/or contractually obliged to keep subscriber information private;<sup>114</sup> and a cell phone provider is required to keep stored text messages private.<sup>115</sup> However, instead of using the nature of the relationship as a proxy for control over the particular information that is being protected by section 8, Justice Brown treated the relationship itself as the object of section 8’s protection.<sup>116</sup> Instead of protecting information or core biographical data from state intrusion, section 8 now protects particular relationships from state intrusion.

While Justice Brown appears to suggest that the *Dyment* decision supports his approach,<sup>117</sup> this conflates informational privacy with the concept of control. The two are not the same. In *Dyment*, the accused had a reasonable expectation of informational privacy in his blood. While he implicitly consented to the drawing and use of this blood for medical purposes, he did not consent to its use by the police in a criminal prosecution.<sup>118</sup> The fact that it was taken from his body and in the hands of a physician did not destroy this informational privacy; the accused’s residual control through his relationship with his physician ensured that his expectation of privacy remained. But the privacy interest was in the blood itself, not in the relationship between the accused and his physician.<sup>119</sup>

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<sup>112</sup> *Mills*, *supra* note 5 at paras 25–26; *Dyment*, *supra* note 37.

<sup>113</sup> *Dyment*, *supra* note 37 at 418.

<sup>114</sup> *Spencer*, *supra* note 36 at paras 65–66.

<sup>115</sup> *Jones*, *supra* note 111.

<sup>116</sup> *Mills*, *supra* note 5 at para 26.

<sup>117</sup> *Ibid* at para 25 [emphasis in original], “[t]he s. 8 interest was not viewed by the Court as being concerned solely with *the blood*, but principally with the relationship between the patient and the physician.”

<sup>118</sup> *Dyment*, *supra* note 37 at 431–32.

<sup>119</sup> *Ibid* at 432.

Justice Brown's revision of *Dyment* to create a relationship-based understanding of section 8 is remarkable. It places courts in the business of assessing relationships in which information is gathered and ultimately disclosed to the state in order to determine whether that particular relationship is one worthy of *Charter* protection. The information itself and its importance to the person who is claiming privacy in it is largely irrelevant. Consider how this would apply to a situation like *R v Stillman*:<sup>120</sup> if the privacy interest is in the relationship and not the information, then an accused person who is in lawful police custody has no reasonable expectation of privacy in bodily samples that are seized from him by the police. An officer could directly draw blood from the accused without judicial authorization and use the informational contents of that blood as evidence against the accused, without the accused being able to claim the protection of section 8 of the *Charter*.

While Justice Brown might understandably protest this articulation of the implications of his conclusion,<sup>121</sup> such a protest would presumably be premised on the argument that there is a difference between a relationship-based understanding of privacy between private individuals and the privacy interest that one holds directly against the state. In the former, section 8 protects the relationship itself, while in the latter, section 8 protects the intimate details of a person's life, such as those disclosed by bodily samples, against unauthorized state intrusion. But to uphold this protest would be to undermine Justice Brown's reasoning in *Mills*, as Justice Brown denied the latter concept of informational privacy in a direct relationship between the accused and the state. By concluding that the relationship itself was not worthy of protection, he concluded that there was no reasonable expectation of privacy in the information that the accused believed he was privately disclosing.

Without *Marakah* and its diminishment of the element of control in the objective expectation of privacy analysis, it is likely that Justice Brown would have reached the same conclusion that Mr. Mills had no objectively reasonable expectation of privacy without undermining decades of *Charter* law. If control was still the predominant factor to be considered, the Court

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<sup>120</sup> [1997] 1 SCR 607, 144 DLR (4th) 193. For those unfamiliar with *Stillman*, it involved the police forcibly taking hair samples and teeth impressions from the 17-year-old accused while he was in police custody and subject to intense interrogation.

<sup>121</sup> As he did to similar suggestions made by Justice Martin in her dissent. See *Mills*, *supra* note 5 at para 30.

would have easily concluded that Mr. Mills lacked an objectively reasonable expectation of privacy in messages that were found on the recipient's device, regardless of whether that recipient was a police officer or an actual child. Mr. Mills simply had no control over what the recipient chose to do with his messages, as he could only hope that the recipient would agree to keep the messages private and delete them regularly.<sup>122</sup> A hope is not the same as a reasonable expectation of privacy, especially when the stranger is not personally known to the accused. An accused simply has no control over information in the hands of third parties in the absence of a legal requirement to keep that information confidential. An accused, therefore, has no reasonable expectation of privacy in that information. However, given the majority holding in *Marakah*, this line of reasoning was not open to the Court in *Mills*.

Justice Brown concluded that there were no broader implications of his decision because it was confined to the narrow facts of this case.<sup>123</sup> But, saying it is so does not make it so. By declining to engage with *Marakah* and sidestepping its implications, the majority's reasons in *Mills* have taken Canadian privacy law in a significant backward direction. The implications of *Mills* are chilling. A person engaging in text, email, or online communications must self-censor on the possibility that the recipient is an agent of the state, as the declarant cannot speak freely with the knowledge that a permanent record of his words can and will be used as evidence against him. This is because police tactics aimed at manipulating a person's expectation of privacy in online communications to create evidence of an offence are now recognized as permissible, even without judicial authorization.<sup>124</sup> A person engages in online communications precisely because they expect them to be private. After all, "there is no more discreet form of correspondence" than text messaging or other types of electronic communications.<sup>125</sup>

It is no answer to say that a person can still engage freely in online conversation with persons whose identity is known to that individual. Such an argument is based on a false analogy to face-to-face conversations which denies the realities of the online world and creates an impossibly blurred standard. There is a significant difference between speaking to a person face-

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<sup>122</sup> *Ibid* at para 19.

<sup>123</sup> *Ibid* at para 30.

<sup>124</sup> Subject to the jurisprudence that may develop after *Ahmad*, *supra* note 110.

<sup>125</sup> *Marakah* 2017, *supra* note 1 at para 35.

to-face, where the speaker can generally verify the identity of the other participant in the conversation and speaking to an individual online. A person who is engaging in digital conversations may not be who they say they are; even if an individual believes they are conversing with a person who is known to them, they may, in fact, be conversing with someone completely different, including a police officer. As Justice Martin pointed out in her dissent in *Mills*, it is all too easy to impersonate another online.<sup>126</sup> This is true whether one creates an entirely false identity, as the police did in *Mills*, or where one impersonates another that is known to the individual. The implication of *Mills* is that it is a risk inherent to all online conversations that the recipient may not be who they say they are and that because of that risk, an individual therefore has no reasonable expectation of privacy in the contents of their communications.

One might answer this argument by pointing to *Duarte*: just as a person must assume the risk that the individual to whom they are speaking face-to-face is an agent of the state, a person engaged in online or electronic communications must assume the risk that the recipient of their communications is not the person whom they believe it to be. This was, indeed, the basis of Justice Karakatsanis' separate opinion in *Mills*.<sup>127</sup> But this takes *Duarte* too far: *Duarte*'s holding was premised on the difference between a verbal conversation and a record of that conversation.<sup>128</sup> While a person must always assume the risk that the recipient of their communications will disclose those communications, the *Charter* protects against "the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words."<sup>129</sup> The normative rationale for this protection is that, absent it, "there would be no meaningful residuum to our right to live our lives free from surveillance."<sup>130</sup> While *Duarte* was decided before the age of electronic communications, there would be some irony in using its principled protection of privacy to undermine privacy rights because participation in society has become increasingly electronic. As Justice Karakatsanis noted in *R v KRJ*, "[f]or many Canadians, membership in online communities is an integral component

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<sup>126</sup> *Mills*, *supra* note 5 at para 106.

<sup>127</sup> *Ibid* at paras 48–50.

<sup>128</sup> *Duarte*, *supra* note 86.

<sup>129</sup> *Ibid* at para 23.

<sup>130</sup> *Ibid* at para 24.

of citizenship and personhood.”<sup>131</sup> The internet is, in many respects, the new public space where relationships are fostered, business is conducted, and people live all aspects of their lives.<sup>132</sup> To deny an individual privacy against the state where such privacy would have been granted had the same conversation occurred face-to-face would severely diminish the adaptability of section 8 to the digital age.

To return to the premise of this article: would we have *Mills* without the well-meaning but ultimately flawed decision in *Marakah*? In my view, we would not. This is because without *Marakah*, the element of control would have been determinative in *Mills*. The Court would have easily found that Mr. Mills had no control over his communications once they were sent and therefore ceased to have a reasonable expectation of privacy in them. Indeed, this was the precise reasoning of the Newfoundland Court of Appeal in *Mills*, which released its decision without the benefit of the Supreme Court’s reasons in *Marakah*.<sup>133</sup> Without *Marakah*, there would have been no need to alter the course of section 8 of the *Charter* to achieve what all judges of the Supreme Court saw to be a just result: the use of Mr. Mills’ communications with “Leann” to convict him of child luring offences.

But what about the facts in *Marakah*, one might ask? Surely the police should not be able to skirt the well-established requirement to obtain prior judicial authorization to access one party’s text messages simply by conducting an unconstitutional search of the recipient’s phone. I agree that the police should not be able to do so, but in a perfect world, *Marakah* ought not to have been a section 8 case at all. If the mischief was that the police were deliberately manipulating and avoiding well-established legal rules to ensure that evidence would be admitted at trial, that action ought to be treated as an abuse of process under section 7. But this is not a perfect world, and the doctrine of abuse of process under section 7 has been severely limited by the courts. As *Marakah* has shown, it is easier to obtain a novel ruling significantly expanding section 8 of the *Charter* than it is to obtain a narrow remedy for abuse of process.<sup>134</sup> But, this is a problem for another

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<sup>131</sup> *R v KRJ*, 2016 SCC 31 at para 54.

<sup>132</sup> *Ibid*, citing Bradley Areheard and Michael Stein, “Integrating the Internet” (2015) 83 *Geo Wash L Rev* 449 at 456.

<sup>133</sup> *R v Mills*, 2017 NLCA 12 at para 23.

<sup>134</sup> *Marakah* 2017, *supra* note 1 at para 192. Justice Moldaver alluded to this state of affairs in his dissent, where he noted that deliberate *Charter* evasion by the police “can be fully addressed under ss. 7 and 11(d) of the *Charter*.”

day. The point is simply that the remedy in *Marakah* — exclusion of the evidence — could have been obtained without necessarily expanding the scope of section 8 and creating the paradox that led to *Mills*, which may ultimately restrict the protections of section 8 for all.

## VI. CONCLUSION

This article is about how well-meaning judicial decisions can have unintended results. The Court in *Marakah* intended to narrowly expand section 8 of the *Charter* to ensure that the police could not avoid their obligation to obtain prior judicial authorization simply by obtaining the accused's text messages from the recipient's device. This expansion, however, was anything but narrow. As a result, the Court tried to rein in the expansion in *Mills* to avoid the undesirable result of the *Charter* shielding an accused's attempts at child luring from prosecution. The net result is a confusing mess of section 8 of the *Charter*: it protects communications that are intended to be kept private but not those communications that are intended to be kept private and end up being directly received by the police. It encourages the police to prey on citizens' expectations of privacy online without any judicial oversight whatsoever; as long as the police are able to create a sufficiently real dupe, the accused's subjective expectation of privacy becomes objectively unreasonable. While *Marakah* sought to ensure that citizens could communicate as freely online and in digital formats as they can verbally, *Mills* erased that assurance. Online and digital communications must be self-censored unless the accused knows the recipient, as the accused must otherwise expect that these communications can and will be used against them. And even if the accused knows the recipient, courts are now in the business of determining whether the relationship between the accused and the recipient, as well as the contents of their communications, are worthy of constitutional protection.<sup>135</sup>

*Mills* fulfills the privacy paradox. In an attempt to address the unintended consequences of *Marakah*, the Court significantly reduced the protections of section 8 of the *Charter* in the digital age. Expanding section 8 in *Marakah* arguably led to the overall dilution of section 8 in *Mills*. These

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<sup>135</sup> See e.g. *Heppner*, *supra* note 9 at para 58, concluding that the accused's email communications to the complainant were not protected by section 8 because the complainant was a vulnerable person.

two cases present a cautionary tale about *Charter* decisions that are lauded as progressive: unintended implications may undermine and ultimately negate any progressive gains made by that decision. Courts, therefore, ought to think carefully about the practical and legal paradoxes that progressive decisions can create. While it may be unpopular to decide a case like *Marakah* narrowly or to grant a fact-based remedy like a remedy for abuse of process,<sup>136</sup> this may ultimately lead to more progressive developments of the protections of the *Charter* in the long run.

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<sup>136</sup> Which would arguably require a less-restrictive understanding of abuse of process in section 7. I recognize the irony of suggesting this as an alternative to expanding the scope of section 8 to grant the remedy sought. But the point here is that a finding of abuse of process is generally fact-specific and does not require the Court to establish any new legal principles.

# Social Suppliers and Real Dealers: Incorporating Social Supply in Drug Trafficking Law in Canada

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S A R A H F E R E N C Z \*

## ABSTRACT

Social drug supply is non-commercial drug supplying, or sharing, among friends and acquaintances for little to no profit. Given the increasing research and international recognition of the social supply of drugs, this paper critically assesses how Canadian law has incorporated social supply in drug trafficking. While the *Cannabis Act* includes a limited exception for social supply, the overall approach to drug trafficking law in Canada is overly broad and over emphasizes drug trafficking as inherently predatory. This approach does not adequately account for the social nature of drug supplying. Considering the recognition that social supplying is less morally blameworthy than commercial dealing, the fact that many people who use drugs do not regard social sharing as trafficking, and the harm reduction benefits associated with social supply as an alternative to other forms of dealing, law reform is needed in Canada. Three avenues for law reform are proposed: (1) educate judges and lawyers about the lived experiences of people who use drugs and the phenomenon of social supply; (2) use the language of social supply and minimally commercial supply in sentencing submissions to gradually challenge ideas about drug use and supply; and (3) pursue strategic *Charter* arguments under section 7 against the overly broad definition of drug trafficking.

**Keywords:** drug trafficking; social supply; drug dealing; drug supply; user-dealers; minimally commercial supply; friend supply; sentencing; illicit drug use; substance use; criminal law; social sharing; harm reduction; drug policy; regulation of vice

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## I. INTRODUCTION

Social science research in Canada shows that social supplying behaviours are common within social networks of people who use drugs. These behaviours include buying drugs together, buying drugs for another person, and pooling money to purchase a larger quantity of drugs to be shared with a social group.<sup>1</sup> The concept of social supply<sup>2</sup> has been recognized in international drug policy and research as qualitatively different from commercial drug trafficking. International researchers do not agree on a universal definition of social supply, but two central elements are that it is an exchange of drugs with little to no profit and that it occurs between friends or acquaintances.<sup>3</sup> Where a small profit is obtained in the exchange of drugs within a social group, some researchers have also used the term “minimally commercial supply.”<sup>4</sup> In Canada, social supply has not explicitly been recognized in law and policy.<sup>5</sup> However, some discussion of social supply has emerged in the context of cannabis, with some exceptions made in the *Cannabis Act* for sharing small quantities of cannabis.<sup>6</sup> Beyond cannabis, social supply conduct continues to be prosecuted as drug trafficking.<sup>7</sup>

Given the increasing research and international recognition of the social supply of drugs, this paper critically assesses how Canadian law has (and has not) incorporated social supply into understanding drug trafficking and provides recommendations for how the concept can be leveraged by legal advocates. Overall, I argue that the current understanding of drug trafficking, represented by an overly broad definition of drug trafficking and case law’s overemphasis on drug trafficking as inherently predatory, does not adequately account for the social nature of drug supplying. Considering

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<sup>1</sup> Gillian Kolla & Carol Strike, “Practices of Care Among People Who Buy, Use, and Sell Drugs in Community Settings” (2020) 17:27 *Harm Reduction J* 1 at 9.

<sup>2</sup> Case law and research varies in the language used. In this paper, I use the terms social supply, social sharing, social dealing, and social trafficking interchangeably.

<sup>3</sup> Ross Coomber et al, “The Burgeoning Recognition and Accommodation of the Social Supply of Drugs in International Criminal Justice Systems: An Eleven-Nation Comparative Overview” (2018) 58 *Intl J Drug Policy* 93 at 95 [Coomber et al, “Recognition and Accommodation”].

<sup>4</sup> *Ibid* at 95.

<sup>5</sup> *Ibid* at 99.

<sup>6</sup> *Cannabis Act*, SC 2018, c 16, ss 9–10 [*Cannabis Act*].

<sup>7</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 2 [*CDSA*].

the recognition that social supplying is less morally blameworthy than commercial dealing, the fact that many people who use drugs do not regard social sharing as trafficking, and the harm reduction benefits associated with social supply as an alternative to other forms of dealing, law reform is needed in Canada. A reliance on police and prosecutorial discretion is an inadequate approach, given that it creates disparate results between jurisdictions and that the police exercise discretion to enforce drug laws in a way that perpetuates the marginalization of some groups. Some researchers have advocated for creating a separate offence for social supply or minimally commercial supply.<sup>8</sup>

I argue instead that more education is needed on social supply within the legal system, and I consider how drug trafficking could be challenged under section 7 of the *Charter of Rights and Freedoms*.<sup>9</sup> Further education is necessary to address the misconceptions that lawyers and judges have about people who use and supply drugs.<sup>10</sup> One modest way that lawyers can contribute to systemically changing misconceptions about drug trafficking is to refer to the research on social supply and minimally commercial supply in sentencing submissions to advance arguments that these types of trafficking offences are less culpable and deserving of harsh punishment, even where the offence involves opioids. Legal advocates could also pursue a more ambitious *Charter* challenge under section 7 for violating the principle against overbreadth. The effect of a *Charter* challenge might result in the law treating social supply offences equivalent to possession offences or otherwise direct Parliament to redraft the law in a minimally impairing manner.

This paper is structured as follows. First, I review the international research and policy context recognizing the concept of social supply, with a focus on English common law legal systems. Second, I thoroughly analyze the legal context in Canada. In this section, I briefly consider the research

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<sup>8</sup> See e.g. Leah Moyle, Ross Coomber & Jason Lowther, “Crushing a Walnut with a Sledge Hammer? Analysing the Penal Response to the Social Supply of Illicit Drugs” (2013) 22:4 Soc & Leg Studies 553.

<sup>9</sup> *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*].

<sup>10</sup> Haley Hrymak, “The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System” (2020) 43:1 Dal LJ 1 (there is a lack of understanding of addiction within the criminal justice system) [Hrymak, “The Opioid Crisis”]; Kolla & Strike, *supra* note 1 (popular perceptions of drug trafficking are predatory, but people who use drugs often have positive perceptions of people who supply their drugs).

focus in Canada on cannabis, followed by an analysis of social supply as drug trafficking under the *Controlled Drugs and Substances Act* (CDSA). I also discuss how social trafficking is considered at sentencing. Third, I address the inadequacy of relying on prosecutorial and police discretion to pursue more serious forms of trafficking. Fourth, I consider several law reform strategies that legal advocates could consider that would address the shortcomings in drug trafficking law in Canada. Overall, I argue that the Canadian legal system should more explicitly acknowledge social supply as distinct from commercial drug dealing. Law reform efforts should account for the harm reduction insights of people who use and supply drugs and draw on the research and insights from international drug policy.

## II. INTERNATIONAL RESEARCH AND POLICY ON SOCIAL DRUG SUPPLY

Social science research and international drug policy scholars have identified social drug supply as qualitatively different from profit-motivated drug dealing.<sup>11</sup> In this section, I provide a general overview of how social drug supply has been defined internationally, drawing largely on the literature review of Ross Coomber and colleagues.<sup>12</sup> This burgeoning research originated in the United Kingdom (UK). Since then, several criminal justice legal frameworks have accounted for a distinction between social supply from more serious forms of drug dealing in criminal codes, sentencing frameworks, and in the common law.<sup>13</sup> As this research has been expanded in the Canadian context, two important insights have emerged: (1) social supplying is the preferred mode of drug supplying among people who use drugs, especially youth,<sup>14</sup> and (2) social supply is a form of harm reduction.<sup>15</sup>

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<sup>11</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* at 96, 99. See e.g. Andrew Hathaway et al, “‘It’s Really No Big Deal’: The Role of Social Supply Networks in Normalizing Use of Cannabis by Students at Canadian Universities” (2018) 39:12 *Deviant Behavior* 1672 [Hathaway et al, “Social Supply Networks”].

<sup>15</sup> Kolla & Strike, *supra* note 1.

## A. International Recognition of Social Supply in Research

In 2000, the UK Police Foundation published a report (*Police Foundation Report*) on the *United Kingdom's Misuse of Drugs Act (UK Drugs Act)*, which recognized a distinction within prosecuted drug supply offences between more serious commercial drug supply and a less serious, more social drug supply, whereby friends share smaller quantities of drugs between each other.<sup>16</sup> The *Police Foundation Report* criticized that this less serious form of drug dealing was disproportionately prosecuted, contrary to the legislative intent of the *UK Drugs Act*.<sup>17</sup> Thus, the *Police Foundation Report* proposed drawing a distinction between drug dealing and group supply and that the law should recognize this distinction with a separate offence for group supply, as the latter is less serious criminal conduct.<sup>18</sup>

The *Police Foundation Report* emerged around the time that the normalization of recreational drug use was emerging in developed countries, which some researchers have suggested includes the normalization of recreational, non-commercial drug supply for drug users.<sup>19</sup> In other words, people who use drugs are increasingly engaged in informal drug sharing for little to no profit. According to UK researchers, these social suppliers often do not regard themselves as drug dealers, and drug purchasers often do not consider the sellers to be dealers either.<sup>20</sup>

In Ross Coomber and colleagues' review of the literature, they note several social supply practices that empirical research has identified.<sup>21</sup> These practices include gift giving among cannabis users, 'party buying' among clubbers, and social drug distribution of performance and image enhancing drugs in gyms.<sup>22</sup> Additionally, people who are engaged in social drug supply

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<sup>16</sup> "Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971" (28 March 2000), online: *The Police Foundation* <[www.police-foundation.org](http://www.police-foundation.org)> [perma.cc/6FUK-2T6J].

<sup>17</sup> *Ibid* at 62–63.

<sup>18</sup> *Ibid* at 63.

<sup>19</sup> Howard Parker, Judith Aldridge & Fiona Measham, *Illegal Leisure: The Normalization of Adolescent Recreational Drug Use (Adolescence and Society Series)* (London, UK: Routledge, 1998); Howard Parker and Judith Aldridge "The Normalisation of 'Sensible' Recreational Drug Use: Further Evidence From the North West Longitudinal Study" (2002) 36:4 *Sociology* 941.

<sup>20</sup> See Camille Jacinto et al, "'I'm Not a Real Dealer': The Identity Process of Ecstasy Sellers" (2008) 38:2 *J Drug Issues* 419; Ross Coomber, *Pusher Myths: Re-situating the Drug Dealer* (London, UK: Free Association Books, 2006).

<sup>21</sup> Coomber et al, "Recognition and Accommodation", *supra* note 4.

<sup>22</sup> *Ibid* at 95.

may share, swap, or combine their money to buy a larger quantity of drugs as a group. These practices help people who do not otherwise have access to drug supply networks to protect themselves from criminalization. In return, the person buying the drugs may obtain free drugs or a monetary contribution for the time and risk taken to purchase the group supply.<sup>23</sup>

Some researchers have recommended using the term “minimally commercial supply” to account for situations where a minimal profit motive is present and the dealer is also a user of those drugs.<sup>24</sup> For example, heroin user-dealers might engage in drug selling to maintain access to a drug supply and to retain a reliable income for purchasing their drugs. These individuals do not engage in the kind of drug selling that leads to lavish lifestyles. Instead, drug dealing occurs for the purpose of acquiring the means to obtain their next “hit” and as an alternative to other forms of income-generating crimes.<sup>25</sup> Ross Coomber and Leah Moyle argue that user-dealer drug supplying is equivalent to the “group supply” that is described by the *Police Foundation Report* as a less severe supply offence.<sup>26</sup> User-dealing often occurs between small and self-contained groups, it is non-predatory, and it is usually limited to dealing to people who are already addicted to the substance.<sup>27</sup> Therefore, what distinguishes predatory commercial dealing from minimally commercial dealing is the motivation, intent, and associated harm of the conduct: motivation is minimal financial gain and acquiring one’s own supply of drugs; the intent is non-predatory and supplied within a contained group; and the associated harm is contained within the smaller group, as the dealer does not seek out new, vulnerable purchasers.<sup>28</sup>

Researchers have also found that social drug supplying reduces drug related harms for people who use and purchase drugs, as compared to purchasing drugs from more commercial dealers.<sup>29</sup> The common perception portrayed in the media and the general public is that people who sell drugs

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<sup>23</sup> *Ibid.*

<sup>24</sup> Ross Coomber & Leah Moyle, “Beyond Drug Dealing: Developing and Extending the Concept of ‘Social Supply’ of Illicit Drugs to ‘Minimally Commercial Supply’ (2014) 21:2 *Drugs: Education, Prevention & Policy* 157 [Coomber & Moyle, “Beyond Drug Dealing”].

<sup>25</sup> *Ibid.* at 161.

<sup>26</sup> *Ibid.* at 162.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 162–63.

<sup>29</sup> See e.g. Kolla & Strike, *supra* note 1.

are inherently predatory, aggressive, and violent.<sup>30</sup> However, the role that social suppliers play in reducing harm for people who use drugs challenges these views. Securing a safe drug supply is a key concern for people who use drugs and purchasing drugs from trusted sources is a key form of harm reduction.<sup>31</sup> For example, trusted drug suppliers may receive information about an overly potent drug source and will respond to this information by informing their social network of the toxic supply and preventing them from unknowingly accessing it, thereby preventing overdoses.<sup>32</sup>

Additionally, people who supply drugs can be an important resource for communicating between more commercial suppliers, as some people who use drugs have better skills than others in navigating conflict, negotiation, and avoiding a bad deal in unregulated drug markets.<sup>33</sup> As such, social suppliers reduce the interactions that people who use drugs have with organized crime groups,<sup>34</sup> reduce the risk of criminalization and police exposure for a greater number of people who use drugs,<sup>35</sup> and assist people who are addicted to drugs in getting access to the drugs they rely on in their daily lives.<sup>36</sup> Gillian Kolla and Carol Strike describe these procuring and group-buying strategies as “practices of care” among people who use drugs.<sup>37</sup>

## B. Comparative English Common Law Approaches

Various countries have incorporated social supply into policy and law, either implicitly or explicitly. While I focus on the Canadian situation in

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<sup>30</sup> *Ibid* at 4.

<sup>31</sup> *Ibid* at 2, 8–9.

<sup>32</sup> *Ibid* at 2, 7.

<sup>33</sup> *Ibid* at 8.

<sup>34</sup> *Ibid* at 10 (for example, Kolla and Strike contrast their research with research on “crack houses”, which are often affiliated with organized crime groups. Social suppliers who purchase drugs on behalf of a small group of friends from a commercial dealer can be an alternative drug source that exposes one to less criminal harm, even if that individual keeps a profit from doing so). See also Elise Roy & Nelson Arruda “Exploration of a Crack Use Setting and Its Impact on Drug Users’ Risky Drug Use and Sexual Behaviors: The Case of Piauless in a Montréal Neighborhood” (2015) 50:5 Substance Use & Misuse 630.

<sup>35</sup> *Ibid* at 8–9. See also Vendula Belackova & Christian Alexander Vaccaro “‘A Friend with Weed is a Friend Indeed’: Understanding the Relationship Between Friendship Identity and Market Relations Among Marijuana Users” (2013) 43:3 J Drug Issues 289 at 306.

<sup>36</sup> See e.g. Kolla & Strike, *supra* note 1 at 8–9.

<sup>37</sup> *Ibid* at 1.

this paper, it is important to contextualize this with a brief discussion of comparative law. I draw heavily on Ross Coomber and colleagues' article and limit the analysis to several English common law jurisdictions which yield useful insights for the Canadian context.<sup>38</sup>

In England and Wales, where the concept of social supply originated, the law explicitly references social supply in policy and judicial discourse, but implicitly in sentencing frameworks.<sup>39</sup> In accordance with the principle of proportionality, social supply conduct is considered at the sentencing stage. In this context, non-commercial and minimally commercial supply is less culpable, warranting a less severe sentence, than more commercial drug supplying.<sup>40</sup> This distinction focuses on the harm associated with the specific offence and the level of involvement in the supply chain. Threshold quantities are also identified to distinguish suppliers from users.<sup>41</sup> Even though social supply language appears in sentencing cases, the Sentencing Council does not employ the term social supply, as it includes drug supply that is commercial in nature but occurs between friends. Instead, the Sentencing Council emphasizes the profit motive – supply for little to no financial gain is less culpable than supply for financial gain.<sup>42</sup>

Some researchers in England and Wales have criticized current sentencing practices in the UK for focusing on the profit motive and for not recognizing minimally commercial supply as a separate offence.<sup>43</sup> Ross Coomber and Leah Moyle recommend creating a separate offence for minimally commercial supply in the UK, as sentencing frameworks focus too much on the profit motive and drug quantities, while not accounting for the fact that many people who sell drugs do so to support their own drug habits.<sup>44</sup> In fact, the focus on the profit motive has confused many sentencing judges and resulted in frequent appeals of overly harsh sentences for minimally commercial dealing.<sup>45</sup> As well, the quantities of drugs

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<sup>38</sup> Coomber et al, "Recognition and Accommodation", *supra* note 4.

<sup>39</sup> *Ibid* at 99.

<sup>40</sup> *Ibid* at 97-98.

<sup>41</sup> *Ibid* at 98. See also UK, Sentencing Council, *Drug Offences: Definitive Guidelines* (London, UK: Sentencing Council, 2012).

<sup>42</sup> Coomber et al, "Recognition and Accommodation", *supra* note 3 at 99; UK, Sentencing Council, *Drug Offences Guideline: Public Consultation* (London, UK: Sentencing Council, 2011).

<sup>43</sup> See Coomber & Moyle, "Beyond Drug Dealing", *supra* note 24.

<sup>44</sup> *Ibid* at 159.

<sup>45</sup> *Ibid* at 161-62.

considered commercial are too low and not reflective of the quantity of drugs that one might expect to be purchased by someone who is addicted to drugs, purchasing drugs for themselves, or purchasing drugs for their social group.<sup>46</sup>

Australian law does not define social supply formally, but case law occasionally refers to the concept with the discretion of the judge as a less culpable form of drug dealing.<sup>47</sup> Principally, Australian sentencing courts are concerned with the level of commerciality in drug supply offences (distinguishing suppliers from users) and consider quantity thresholds in this assessment.<sup>48</sup> One case example of this is *R v Urbanski*,<sup>49</sup> which has been referenced in Canadian legal scholarship.<sup>50</sup> In that case, a person was found with 18 ecstasy tablets. The defendant bought nine of those tablets, was holding the other nine tablets on behalf of another person and did not intend to sell any of these tablets. The Supreme Court of South Australia held that the accused was liable for supplying drugs (i.e. drug trafficking) but explicitly classified the facts of the case as social supply, as distinct from commercial trafficking, thus warranting a less severe sentence.<sup>51</sup> Similar to the criticisms of the legal system in England and Wales, some critics have raised that these threshold amounts are too stringent and continue to unjustifiably capture users in drug trafficking liability.<sup>52</sup>

Policy discourses on drug trafficking and cannabis law reform efforts in New Zealand recognize the concept of social supply.<sup>53</sup> Overall, legal advocates in New Zealand have recommended that social supply should be explicitly distinguished from commercial dealing and treated more like simple possession.<sup>54</sup> In 2010, the New Zealand Law Commission (Commission) recommended distinguishing social supply from other supply

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<sup>46</sup> *Ibid* at 160.

<sup>47</sup> Coomber et al, "Recognition and Accommodation", *supra* note 3 at 99, 100, 101.

<sup>48</sup> *Ibid* at 99.

<sup>49</sup> [2010] SASFC 57 at para 105 (Austl SASC) [*Urbanski*].

<sup>50</sup> Bruce A MacFarlane, Robert J Frater & Croft Michaelson, *Drug Offences in Canada* (Toronto: Thomson Reuters, 2015) (loose-leaf updated 2019, release 4) at 5:40.120.40.60 [MacFarlane, Frater & Michaelson, *Drug Offences in Canada*].

<sup>51</sup> *Urbanski*, *supra* note 49.

<sup>52</sup> See e.g. Austl, Commonwealth, Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* by Caitlin Hughes et al (Canberra: Australian Government Publishing Services, 2014).

<sup>53</sup> Coomber et al, "Recognition and Accommodation", *supra* note 3 at 95, 99.

<sup>54</sup> *Ibid* at 100.

drug offences.<sup>55</sup> The Commission considered creating a separate offence and suggested that it could be defined as follows: that the supply was a small quantity, that the offender was also using the drugs, that the supply was for friends or acquaintances, and the offence was not motivated by profit.<sup>56</sup>

However, the Commission ultimately found that this definition was not precise enough and it would be better to reform the law with a sentencing guideline approach and with a presumption against imprisonment for social supply offences.<sup>57</sup> Since 2017, the New Zealand Drug Foundation has recommended removing social supply and simple possession from criminal sanction wholly, stating that social supplying should be regarded as equivalent to simple possession, and neither should be criminalized.<sup>58</sup>

Despite the strong push in the New Zealand legal community, no formal recognition appears in legislation or the common law, and there is no social science research on the subject in the country.<sup>59</sup> However, in advance of a referendum to legalize cannabis, the *Cannabis Legalization and Control Bill* provides a limited exception for social sharing. Clause 34(1) would generally prohibit gifting, sharing, or any other form of supplying cannabis unless the recipient is under 20 years old, the amount is less than 14 grams of dried cannabis (or its equivalent), and there is no exchange of consideration or other benefit obtained in doing so.<sup>60</sup> This exception is very narrow. Thus, the only formal recognition of social supply in New Zealand is within the context of potentially legalizing cannabis and, even in this context, it is a narrow exception.

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<sup>55</sup> NZ, Law Commission, *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (Wellington, New Zealand: Law Commission, 2011), online: <[www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R122.pdf](http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R122.pdf)> [perma.cc/K3LT-AKCZ] [NZ Law Commission, *Controlling and Regulating Drugs*].

<sup>56</sup> *Ibid* at 199.

<sup>57</sup> *Ibid* at 200–01.

<sup>58</sup> “New Zealand Drug Foundation Submission on the Mental Health and Addiction Inquiry” (7 June 2018) at 7, 20, online (pdf): *New Zealand Drug Foundation* <[www.drugfoundation.org/assets.pdf](http://www.drugfoundation.org/assets.pdf)> [perma.cc/Y85T-NEK9] [NZ Drug Foundation, “Mental Health and Addiction Inquiry”]. See also “*Whakawātea te Huarahi: A Model Drug Law to 2020 and Beyond* (2017) at 1, 4, online (pdf): *New Zealand Drug Foundation* <[www.drugfoundation.org.nz/assets.pdf](http://www.drugfoundation.org.nz/assets.pdf)> [perma.cc/6G46-SPWX].

<sup>59</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 96, 99–101.

<sup>60</sup> NZ, “Cannabis Legalisation and Control Bill: Exposure Draft for Referendum”, 2020, PCO 22159/24.0, cl 34(1), online: <[www.referendums.govt.nz/materials/CannabisLegalisation-and-Control-Bill-Exposure-Draft-for-Referendum.pdf](http://www.referendums.govt.nz/materials/CannabisLegalisation-and-Control-Bill-Exposure-Draft-for-Referendum.pdf)> [perma.cc/3Q46-765F] [NZ, “Cannabis Legalisation and Control Bill”].

While other countries have begun to recognize social supply, there is little recognition of the concept in the United States (US).<sup>61</sup> Among the minimal research that has been done in the US, the research focus has been on middle class, male university students engaged in the social supply of ecstasy and other recreational drugs.<sup>62</sup> In practice, US criminal justice personnel are unfamiliar with the concept of social dealing as distinct from profit-motivated drug dealing. Broadly, US sentencing does not account for profit motive, and sentencing judges focus on the type and quantity of the drug in determining sentencing severity.<sup>63</sup>

Overall, the recognition of social supply in English common law legal systems occurs at sentencing. Sentencing courts consider commercial drug dealing, characterized by profit motivations and large quantities, to be a more serious offence than social supply, which is less motivated by profit dealing and often involves a smaller drug quantity. Beyond sentencing, there have been some considerations in research and among law reform organizations to create an entirely separate offence for social supply, as distinct from other forms of drug trafficking.<sup>64</sup> At this time, none of the countries discussed in this paper (United Kingdom, Australia, New Zealand, and the US) have created a separate offence, nor removed social supply from criminal sanctions all together.<sup>65</sup> As discussed below, Canada similarly prosecutes drug supply offences as drug trafficking and considers the level of commercialism involved at the sentencing stage.

### III. SOCIAL SUPPLY IN CANADIAN RESEARCH AND LAW

In this section, I discuss the Canadian context in greater detail. First, I briefly discuss the social science research published in Canada. Second, I discuss the unique context of cannabis legalization in Canada, which distinguishes social supply to a degree in the *Cannabis Act*. Third, I discuss

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<sup>61</sup> *Ibid* at 99.

<sup>62</sup> *Ibid* at 96, 98-100.

<sup>63</sup> *Ibid* at 100.

<sup>64</sup> See Coomber & Moyle, "Beyond Drug Dealing", *supra* note 24 (UK researchers who recommend creating a separate offence for minimally commercial supply); NZ Law Commission, *Controlling and Regulating Drugs*, *supra* note 55 (the Commission considered how a separate offence of social dealing could be defined, but ultimately did not recommend creating a separate offence).

<sup>65</sup> See generally Coomber et al, "Recognition and Accommodation", *supra* note 3 for a comprehensive review of international legal approaches to social supply.

how Canadian courts prosecute social supply of other drugs under the CDSA. In turn, I review how sentencing courts indirectly consider social supply through the analysis of commercialism at sentencing.

### A. Research Focus in Canada

While social supply research has explored drug supplying in many drug markets, research in Canada is mostly limited to the study of cannabis.<sup>66</sup> This is likely due to the social context in Canada, whereby attitudes towards cannabis have shifted over time, becoming normalized among Canadian youth and in broader society.<sup>67</sup> Still, this research is limited to young people in universities. For example, in Andrew Hathaway and colleagues' study of a sample of university students in Alberta and Ontario who use cannabis, most participants reported purchasing drugs from friends. Friends acted as brokers to the drug supply and trust, convenience, and safety were cited as benefits, thereby reducing the harm and risk in purchasing drugs.<sup>68</sup> Students regarded some of these friends as unlike "real dealers", while emphasizing trust, normalcy, and the advantage of avoiding "real dealers."<sup>69</sup> However, the distinction between dealers and users was overall subjective, as some friends regarded their friends as dealers, while others regarded their friends as a middle-person between the user and the dealer.<sup>70</sup>

Beyond cannabis, in a more recent study published in 2020, researchers considered the social supply of other drugs, including heroin, through ethnographic research of a peer-led harm reduction program in Toronto.<sup>71</sup> This study is also discussed above in Part II-A. The program employed people who used drugs as peer workers to help others access harm reduction equipment, but the researchers found that these peer workers went beyond this by helping their peers obtain a safe supply of drugs as well. Overall, the researchers observed several social supplying practices that were common among participants including buying drugs together, buying drugs for another person, and pooling money to purchase a larger quantity of drugs to be shared with the group.<sup>72</sup>

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<sup>66</sup> *Ibid* at 96.

<sup>67</sup> See Hathaway et al, "Social Supply Networks", *supra* note 14.

<sup>68</sup> *Ibid* at 1676–78.

<sup>69</sup> *Ibid* at 1676.

<sup>70</sup> *Ibid* at 1676.

<sup>71</sup> Kolla & Strike, *supra* note 1.

<sup>72</sup> *Ibid* at 4, 9.

## B. Canadian Legislation and Common Law

Canadian law and sentencing practices around social supply drug trafficking have historically depended on the type of drug at issue. Prior to the enactment of the CDSA in 1996, the *Narcotic Control Act (NCA)* defined drug trafficking in the same way that the CDSA currently defines trafficking, meaning to “manufacture, sell, give, administer, transport, send, deliver or distribute.”<sup>73</sup> However, drugs previously scheduled under the *Food and Drugs Act (FDA)* did not include the word ‘give’ in its definition of trafficking.<sup>74</sup>

Therefore, depending on what legislation a particular drug was scheduled under, giving drugs may or may not attract criminal sanction. This was illustrated in *R v Rogalsky* where an accused was found guilty of drug trafficking cannabis under the NCA but was only found to be guilty of possession of LSD under the FDA.<sup>75</sup> Between 1996 and 2018, all illicit drug offences were included in the CDSA.<sup>76</sup> As I discuss below, the CDSA prosecutes drug trafficking broadly, capturing acts of social sharing within its definition. In 2018, following the legalization of certain activities around cannabis, the regulation of cannabis was removed from the CDSA and replaced with the *Cannabis Act*.<sup>77</sup> Under the *Cannabis Act*, persons can share drugs in smaller amounts without attracting criminal liability.<sup>78</sup>

### 1. The Cannabis Act

Consistent with the social supply research in Canada, recognition of social supply in Canada is more explicit in the cannabis context and it emphasizes the protection of youth as a key statutory objective. In section 7 of the *Cannabis Act*, the purpose reads (among a list of other purposes) “to protect public health and public safety and, in particular, to (a) protect the health of young persons by restricting their access to cannabis; (b) protect young persons and others from inducements to use cannabis.”<sup>79</sup> Given that social supply research has been documented as common among youth who

<sup>73</sup> *Narcotic Control Act*, RSC 1986, c N-1, s 2, as repealed by *Controlled Drugs and Substances Act*, SC 1996, c 19; CDSA, *supra* note 7, s 2. See this legislation discussed in *R v Kernaz*, 2019 SKCA 37 at para 15 [Kernaz 2019].

<sup>74</sup> See *R v Rogalsky*, [1975] 4 WWR 418 at 400-02, 23 CCC 2d 399 (SKCA) [Rogalsky].

<sup>75</sup> *Ibid*.

<sup>76</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 2:100.

<sup>77</sup> *Ibid* at 2:120.

<sup>78</sup> *Ibid* at 5:40.80.

<sup>79</sup> *Cannabis Act*, *supra* note 6, s 7.

use cannabis,<sup>80</sup> it is unsurprising that the recognition of social supply arose in the context of drug supply and distribution offences under the new legal regime that aims to protect youth.

While the language in the *Cannabis Act* is similar to the *CDSA*, there are several subtle, but important differences. The *Cannabis Act* prohibits drug trafficking in section 9, but it uses the term ‘distribution’ instead. Section 2 of the *Cannabis Act* defines distributing as “administering, giving, transferring, transporting, sending, delivering, providing or otherwise making available in any manner, whether directly or indirectly, and offering to distribute.”<sup>81</sup> Notably, the word ‘includes’ signals a broader definition than the *CDSA*’s definition which uses the word ‘means’: the former indicates a non-exhaustive list, whereas the latter is exhaustive.<sup>82</sup>

Distribution under the *Cannabis Act* is also more complex, with several exceptions that accommodate social sharing. Under subsection 9(1)(a)(i), the federal limit is that persons 18 years or older can lawfully distribute up to 30 grams of dried cannabis.<sup>83</sup> Persons under 18 can distribute up to five grams of dried cannabis, pursuant to subsection (9)(1)(b)(i).<sup>84</sup> As discussed below, this is a departure from the *CDSA*, which continues to prohibit social sharing for those drugs scheduled under it, irrespective of quantity.

In section 10 of the *Cannabis Act*, ‘sell’ is separately defined and likely requires an exchange of money (or another form of consideration) to meet the definition, which is a departure from the *CDSA* definition of sell. The *CDSA* defines the word ‘sell’ with the additional language, “have in possession for sale and distribute, whether or not the distribution is made for consideration.”<sup>85</sup> Drug distribution situations without the exchange of consideration necessarily captures social supplying within criminal liability, given social supply is the exchange of drugs for little to no profit. The decision to exclude the consideration language in the *Cannabis Act* was likely a deliberate parliamentary decision, and a reasonable interpretation could be that Parliament did not intend to capture social supply conduct within its definition of selling. However, case law from the *CDSA*’s predecessor, the *NCA*, has informed the interpretation of the *CDSA*. So, it is possible

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<sup>80</sup> See e.g. Hathaway et al, “Social Supply Networks”, *supra* note 14.

<sup>81</sup> *Cannabis Act*, *supra* note 6, s 2.

<sup>82</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>83</sup> *Cannabis Act*, *supra* note 6, s 9(1)(a)(i).

<sup>84</sup> *Ibid*, s 9(1)(b)(i). See also MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.80.

<sup>85</sup> *CDSA*, *supra* note 7, s 2(1).

that CDSA jurisprudence around drug trafficking without consideration will be applied to the current *Cannabis Act*.<sup>86</sup>

Overall, the accommodation of social supply or social sharing conduct within the *Cannabis Act* reflects the consultation which underpinned cannabis legalization. Following the election of the Liberal Government in 2015 and their electoral promise to legalize and regulate cannabis, the government formed a task force, chaired by the prior Minister of Justice, Anne McLellan.<sup>87</sup> In their final report, the Task Force recommended creating exclusions for social sharing, as the focus of trafficking should be on commercial gain.<sup>88</sup> However, the *Cannabis Act* did not go so far as to enact a social supply exclusion, as recommended. Some critics have raised that the limited exceptions for sharing smaller amounts did not fully respond to the Task Force's recommendations, and the legal scheme remains largely punitive.<sup>89</sup> However, the *Cannabis Act*'s limited exception for social suppliers is less limited than what is currently proposed in New Zealand.<sup>90</sup> Further, in comparison to the CDSA, the *Cannabis Act* is a step in the right direction.

## 2. *The Canadian Drugs and Substances Act*

Section 5 of the CDSA defines the prohibited act and punishment for trafficking and possession for the purposes of trafficking. Similar to the *Cannabis Act*, the CDSA defines trafficking broadly in subsection 2(1) which reads, in respect of substances listed in "Schedules I to V, (a) to sell, administer, give, transfer, transport, send or deliver the substance, (b) to sell an authorization to obtain the substance, or (c) to offer to do anything mentioned in paragraph (a) or (b), otherwise than under the authority of the regulations."<sup>91</sup> As previously discussed, the CDSA is unlike the *Cannabis Act*, as "to sell" is explicitly included within the definition of trafficking, in

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<sup>86</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5A:60.20.

<sup>87</sup> Canada, *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Marijuana Legalization and Regulation*, Anne McLellan, Chair (Ottawa: Minister of Health, 30 November 2016), online: <[www.canada.ca/en.html](http://www.canada.ca/en.html)> [perma.cc/WV8T-JT69] [*Task Force on Marijuana Legalization and Regulation*].

<sup>88</sup> *Ibid* at 5, 39.

<sup>89</sup> See e.g. Andrew Hathaway "Evidence-Based Policy Development for Cannabis? Insights on Preventing Use by Youth" (2019) 62:4 *Can Public Administration* 593 at 596 [Hathaway, "Evidence-Based"].

<sup>90</sup> See NZ, "Cannabis Legalisation and Control Bill", *supra* note 60.

<sup>91</sup> CDSA, *supra* note 7, s 2(1).

addition to its separate definition that includes selling without the exchange of consideration. Unlike the *Cannabis Act*, this definition does not make exceptions for social sharing, but there is some recognition of social trafficking as distinct from more commercial drug dealing at sentencing. In this section, I review case law in Canada, describing how Canadian courts have included social supplying under the broad definition of drug trafficking in the *CDSA*.<sup>92</sup>

### i. To Give

Given that the *CDSA* defines drug trafficking as including situations where one ‘give[s]’ drugs, many social supply practices are considered drug trafficking in law.<sup>93</sup> In cases where persons are alleged to have committed drug trafficking under the *CDSA* for giving drugs, the Crown is not required to lead evidence of the accused’s purpose or motive<sup>94</sup> and it extends to persons who pool their money to purchase drugs in bulk for later joint consumption.<sup>95</sup> Despite the policy concerns of this broad definition, which are considered in greater depth below, Canadian prosecutors and courts continue to use their discretion to prosecute drug trafficking within this broad category.

In 2019, in *R v Kernaz*, the Saskatchewan Court of Appeal (SKCA) reaffirmed that sharing drugs for no profit constitutes drug trafficking under the *CDSA*.<sup>96</sup> While this decision was appealed to the Supreme Court of Canada (SCC), the appeal was denied by the SCC with an oral decision rendered on the same day that the appeal was heard.<sup>97</sup> Notably, within the SKCA decision and the appellant’s SCC factum, there is no reference to the concept of social supply as distinct from other forms of trafficking.<sup>98</sup> However, the case concerns facts that are properly described as an intention to socially supply drugs.

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<sup>92</sup> While many of these cases predate the *CDSA*, they remain reliable authority for interpreting the *CDSA*.

<sup>93</sup> *CDSA*, *supra* note 7, s 2.

<sup>94</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40:80, citing *R v Verge*, [1971] 4 WWR 116, 3 CCC (2d) 398 (BCCA).

<sup>95</sup> *R v Taylor*, [1974] 5 WWR 40 at 40–41, 17 CCC (2d) 36 (BCCA) [*Taylor*].

<sup>96</sup> *Kernaz* 2019, *supra* note 73.

<sup>97</sup> *R v Kernaz*, 2019 SCC 48.

<sup>98</sup> *Kernaz* 2019, *supra* note 73 at para 5; *R v Kernaz*, 2019 SCC 48 (Factum of the Appellant).

Nicholas Kernaz was charged with possession of methamphetamine and cocaine for the purpose of trafficking, contrary to subsection 5(2) of the CDSA.<sup>99</sup> The police arrested him after he parked a borrowed car in front of a house that he was visiting.<sup>100</sup> The subsequent search of his pockets and the borrowed vehicle produced incriminating evidence including, but not limited to, over three grams of methamphetamine, pipes, a container with over 25 grams of cocaine, a large sum of cash, six cell phones, three guns, and ammunition.<sup>101</sup> Nicholas Kernaz testified that he intended to share his drugs with “the girl” in the house and stated, “I had plans with the girl to snort some meth, and hang out”, and affirmed that the she was going to use the meth that he provided, but that he “wasn’t expecting any money or anything like that from her for it though.”<sup>102</sup> The Crown argued that this constituted an admission, whereas the defence argued that this only indicated “a possibility of sharing it” and that there was no agreement made at that point.<sup>103</sup> Defence counsel also acknowledged that giving drugs to someone could constitute trafficking.<sup>104</sup>

The trial judge convicted Nicholas Kernaz of the lesser offence of simple possession because merely expressing an intention to give drugs was not enough to constitute trafficking.<sup>105</sup> Further, much of the evidence was inadequate to constitute possession for the purpose of trafficking because it could not be concluded that these items were subject to his use and control, as the offence requires. Only those drugs he admitted as being in his possession were found to be in his control. The Crown appealed this decision to the SKCA on the basis that the trial judge made an error in law for failing to properly apply the legal test which includes giving drugs. The issue central to the Crown’s appeal was whether Nicholas Kernaz’s testimony was an admission of the offence charged.<sup>106</sup> The SKCA allowed this appeal, setting aside the acquittal of possession for the purpose of trafficking and conviction of simple possession, and entered a verdict of guilty for possession for the purpose of trafficking.<sup>107</sup> The SKCA accepted

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<sup>99</sup> Kernaz 2019, *supra* note 73 at para 1.

<sup>100</sup> *Ibid* at para 3.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* at para 5.

<sup>103</sup> *Ibid* at para 6.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid* at paras 1, 9-11.

<sup>106</sup> *Ibid* at para 16.

<sup>107</sup> *Ibid* at paras 1-2, 25.

the Crown's argument and stated that there was no need for a prior agreement to establish the offence of possession for the purpose of trafficking.<sup>108</sup>

The outcome in *Kernaz* is consistent with past cases, showing that where an accused admits to an intention to share drugs with others, the offence of possession for the purpose of trafficking is committed. In *Rogalsky*, the accused was found guilty of possession for the purpose of trafficking after admitting that sharing his cannabis is proper etiquette when using drugs among others.<sup>109</sup> In *R v Taylor*, a group of friends pooled their money to purchase hashish in bulk with an intention to equally share it and the accused who made the purchase was found guilty of trafficking.<sup>110</sup> This reasoning was adopted in *R v O'Conner* a year later in 1975, which was denied leave to the SCC.<sup>111</sup>

In *O'Conner*, the accused was convicted of trafficking after purchasing drugs to share with his wife, using money they jointly owned, and heading home to use the drugs together.<sup>112</sup> More recently, in *R v Beek*, the British Columbia Court of Appeal (BCCA) found that a proven intention to share drugs will often constitute trafficking, but the trial judge also explained that expressing that one sometimes shares drugs at a party is only expressing a possibility of sharing drugs, and a mere possibility does not meet the definition of trafficking.<sup>113</sup> In *Kernaz*, the SKCA held that the case at issue was more analogous to the drug trafficking in *O'Conner* and *Taylor* and distinguishable from the non-trafficking situation in *Beek*.<sup>114</sup> In other words, Nicholas Kernaz's intention to share drugs went beyond a mere possibility and, therefore, it constituted trafficking. Demonstrably, the line between these cases is subtle and it exemplifies the broad discretion that the Crown and the court have for prosecuting social sharing as drug trafficking.

## ii. To Distribute

Other cases where Canadian courts have found social supply conduct to constitute drug trafficking have occurred in the context of trafficking by

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Supra* note 74 at 399–400.

<sup>110</sup> *Supra* note 95.

<sup>111</sup> [1975] 3 WWR 603, 23 CCC (2d) 110 (BCCA) [*O'Connor*], leave to appeal to SCC refused, 24114 (17 February 1975).

<sup>112</sup> *Ibid.*

<sup>113</sup> 2014 BCSC 971 [*Beek*].

<sup>114</sup> *Kernaz* 2019, *supra* note 73.

distributing. Under the CDSA, distributing drugs falls within the extended definition of ‘sell’ under section 2.<sup>115</sup> As cited in *Taylor*, the ordinary meaning of distribute, as per the Oxford Universal Dictionary is, “to deal out or bestow in portions or shares among many or a number of recipients; to allot or apportion as his share to each person of a number; to spread.”<sup>116</sup> Therefore, within the definition of trafficking by distribution, there must be more than one recipient of the drugs. The Crown must show evidence of at least two transactions, of at least two different recipients to prove trafficking by distribution. Evidence of an exchange of money, or any other passing of consideration, does not need to be shown, pursuant to section 2 of the CDSA.<sup>117</sup> In *Taylor*, the accused was found guilty of trafficking by distributing for getting a bulk purchase of hashish and apportioning the drugs amongst the group, splitting the cost.<sup>118</sup> This case clearly resembles the social supply conduct described in the social science research.

### iii. To Transfer

Another area where the concept of social supply could apply within the definition of drug trafficking is transferring. The Canadian Oxford Dictionary defines transfer as “move (a thing etc.) from one place to another... hand over the possession of (property, rights, etc.) to a person.”<sup>119</sup> Black’s Law Dictionary defines transfer as “[a]n act of the parties, or of the law, by which the title to property is conveyed from one person to another.”<sup>120</sup> In accordance with these definitions, Bruce MacFarlane, Robert Frater, and Croft Michaelson argue that transfer has two dimensions: “a physical movement of drugs, and a notional conveyance of a right to them.”<sup>121</sup> Notably, this method of trafficking has not received judicial consideration because the CDSA predecessors’ definitions of trafficking did not include ‘transfer’. The conduct that could be caught be

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<sup>115</sup> CDSA, *supra* note 7, s 2(1).

<sup>116</sup> *Taylor*, *supra* note 95 at 40.

<sup>117</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.40.

<sup>118</sup> *Supra* note 95 at 36–39.

<sup>119</sup> Katherine Barber, ed, *The Canadian Oxford Dictionary* (Oxford: Oxford University Press, 2004) sub verbo “transfer”, cited in MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>120</sup> Bryan A Garner, ed, *Black’s Law Dictionary* (St. Paul, MN: Thomson Reuters, 2014) sub verbo “transfer”, cited in MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

<sup>121</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.100.

this definition also overlaps with the definition of transporting and giving; thus, the same conduct can be prosecuted by transporting or giving instead.<sup>122</sup> One can imagine how transferring drugs might capture social supply, such as gifting drugs to a friend.

#### iv. Joint Possession and Purchasing

The cases cited above also illustrate that joint possession does not necessarily preclude the offence of drug trafficking from also being made out. The concept of joint possession is encompassed within the definition of possession pursuant to subsection 4(3) of the *Criminal Code*.<sup>123</sup> Generally, the courts have interpreted joint supply to mean one person being in possession of drugs on behalf of a group, with the group's knowledge and consent.<sup>124</sup> In *Taylor*, the defence argued that the drugs were held for joint possession and not for the purpose of trafficking. This argument was rejected by the BCCA, affirming the conviction of trafficking as it did "not alter the nature of the physical act of giving, delivering or distributing the narcotic to another or others, which in itself constitutes the offence."<sup>125</sup> Joint ownership between spouses does not alter the trafficking nature of the act either.<sup>126</sup>

Alternatively, if the joint purchasers or owners transport the drugs together, both may only be guilty of the lesser offence of joint possession.<sup>127</sup> In *R v Binkley*, the accused drove a vehicle, travelling with a passenger whom he jointly possessed drugs with. The accused had no intention of transporting or distributing the drugs further and, therefore, was only guilty of simple possession, held jointly with the passenger.<sup>128</sup> Similarly, in *R v Gardiner* the police stopped a vehicle, in which the accused was a passenger and found to be in possession of cocaine. In deciding whether this constituted drug trafficking or joint possession, the Ontario Court of Appeal (ONCA) found that it was more credible that the accused was only

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<sup>122</sup> *Ibid* at 5:40:100

<sup>123</sup> *Criminal Code*, RSC 1985, c C-46, s 4(3) [*Criminal Code*].

<sup>124</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 4:120.20.

<sup>125</sup> *Taylor*, *supra* note 95 at 41.

<sup>126</sup> O'Connor, *supra* note 111.

<sup>127</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.120.40.60.

<sup>128</sup> *R v Binkley* (1982), 15 Sask R 251 at 465, 69 CCC (2d) 169 (SKCA) [*Binkley*].

in possession of the drugs because the joint owners, who had pooled their resources to purchase the drugs, were also present in the car.<sup>129</sup>

The key distinction between the *Binkley* and *Gardiner* line of cases, where joint possession was found, from the *Young, Taylor*, and *O’Conner* line of cases, where trafficking was made out, is whether the joint owners are present upon arrest. When everyone is together, it is more credible to the court that the accused is simply in joint possession, compared to cases where others are not present and may not be charged with possession themselves.<sup>130</sup> This distinction may seem arbitrary and has been criticized for overlooking the definition of possession under subsection 4(3) of the *Criminal Code*, which has an extended reach. In fact, one could consider the individuals awaiting the accused’s delivery of drugs in *Young, Taylor*, and *O’Conner* as being in constructive possession. Nonetheless, this distinction does not necessarily apply to trafficking by giving, selling, or delivering because those acts constitute the promotion of distribution in and of themselves, whether the other party is present or not.<sup>131</sup>

#### v. Drug Possessors are not Aiders and Abettors of Trafficking

The SCC considered the offence of aiding and abetting of drug trafficking for simple possession and ruled that it was outside of the scope of drug trafficking. In *R v Eccleston*,<sup>132</sup> cited by the SCC in *R v Greyeyes*,<sup>133</sup> the BCCA stated, “the definition of trafficking so as to encompass conduct that right-minded people would say is not trafficking is damaging and to be avoided.”<sup>134</sup> In *Greyeyes*, the SCC cited this quote to hold that drug possessors should not be held as aiders and abettors to drug trafficking.<sup>135</sup> As the phenomenon of social drug sharing grows with drug normalization and people who use drugs turn to this form of drug supplying as a more trustworthy source, a similar argument can potentially be made – encompassing social supply as drug trafficking is damaging and should be avoided. The subtle distinctions in the case law between possession and drug trafficking show that the line between drug user and drug supplier is

<sup>129</sup> *R v Gardiner* (1987), 35 CCC (3d) 461, 21 OAC 177 (ONCA) [*Gardiner*].

<sup>130</sup> *Ibid* at 465.

<sup>131</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 6:100.20.40.20.

<sup>132</sup> [1975] 5 WWR 141, 24 CCC (2d) 564 (BCCA) [*Eccleston*].

<sup>133</sup> [1997] 2 SCR 825, 148 DLR (4th) 634 [*Greyeyes*].

<sup>134</sup> *Ibid* at para 5, citing *Eccleston*, *supra* note 132 at 568, per Justice Seaton.

<sup>135</sup> *Ibid* at para 8.

tenuous. This tenuous distinction is consistent with the social science research which shows that many people who use drugs do not regard drug supply as drug trafficking.<sup>136</sup>

### C. Sentencing Considerations

Similar to sentencing practices in other English common law countries, social supply is considered a less severe form of drug trafficking than more commercial dealing in Canada. With a focus on commercialism, Canadian courts have compared social supply conduct with more organized commercial drug trafficking. In this section, I first consider the SCC's decision in *R v Lloyd*, where the Court stated that sharing drugs for no profit is less morally blameworthy than more commercial trafficking and, with all factors being considered, warrants a less severe sentence.<sup>137</sup> I then turn to a discussion of the sentencing principles in the *Criminal Code*, which frame how sentencing courts could theoretically consider the relevance of social supply as distinct from commercialism. Referring to cases in Alberta where courts more explicitly consider social trafficking, I show that Canadian courts disparately consider social supply between provinces.

#### 1. *Constitutional Considerations of Sentencing Social Traffickers*

Canada's highest court has clearly signalled that treating commercial drug trafficking as equivalent to social trafficking at sentencing is unconstitutional. In *Lloyd*, in 2016, the SCC considered the reasonable hypothetical of a social supplier where the Court held that the mandatory minimum sentencing provisions for trafficking offences were unconstitutional and struck down.<sup>138</sup> The SCC indicated that social supplying conduct is less morally blameworthy and deserving of punishment than other forms of trafficking, even though the case was not centrally about supply.<sup>139</sup>

In *Lloyd*, the Court found that mandatory minimum sentences for drug trafficking violated section 12 of the *Charter*, which protects the accused from cruel and unusual punishment.<sup>140</sup> Hypothetically, a one-year sentence for someone who possesses a small amount of a Schedule I drug to share

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<sup>136</sup> See e.g. Jacinto et al, *supra* note 20.

<sup>137</sup> 2016 SCC 13 [*Lloyd*].

<sup>138</sup> *Ibid* at paras 23, 27-35.

<sup>139</sup> *Ibid* at paras 28-32.

<sup>140</sup> *Ibid* at para 37; *Charter*, *supra* note 9, s 12.

with a spouse or friend would be grossly disproportionate to the penal goals and sentencing principles as articulated in the CDSA and *Criminal Code*.<sup>141</sup> The SCC also found that it would be “abhorrent” or “intolerable” to Canadians to punish these offences in the same way.<sup>142</sup> The mandatory minimum sentence casts its net too broadly, as “it applies indiscriminately to professional drug dealers who sell dangerous substances for profit and to drug addicts who possess small quantities of drugs that they intend to share with a friend, a spouse, or other addicts.”<sup>143</sup> The definition of trafficking within the CDSA also captures conduct so broadly, such that it captures people who give small amounts of drugs to friends, regardless of the reason for doing so. The SCC states:

At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of Schedule I substances, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of a Schedule I drug with a friend or spouse and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before. I agree with the provincial court judge that most Canadians would be shocked to find that such a person could be sent to prison for one year.<sup>144</sup>

Despite the strong language from the majority, in dissent, Justices Wagner, Gascon, and Brown argue that social sharing might be less blameworthy, but a one-year sentence for a social supplier is constitutional.<sup>145</sup> According to them, the societal harms of trafficking remain the same, writing:

Whether the offender traffics by sharing, or to support her own addiction, or purely for profit, she facilitates the distribution of dangerous substances into the community. She may provide drugs to people who would not otherwise have had access to them. The harm to the community – in the form of overdose, addiction, and the crime that sometimes comes with supporting addiction – remains the same regardless of the offender's motives.<sup>146</sup>

The dissenting justices' comments reflect a larger issue within society and the justice system where overly-punitive views of people who use and supply drugs persist, without consideration of how social suppliers can

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<sup>141</sup> Lloyd, *supra* note 137 at paras 22, 37.

<sup>142</sup> *Ibid* at para 24.

<sup>143</sup> *Ibid* at para 29.

<sup>144</sup> *Ibid* at para 32.

<sup>145</sup> *Ibid* at para 93.

<sup>146</sup> *Ibid*.

reduce harm for people who use drugs.<sup>147</sup> Arguably, so long as social supply remains captured within the definition of social trafficking, many judicial actors maintain an association to the broader harms of trafficking even with low-level trafficking offences.

While the dissent did not win the day, the dissenting justices also strongly emphasized the existence of other factors, specifically a prior criminal record, which would warrant a more severe sentence, even for those cases involving social supply.<sup>148</sup> The majority did not appear to disagree with this part of the dissent and signals that the reasonable hypothetical of the person who shares their drugs with a friend is only one element among many that are considered at sentencing. As can be seen in the majority's passage included above, the reference is made to the type and quantity of drugs, as well as the presence of a prior criminal record.<sup>149</sup> Any recognition of social supply is ultimately balanced against other aggravating and mitigating principles recognized in Canadian law. Further, in a 2018 paper published in the *Manitoba Law Journal*, Haley Hrymak analyzes case law involving street-level fentanyl trafficking and finds that trafficking fentanyl will necessitate a greater emphasis on deterrence and punishment, thereby deserving a more severe punishment.<sup>150</sup> As such, social trafficking might be a relevant factor, but additional factors such as the context of the overdose crisis and the potency of the drug (e.g. fentanyl) tend to weigh more heavily at sentencing.

## *2. Commercialism as a Sentencing Principle*

The general principles at sentencing are prescribed in sections 718 to 718.2 of the *Criminal Code*.<sup>151</sup> Like England and Wales, proportionality is a fundamental principle at sentencing in Canada, which means that sentencing “must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”<sup>152</sup> One of several factors listed in

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<sup>147</sup> See e.g. Kolla and Strike, *supra* note 1 at 4; Hrymak, “The Opioid Crisis”, *supra* note 10.

<sup>148</sup> Lloyd, *supra* note 137 at paras 77, 94.

<sup>149</sup> *Ibid* at para 32.

<sup>150</sup> Haley Hrymak, “A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers” (2018) 41:4 Man LJ 149 [Hrymak, “A Bad Deal”].

<sup>151</sup> *Criminal Code*, *supra* note 123.

<sup>152</sup> *Ibid*, s 718.1.

the *Criminal Code* is whether “the offence was committed for the benefit of, at the direction of or in association with a criminal organization.”<sup>153</sup>

Outside of the statutory sentencing framework, courts have considered the presence of commercialism in drug transactions as an aggravating factor. Serious forms of commercialism may include involvement with a criminal organization. However, Canadian courts do not have clear indicia of what amounts to commercialism.<sup>154</sup> In *R v Webber*, the Alberta Court of Appeal (ABCA) stated that commercialism is not met simply by the exchange of drugs for money.<sup>155</sup>

Prior research of social supply in Canadian case law has noted that trafficking offences can be organized into three categories, ranked by increasing order of severity: social sharing, petty retail operations, and full-time commercial operations.<sup>156</sup> However, upon a search of jurisprudence using WestlawNext Canada and a reading of a prominent publication on drug offences in Canada,<sup>157</sup> I was unable to identify a legal authority which shows that trafficking offences are actually categorized in this way. Instead, the discussion of social sharing or social trafficking in Canadian sentencing appears to be disparate and inconsistently considered between provinces, with no formal legal test established.

One frequently cited case which explicitly refers to social trafficking as a less serious offence emerges from the ABCA.<sup>158</sup> In *R v Maskell*, a young university student with no criminal record was found guilty of possession of cocaine for the purpose of trafficking.<sup>159</sup> The circumstances of the case involved a commercial operation that was “more than a minimal scale.”<sup>160</sup>

At sentencing, the Court stated, “[i]f this were a case of social trafficking, or an isolated sale, adopting as we have the position that cocaine is not as serious or dangerous a drug as heroin, a lesser sentence may have been imposed.”<sup>161</sup> In this regard, the ABCA indicates that social trafficking

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<sup>153</sup> *Ibid*, s 718.2(a)(iv).

<sup>154</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 33:80.40.40.

<sup>155</sup> 2013 ABCA 189 at para 26 [*Webber*].

<sup>156</sup> Coomber et al, “Recognition and Accommodation”, *supra* note 3 at 98; Hathaway, “Evidence-Based”, *supra* note 89 at 595.

<sup>157</sup> See MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50.

<sup>158</sup> Whereas neither the SCC in *Lloyd*, *supra* note 137, nor the *Criminal Code*, *supra* note 123 sentencing provisions explicitly use the terms social trafficking or social supply.

<sup>159</sup> (1981), 58 CCC (2d) 408, 5 WCB 490 [*Maskell*].

<sup>160</sup> *Ibid* at para 20.

<sup>161</sup> *Ibid* at para 19.

and isolated sales are closer to minimal scale trafficking offences. Given the more commercial elements to the case at issue, the ABCA imposed a more severe sentence of three years imprisonment.<sup>162</sup> This case has been cited in 223 cases according to WestlawNext Canada, as of 2 June 2020, but its application outside of Alberta remains limited.<sup>163</sup>

*Maskell* is often cited for its reference to “minimal scale” as a starting point for the severity of drug trafficking, but what constitutes a “minimal scale” offence is unclear.<sup>164</sup> More recently, in *R v Gittens* in 2019, the ABCA stated that the characterization of something as more than a minimal scale is a fact-finding exercise for the trial judge.<sup>165</sup> The ABCA also notes that there have been more cases characterized as more than a minimal scale than cases that are of a minimal scale.<sup>166</sup> However, this may be a result of joint submissions, which are common practice in Canadian courts, such that minimal scale offences (such as social trafficking) do not come before appellant courts.<sup>167</sup> The ABCA also states that it is likely that many minimal scale drug trafficking cases are diverted to drug court, such that the consideration of drug supply is not reflected in case law per se.<sup>168</sup> As the ABCA states, “for all we know, the ‘minimal scale’ cases might well be the majority.”<sup>169</sup> As such, one might argue that prosecutorial and police discretion are exercised for low-level social supply offences; thus, in effect, social supply is diverted out of the court already and this is considered a satisfactory outcome. In the next section, I critically consider the topic of discretion.

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Maskell*, *supra* note 159 has only been cited five times in BC, for example (*R v Massey*, 2012 BCSC 935; *R v Shusterman*, 2012 BCSC 362; *R v Newman*, 2010 BCCA 109; *R v Desjardins*, 2006 BCPC 441; *R v Saulnier*, [1988] 2 WWR 546, 21 BCLR (2d) 232). Within these five decisions, there is no reference to its discussion of social trafficking or the minimal scale analysis; therefore, this part of the analysis has not been applied in BC. The majority of the citations are for cases within Alberta (175).

<sup>164</sup> See e.g. *R v Gittens*, 2019 ABCA 406 at paras 5–6 [*Gittens*].

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* at para 22.

<sup>167</sup> *Ibid* at para 31.

<sup>168</sup> *Ibid* at paras 30–34.

<sup>169</sup> *Ibid* at para 32.

#### IV. THE LIMITS OF DISCRETION

The dissenting justices' views in *Lloyd* reflect a larger tendency in the justice system to rely on police, prosecutors, and sentencing judges to exercise their discretion to not enforce drug laws that are otherwise overly broad and unjust. The justices argued that the reasonable hypothetical of a low-level social sharer is "far-fetched" and there are "very few reported cases where offenders have been convicted of trafficking for sharing drugs."<sup>170</sup> Similarly, one social supply scholar from Australia has argued that relying on police and judicial discretion to refrain from charging and prosecuting social supply is an adequate legal approach.<sup>171</sup> The problem with this perspective is that reported cases do not reflect the many incidents where people who supply drugs come into conflict with the justice system and experience the stigma of criminalization in their daily lives. As well, the majority in *Lloyd* stated, in rejecting the argument that discretion justified maintaining mandatory minimum sentences, that exemptions "based on Crown discretion provide only 'illusory' protection against grossly disproportionate punishment."<sup>172</sup>

Contrary to the dissenting judges' views in *Lloyd*, social supply offences continue to come before Canadian courts as drug trafficking offences. Many of these cases may not be published because, as the ABCA in *Gittens* stated, it is likely that many low-level social cases are diverted through joint submissions and drug courts.<sup>173</sup> Furthermore, as the prior analysis of Canadian case law demonstrated in part III-B, there are a myriad of ways that social supply conduct is prosecuted as drug trafficking through giving, distributing, transferring, and jointly possessing or purchasing drugs. While many of these cases are dated, they continue to be cited in current case law, such as *Kernaz* in 2019.<sup>174</sup> Thus, social supply cases remain criminalized and prosecuted with apparent disparities in how it is considered at sentencing.

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<sup>170</sup> *Lloyd*, *supra* note 137 at para 91.

<sup>171</sup> Gary Potter "Exploring Retail-Level Drug Distribution: Social Supply, 'Real' Dealers and the User/Dealer Interface" in Zsolt Demetrovics, Jane Fountain & Ludwig Kraus, eds, *Old and New Policies, Theories, Research Methods and Drug Users Across Europe* (Lengerich: Pabst Science Publishers, 2009) 50 at 66-67.

<sup>172</sup> *Supra* note 137 at para 34, citing *R v Nur*, 2015 SCC 15 at para 94.

<sup>173</sup> *Gittens*, *supra* note 164 at paras 30-34.

<sup>174</sup> *Kernaz* 2019, *supra* note 73 (I recognize that the facts surrounding this case appeared to be more serious on its face, as there were large cash amounts, weapons, and larger drug quantities found. However, this evidence was found not to be in Mr. Kernaz's

One might also argue that police themselves are not pursuing low level trafficking offences, such as social trafficking. However, local police forces have broad authority to adopt their own policy on discretion. For example, according to the British Columbia (BC) Ministry of Mental Health and Addictions, police agencies in BC “have embraced a harm reduction approach to people with substance use disorders, and focus its enforcement efforts on those who import, manufacture, and traffic drugs.”<sup>175</sup>

Nonetheless, it is unclear to what extent this policy is being implemented and how it is being interpreted throughout BC. This harm reduction approach does not specify whether it means a focus away from non-commercial forms of trafficking or whether this discretion extends to casual users who do not have substance use disorders.<sup>176</sup> In fact, the Vancouver Police Department’s (VPD) publicly available drug policy asserts that “street-level drug trafficking remains a priority” and police will not use their discretion to distinguish between user-dealers.<sup>177</sup> The VPD also states it will direct “more” attention towards “traffickers who exhibit higher degree of organization and coordination.”<sup>178</sup> Whether other police agencies in BC and Canada use their discretion in this way is largely unknown. Overall, as a US legal scholar critiques in a 2015 article published in the *Howard Law Journal*, police policy and discretion are hidden from public scrutiny and subject to the internal policy direction of local police agencies.<sup>179</sup> This creates a patchwork of discretionary policies between communities and allows for police, without adequate oversight, to unevenly apply laws between neighborhoods and groups in a way that can disadvantage marginalized communities.<sup>180</sup>

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possession and was excluded from the consideration of whether trafficking occurred. Intention to traffic was found based on the simple fact that he admitted to his intention to share his drugs with a woman he was meeting up with).

<sup>175</sup> British Columbia, Ministry of Mental Health and Addictions, *Escalating BC’s Response to the Overdose Emergency* (Victoria, BC: Ministry of Mental Health and Addictions, last visited 21 June 2020) at 17, online: <[www2.gov.bc.ca/assets/gov/overdoseawareness/mha\\_escalating\\_bcs\\_response\\_report\\_final\\_26feb.pdf?bcgovtm=CSMLS](http://www2.gov.bc.ca/assets/gov/overdoseawareness/mha_escalating_bcs_response_report_final_26feb.pdf?bcgovtm=CSMLS)> [perma.cc/B7BF-B6N6].

<sup>176</sup> *Ibid.*

<sup>177</sup> British Columbia, *Vancouver Police Department Drug Policy* (Vancouver, BC: VPD, adopted September 2006) at 5, online: <[vancouver.ca/police/assets/pdf/reports-police/vpd-policy-drug.pdf](http://vancouver.ca/police/assets/pdf/reports-police/vpd-policy-drug.pdf)> [perma.cc/7THJ-BDLX].

<sup>178</sup> *Ibid.*

<sup>179</sup> Eric J Miller “Challenging Police Discretion” (2015) 58:2 *How LJ* 521.

<sup>180</sup> *Ibid* at 521–23, 530–32.

The incidence of over-policing of certain communities in Canada, such as Indigenous people and Black Canadians, has been well studied and documented in empirical research.<sup>181</sup> In a recent study on youth experiences with the police, having a low income and a prior criminal record was significantly related to whether the police charged youth for drug offences.<sup>182</sup> This same study of youth experiences with police also found that gender non-binary and Indigenous youth were more likely to be handcuffed or arrested than other youth.<sup>183</sup> Prior analyses of official crime statistics also show that street and low-level crimes are disproportionately reported in comparison to higher level, corporate crimes and that this is directly related to policing practices and policy focuses.<sup>184</sup> Overall, these findings show that police exercise their discretion to enforce drug laws in a way that disproportionately targets socially marginalized groups including poor, racialized, and gender non-conforming youth.

Further, in Pivot Legal Society's *Project Inclusion Report* involving a year-long study interviewing people who use drugs throughout BC, participants reported frequent experiences with the police involving harassment and disruption of harm reduction activities.<sup>185</sup> Social service providers shared stories about people living in low-barrier shelters who were charged with drug trafficking when undercover police asked them to help them find fentanyl.<sup>186</sup> As drug users themselves, their motivation was to support their own addictions, as well as a desire to help other people who use drugs with finding a drug supply.<sup>187</sup>

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<sup>181</sup> See e.g. Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012); Akwasi Owusu-Bempah & Scot Wortley "Race, Crime, and Criminal Justice in Canada" in Sandra M. Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (New York, NY: Oxford University Press, 2014) 281.

<sup>182</sup> Alissa Greer et al, "Police Discretion to Charge Young People who use Drugs Prior to Cannabis Legalization in British Columbia, Canada: A Brief Report of Quantitative Findings" (2020) *Drugs: Education, Prevention & Policy* 1.

<sup>183</sup> Kiffer G Card et al, "Event-level Outcomes of Police Interactions with Young People in Three Nonmetropolitan Cities across British Columbia, Canada" (2020) *Intl J Drug Policy* 1 at 5.

<sup>184</sup> Susan Boyd, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada* (Nova Scotia: Fernwood Publishing, 2016) at 48-49.

<sup>185</sup> Darcie Bennet & DJ Larkin, "Project Inclusion: Confronting Anti-Homelessness and Anti-Substance Use Stigma in British Columbia" (2018), online: *Pivot Legal Society* <[www.pivotlegal.org/full\\_report\\_project\\_inclusion\\_b](http://www.pivotlegal.org/full_report_project_inclusion_b)> [perma.cc/7MYM-CM9S].

<sup>186</sup> *Ibid* at 50.

<sup>187</sup> *Ibid* at 50-52.

One participant who was charged with drug trafficking in another community described an undercover officer who approached her asking for help to get drugs.<sup>188</sup> In describing the encounter, she said “[s]o I get the dope, I give it to her, get the money, give it to him, that’s it. If she had asked me to fix her bike, if she asked me to find her puppy, if she asked me to paint her garage door I’d have done it for her and that’s what she asked me to do and I did” and then stated “I’m not a drug dealer.”<sup>189</sup> This undercover police encounter demonstrates how police criminalize the practices of care which public health scholars have lauded for reducing drug use harms.<sup>190</sup> Ultimately, these kinds of encounters are not limited to BC and because of the nature of police discretion, it is difficult to know the extent to which these policing methods occur throughout Canada and impact the day-to-day lives of people who use drugs.<sup>191</sup>

## V. AVENUES FOR LAW REFORM

This paper has highlighted a critical issue necessitating law reform. In this section, I consider various avenues for law reform for legal advocates to consider. I consider the arguments proposed by past researchers that legislators should create a separate offence and outline several limitations to this approach. Given the lack of clarity in considering the level of commercialism at sentencing, I call on lawyers and judges to draw on the concepts of social supply and minimally commercial supply to help clarify the principle of commercialism in determining a proportionate sentence. Finally, I consider arguments which legal advocates could advance under section 7 of the *Charter*. Overall, these recommendations are modest and

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<sup>188</sup> *Ibid* at 50–51.

<sup>189</sup> *Ibid.*

<sup>190</sup> Kolla and Strike, *supra* note 1.

<sup>191</sup> See e.g. *R v Shenfield*, 2008 ABPC 47. This was a case from Alberta showing that undercover operations that target social suppliers are conducted and prosecuted in other provinces as well. Similar to the encounter described by the participant in *Project Inclusion* (see Bennet & Larkin, *supra* note 185), this case involved an Indigenous woman who was a known sex worker. An undercover police officer approached her for assistance in finding drugs. She did not have drugs on her at that time, nor a cell phone. The police offered their phone and she called a drug dealer. She then walked the officer’s money to the dealer, took the drugs, but did not keep a portion of the money for herself. She was sentenced as a drug trafficker, albeit leniently.

should be considered alongside the priority of challenging drug possession offences.

### A. Separate Offence for Social Supply

The potential challenges and unintended consequences of creating a separate offence for social supply or minimally commercial supply may outweigh the benefits in doing so. While some scholars in the UK have recommended a separate offence for social supply or a minimally commercial drug supply,<sup>192</sup> no country has created a separate offence to date<sup>193</sup> and the UK government rejected this recommendation.<sup>194</sup> Legal advocates might face similar challenges in Canada. As well, Gary Potter has argued that the differences between commercial and social drug supply are not adequately defined in the scientific literature and translating unclear scientific concepts into legal definitions is difficult.<sup>195</sup> Thus, he argues that the law should remain clear.<sup>196</sup> For example, judges might struggle to interpret a definition that includes subjective elements of friendship and a profit motive.<sup>197</sup> Potter's emphasis on maintaining legal clarity is important in the Canadian context, particularly in consideration of access to justice concerns around the increasing complexity and length of criminal trials.<sup>198</sup> More serious offences, including drug trafficking and homicide, already involve more court appearances on average than less serious offences.<sup>199</sup>

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<sup>192</sup> See Coomber & Moyle, "Beyond Drug Dealing", *supra* note 24.

<sup>193</sup> See generally Coomber et al, "Recognition and Accommodation", *supra* note 3.

<sup>194</sup> Potter, *supra* note 171 at 66.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid* at 71.

<sup>197</sup> Simon Lenton et al, "The Social Supply of Cannabis in Australia: Definitional Challenges and Regulatory Possibilities" in Bernd Werse & Christiane Bernard, eds, *Friendly Business: International Views on Social Supply, Self-Supply and Small-Scale Drug Dealing* (Essen, Germany: Springer, 2016) 29 at 43.

<sup>198</sup> See Canada, Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (Report), by Albert Currie (Canada: DOJ, Research and Statistics Division, last modified 7 June 2015) at 7-9, online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03\\_5/rr03\\_5.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf)> [perma.cc/AFL5-SS3Q] [DOJ], *Riding the Third Wave*].

<sup>199</sup> Statistics Canada, *Measuring Efficiency in the Canadian Adult Criminal Court System: Criminal Court Workload and Case Processing Indicators*, by Maisie Karam et al, Catalogue No 85-002-X (Ottawa: Statistics Canada, 5 March 2020) at 12-13, 19, online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.pdf](http://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.pdf)> [perma.cc

This increasing complexity further burdens accused persons through increasing legal fees.<sup>200</sup>

## B. Educating Criminal Lawyers and Judges on Social Supply

A general and more practical recommendation for law reform is to educate Canadian judges and the practicing criminal law bar on the nuances of drug supplying and the misconceptions about drug supplying as inherently predatory. As demonstrated by the dissent in *Lloyd* and the analysis of drug trafficking cases in BC, there is some resistance within Canadian courts to recognize social supply as less culpable, especially where the offence involves fentanyl and within the context of the overdose crisis.<sup>201</sup>

This is unfortunate given that social supply research shows that social suppliers can actually reduce the risk of opioid overdoses.<sup>202</sup> Therefore, increasing education of social supply within the legal system is needed. Australian scholars have argued that educating lawyers and judges on social supply adequately balances Ross Coomber and Leah Moyle's arguments in favour of a separate offence with Gary Potter's emphasis on clarity and judicial discretion.<sup>203</sup> Hopefully, this paper will contribute, in part, to this education.

Defence counsel should also clarify the differences between social supply, minimally commercial supply, and organized dealing in sentencing submissions to challenge sentencing judges' common misconceptions of drug trafficking offences. Arguably, judges already consider social supply at sentencing, given that *Lloyd* explicitly described sharing drugs as less culpable and that the level of commercialism is already a sentencing principle. In sentencing a husband for trafficking for transporting drugs to his wife in *O'Connor*, the BCCA even stated "when we come to the matter of sentence in this case it should be regarded as a case of possession without any element whatever of a commercial dealing in the drugs."<sup>204</sup> However, as

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/3J3J-L763]. The median time to close an adult criminal case is 121 days. By comparison, drug trafficking, production, and importing and exporting averages 218 days and homicide is 286 days.

<sup>200</sup> DOJ, *Riding the Third Wave*, *supra* note 198.

<sup>201</sup> *Lloyd*, *supra* note 137 at paras 57–100; Hrymak, "A Bad Deal", *supra* note 150 (showing how sentencing judges are overly punitive of trafficking cases involving fentanyl, even in those cases with user-dealers).

<sup>202</sup> See e.g. Kolla & Strike, *supra* note 1.

<sup>203</sup> Lenton et al, *supra* note 197 at 43.

<sup>204</sup> *R v O'Connor*, 1975 CarswellBC 842 (BCCA) at 3 [O'Connor, Sentencing Decision].

I have argued in Part III, courts have not identified clear indicia for what amounts to commercialism and other factors, such as the presence of fentanyl, tend to weigh more heavily in favour of a more severe sentence. Therefore, it would be useful for counsel to employ the language and definitions of social supply and minimally commercial supply in sentencing submissions, especially in those cases involving opioids, to assist courts in exercising their discretion in a more nuanced way. For example, legal counsel can draw on the New Zealand Law Commission's definition of social supply, referenced in Part II.<sup>205</sup>

As the Australian legal scholar Kate Seear argues, legal counsel have an important role in reinforcing, perpetuating, or challenging perceptions in the criminal justice system around illicit drug use.<sup>206</sup> Judges are largely constrained by the arguments put forward by counsel.<sup>207</sup> Therefore, legal submissions can either perpetuate or challenge harmful views of people who use and sell drugs. In *R v Smith*, in which the BCCA set out the sentencing range for street-level trafficking offences, the Crown submitted evidence of the increasing presence of fentanyl in Canada and the overdose crisis.<sup>208</sup>

This evidence was used to successfully argue for a more severe sentence.<sup>209</sup> As Haley Hrymak's analysis shows, *Smith* helped establish a pattern of overly punitive sentences imposed on street-level dealers who are often people who use drugs themselves who are selling drugs to support their own addictions.<sup>210</sup> Defence counsel can similarly use sentencing submissions as an opportunity to submit general evidence and use it as an opportunity to challenge the habitual misconceptions in the judicial system about people who use drugs (and by extension, people who supply drugs). Lawyers ought to recognize their role in advancing strategic arguments that can either perpetuate stigma or challenge longstanding stereotypes, thereby creating new ideas in legal discourse about people who use and supply drugs that are rooted in harm reduction and the autonomy of people who use drugs. In the end, the collective actions of Crown and defence counsel can

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<sup>205</sup> NZ Law Commission, *Controlling and Regulating Drugs*, *supra* note 55.

<sup>206</sup> See generally Kate Seear, *Law, Drugs and the Making of Addiction: Just Habits*, 1st ed (New York, NY: Routledge, 2020).

<sup>207</sup> *Ibid* at 61–62.

<sup>208</sup> 2017 BCCA 112 at paras 2, 9, 35–36, 45.

<sup>209</sup> *Ibid* at paras 9, 45; Hrymak, "A Bad Deal", *supra* note 150 at 155–56.

<sup>210</sup> See generally Hrymak, "A Bad Deal", *supra* note 150 at 155–56.

make things “otherwise in law.”<sup>211</sup>

### C. Challenging the Legal Definition of Drug Trafficking Under Section 7 of the *Charter*

A more ambitious avenue for law reform is to challenge the current definition of drug trafficking under section 7 of the *Charter*. This legal strategy is consistent with the New Zealand Drug Foundation’s recommendation to remove criminal sanctions of social supply along with possession, as the law should treat social supply and possession equally.<sup>212</sup>

A violation of section 7 occurs where a law deprives an individual of “the right to life, liberty, and security of the person” and where this deprivation is not “in accordance with the principles of fundamental justice.”<sup>213</sup> Where there is a threat of imprisonment for an offence, the liberty interest is engaged;<sup>214</sup> thus, the main question in a section 7 challenge would be whether the definition of trafficking violated a principle of fundamental justice (including the principles against arbitrariness, gross disproportionality, or overbreadth) for capturing social supply.<sup>215</sup> In effect, a successful challenge of social supply would mean that social supply would formally be considered equivalent to possession. Alternatively, it would open the door for Parliament to redraft the definition of drug trafficking to align with the exceptions for social supply in the *Cannabis Act*.<sup>216</sup>

The ONCA declined to answer whether the broad definition of trafficking is contrary to section 7 in *United States v Saad* in 2004 and *Canada (Attorney General) v Saad* in 2007.<sup>217</sup> However, the arguments were narrowly

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<sup>211</sup> See Seear, *supra* note 206 at 86. See also Alana Klein “Criminal Law and the Counter-Hegemonic Potential of Harm Reduction” (2015) 38:2 Dal LJ 447 at 451, 471. Klein argues that the adoption of “harm reduction within constitutional discourse likewise risks reinforcing rather than undermining hegemonies perpetuated through law” but its key features, including an orientation towards self-determination, remain important to challenging drug laws.

<sup>212</sup> NZ Drug Foundation, “Mental Health and Addiction Inquiry”, *supra* note 58.

<sup>213</sup> *Charter*, *supra* note 9, s 7. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 54–56 [*Carter*].

<sup>214</sup> See *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 84.

<sup>215</sup> *Carter*, *supra* note 213 at paras 71–72.

<sup>216</sup> See O’Connor, Sentencing Decision, *supra* note 204. While technically convicted of drug trafficking at sentencing, the BCCA recommended that he should be sentenced as if he was a joint possessor, thereby reducing the sentence from three years to three months.

<sup>217</sup> *United States v Saad* (2004), 237 DLR (4th) 623, 183 CCC (3d) 97 (ONCA) [*Saad* 2004]; *Canada (Minister of Justice) v Saad*, 2007 ONCA 75 [*Saad* 2007].

construed and the cases predate case law where harm reduction arguments have been successfully advanced under section 7.<sup>218</sup> In *United States v Saad*, the appellant argued that trafficking by giving was a violation of the right to fundamental justice, pursuant to section 7 of the *Charter*.<sup>219</sup> The applicant argued that including giving as a mode of trafficking within the definition “went too far in trying to shut down the trade in narcotics.”<sup>220</sup> The definition captures conduct, including “sharing drugs or purchasing drugs on behalf of a group of users”, which most “right-minded” people would not consider to be trafficking.<sup>221</sup> Therefore, the stigma of the trafficking conviction outweighs the blameworthiness of the conduct.<sup>222</sup> However, the ONCA found that the accused was guilty of trafficking by transferring instead and it was not necessary to decide the *Charter* issue, as the argument was limited to whether trafficking by giving was unconstitutional.<sup>223</sup> The ONCA relied on this decision, without further consideration, when the issue was argued again in 2007.<sup>224</sup> Therefore, the question of whether the definition of trafficking is unconstitutional remains open.<sup>225</sup>

One way a section 7 challenge could be advanced is that criminalizing social supplying within the definition of drug trafficking is contrary to the principle against overbreadth. Overbreadth occurs where the law is rational, in part, but it overreaches by capturing conduct that bears no connection to its objective.<sup>226</sup> At the stage where the court considers whether a principle of fundamental justice has been violated, the focus is on the individual.<sup>227</sup> Enforcement practicality that might justify an overly-broad law should be considered under section 1 of the *Charter*.<sup>228</sup> In *Canada (Attorney General) v Bedford*, the SCC found that a law that criminalized living on the avails of

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<sup>218</sup> *Saad* 2004, *supra* note 217 at para 37; *Saad* 2007, *supra* note 217 at paras 23–26. See e.g. *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 131 [PHS] (where harm reduction was discussed by the SCC for the first time), cited by Klein, *supra* note 211.

<sup>219</sup> *Saad* 2004, *supra* note 217.

<sup>220</sup> *United States v Saad*, 2003 CarswellOnt 1574 at para 7, 57 WCB (2d) 391 (ON Ct J) [*Saad* 2003].

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Saad* 2004, *supra* note 217 at para 37; *Saad* 2007, *supra* note 217 at paras 23–26.

<sup>224</sup> *Saad* 2007, *supra* note 217.

<sup>225</sup> MacFarlane, Frater & Michaelson, *Drug Offences in Canada*, *supra* note 50 at 5:40.80.

<sup>226</sup> *Bedford v Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112–13 [*Bedford*].

<sup>227</sup> *Ibid* at para 113.

<sup>228</sup> *Ibid* at paras 101–02, 105, 113.

prostitution was overbroad because it captured non-exploitative relationships that the law was not intended to prohibit.<sup>229</sup> Specifically, the law was contrary to section 7 because it did not distinguish between exploitative pimps and individuals who could legitimately increase the safe working conditions for sex workers, such as bodyguards.<sup>230</sup>

The Ontario Court of Justice has more recently determined that laws which prohibit sex workers from working with other sex workers in non-exploitative business relationships are overbroad, given that working with other sex workers reduces workplace risks.<sup>231</sup> A similar argument could be advanced that drug trafficking is drafted too broadly, capturing conduct that the legislation was not intended to capture. In *Canada (Attorney General) v PHS Community Services*, the SCC found that the purpose of drug laws is to protect public health and safety.<sup>232</sup> Here, the overly-broad definition of trafficking criminalizes social suppliers who legitimately reduce harm for people who use drugs, as argued above, without distinguishing these individuals from more predatory, organized criminals. Overall, criminalizing social suppliers bears no relation to the object of the law – to protect health and safety.

The fact that it may be difficult for police to distinguish social suppliers from predatory commercial traffickers would not likely undermine the argument that the law is unconstitutional under section 7. In *Bedford*, the Attorney General of Canada argued that the line between exploitative pimps and other individuals, such as bodyguards, was unclear and reading down the law might mean exploitative pimps would escape criminal sanction.<sup>233</sup> The SCC rejected this argument, given that it was to be addressed under section 1 (whether the infringement is justified), and found that it was not justified because it was not minimally impairing.<sup>234</sup>

The law captured individuals such as bodyguards and receptionists, and the effect of this was to prevent sex workers from “taking measures that would increase their safety, and possibly save their lives”; this outweighed any positive effect of protecting sex workers from exploitation.<sup>235</sup> Similarly, laws that prevent people who use drugs from taking the necessary steps to

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<sup>229</sup> *Ibid* at paras 139–44.

<sup>230</sup> *Ibid* at paras 139–45.

<sup>231</sup> *R v Anwar*, 2020 ONCJ 103 at para 208.

<sup>232</sup> *Supra* note 218 at para 136.

<sup>233</sup> *Supra* note 226 at para 143.

<sup>234</sup> *Ibid* at paras 162–63.

<sup>235</sup> *Ibid* at paras 143, 162.

decrease their risk of overdose, including engaging in social supply, could be unconstitutional because it outweighs any benefit that could be obtained by possibly allowing some conduct of drug supplying to be excluded from prosecution under drug trafficking (acknowledging that it may remain illegal under the lesser offence of simple possession). Surely, legislators could draft drug trafficking in a less impairing manner.

Nevertheless, further research in the Canadian context may be needed to successfully bring a section 7 case challenging the overbreadth of the definition of drug trafficking. Notably, in *Bedford* and in *PHS*, the Court was presented with considerable evidence on the record and general social science evidence played a key role in these decisions.<sup>236</sup> Legal advocates should also learn from the failed section 7 argument in *United States v Saad* and draft the argument broadly. Advancing a broader framed argument (i.e. beyond ‘giving’) that draws on social science research on the Canadian drug supply situation may reform the law in a way that challenges longstanding misconceptions in the justice system about people who use and supply drugs.

## VI. CONCLUSION

In this paper I have argued that the Canadian approach to social drug trafficking remains inconsistent with social science and fails to account for the perspectives of people who use drugs. As the research has shown, acquiring drugs through social supply can be a form of harm reduction, and many people who use drugs would not categorize social drug suppliers as “real dealers.”<sup>237</sup> The SCC has clearly signalled that social sharing is less culpable than other forms of drug trafficking,<sup>238</sup> and that conduct which “right-minded people” do not constitute as trafficking should not be legally classified as trafficking at all.<sup>239</sup> Yet, people who socially supply drugs continue to face threats of criminalization and sentencing judges have

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<sup>236</sup> See Klein, *supra* note 211 at 462–63. The author cites these cases and their use of empirical social science in *Charter* claims framed around harm reduction. See also *Bedford*, *supra* note 226 at para 15 (“the evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined.”)

<sup>237</sup> See e.g. Hathaway et al, “Social Supply Networks”, *supra* note 14.

<sup>238</sup> See e.g. *Lloyd*, *supra* note 137.

<sup>239</sup> See e.g. *Greyeyes*, *supra* note 133 at para 5.

tended to view other factors, including criminal records and the type of drug, as more significant. Overall, policing and prosecuting people who socially supply drugs under the more serious offence of trafficking undermines the practices of care that people who use and supply drugs engage in to protect one another.<sup>240</sup>

When it comes to drug policy and law, our understanding of right-minded people ought to consider the perspectives of people who use drugs themselves. Given the misconceptions that persist in the justice system of people who use and supply drugs, the experiences of people who use and supply drugs can help inform drug law reform and educate lawyers and judges. While it might not be necessary to create an entirely new offence for social supply, legal advocates challenging misconceptions and stigmatizing views of people who use and supply drugs should consider the following law reform strategies: (1) educate judges and lawyers about the lived experiences of people who use drugs and the phenomenon of social supply; (2) use the language of social supply and minimally commercial supply in sentencing submissions to gradually challenge ideas about drug use and supply; and (3) pursue strategic *Charter* arguments under section 7 against the overly-broad definition of drug trafficking.

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<sup>240</sup> Kolla & Strike, *supra* note 1.