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CALL FOR PAPERS: Closes April 3, 2023
Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 45(4), 45(5), and 45(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

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

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections, and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances

- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

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

- Reflections on Indigenous traditions in evidence law (including possibilities)
- New developments in digital evidence and crimes
- 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
- 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 April 3, 2023. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 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 April 3, 2023 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or David Ireland, at this email address.

THE JOURNAL

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

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The Right to Counsel and the Right to Have Counsel Present

JOHN BURCHILL*

I. INTRODUCTION

> The police are not the guardians of the solicitor-client relationship ... the primary function of the police is to investigate an alleged crime with a view to solving it and obtaining a conviction.
>
> *R v Bain*[1]

> The Charter does not prohibit admissions of guilt. ⋯ Where freely and voluntarily given, an admission of guilt provides reliable tool in the elucidation of crime, thereby furthering the judicial search for the truth and serving the societal interest in repressing crime through the conviction of the guilty. An effective police investigation may therefore include as one of its aims the obtention of a confession from a suspect.
>
> *R v Smith*[2]

On December 3, 2021, the Supreme Court of Canada heard appeals in two different cases. Both involved the right to counsel, in particular the right to counsel during the custodial interview by police.[3] The Court was being asked to consider (or reconsider) the accused's right to silence in the absence of counsel.[4] In both cases the accused was told to say nothing to the police by their lawyer on the phone. Invariably, however, they did provide

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* Member of the Manitoba Bar. JD (Manitoba), LLM (York). Instructor Robson Hall Law School. Portions of this paper were previously presented at the Manitoba Crown Conference and at the Winnipeg Police Homicide Conference. The opinions expressed are those of the author and does not represent legal advice or legal opinion on specific facts or circumstances.

1 *R v Bain*, (1989), 47 CCC (3d) 250 (Ont CA), 45 CRR 193, rev'd [1992] 1 S.C.R. 91 on other grounds.

2 *R v Smith*, [1989] 2 SCR 368, per L'Heureux-Dube concurring at 388-39.

3 *R v LaFrance*, 2021 ABCA 51, now decided *R v LaFrance*, 2022 SCC 32; and *R v Dussault*, 2020 QCCA 746, now decided *R v Dussault*, 2022 SCC 16.

4 See *Canadian Charter of Rights and Freedoms*, s 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

incriminating evidence in their respective trials for murder. In *Dussault*, the lawyer was turned away at the police station when he arrived for a follow-up with his client. In *LaFrance*, the accused was denied the assistance of his father in obtaining legal advice.

In both cases the accused had the benefit of private consultation with their lawyer prior to the police continuing with the interview and eventually obtaining the incriminating comments. In *LaFrance*, counsel for the Intervener before the Supreme Court, the Canadian Civil Liberties Association, suggested in order to level the field between the accused and the police, that the accused's lawyer (presumably once identified by the father) should be present during the interview to provide advice as in similar jurisdictions.

Certainly in the United States a confession is not admissible where there has been a request for counsel to be present. This has generally been the rule since the Supreme Court's 1966 decision of *Miranda v. Arizona* and is best articulated in the Court's 1990 decision of *Minnick v. Mississippi.*

In *Minnick* a majority of the United States Supreme Court held that "police-initiated interrogations [are prohibited] unless the accused has counsel with him at the time of questioning ... when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has [already] consulted with an attorney".[5]

Such a bright-line rule, acknowledged by the majority of the Supreme Court, would also result in "the suppression of trustworthy and highly probative evidence even though the confession might be voluntary." As a result the dissenting justices held that such a "prophylactic rule," which simply excludes all confessions (including the trustworthy and probative), must be assessed not only on the basis of what is gained, but also on the basis of what is lost.

> Police questioning [is] a tool for effective enforcement of criminal laws. Admissions of guilt ... are more than merely desirable; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law.[6]

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5 *Minnick v Mississippi*, 498 US 146 (1990), at 153 (6:2). Souter, J., took no part in the consideration or decision of the case. Also see *Miranda v Arizona*, 384 U.S. 436 (1966).

6 *Ibid* at 161 per Scalia, J and Rehnquist, CJ, dissenting. This oft repeated phrase was originally penned in *Moran v Burbine*, 475 US 412 (1986) at 426.

In 2007 the Supreme Court of Canada followed the general reasoning of the dissent in *Minnick* holding, in a 5:4 decision, that nothing prevents the police from attempting to obtain an admission from a suspect who has previously and repeatedly invoked his right to silence. To hold otherwise overshoots the protection afforded to the individual's freedom of choice both at common law and under the *Charter*. More importantly such a proposition ignores the state interest in the effective investigation of crime.[7]

> What the common law recognizes is the individual's right to *remain* silent. This does not mean, however, that a person has the right *not to be spoken to* by state authorities. The importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime.[8]

In 2010 a majority of the Supreme Court of Canada affirmed that the "Miranda rule" and the right to have counsel present throughout a police interview should not be transplanted in Canadian soil, holding that:

> The scope of s. 10(b) of the Charter must be defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement in the Canadian context. Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures.[9]

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7 See *R v Singh*, 2007 SCC 48, at paras 43, 45 [*Singh*].

8 *Ibid* at para 28. Also see *R v Smith*, [1989] 2 SCR 368, per L'Heureux-Dube concurring at 388-39, where she stated:

A main goal of s. 10(b) ... does not preclude the interrogation of suspects by the police, nor is it inconsistent with the taking by the police of incriminating statements. The Charter does not prohibit admissions of guilt. ... Where freely and voluntarily given, an admission of guilt provides reliable tool in the elucidation of crime, thereby furthering the judicial search for the truth and serving the societal interest in repressing crime through the conviction of the guilty. An effective police investigation may therefore include as one of its aims the obtention of a confession from a suspect.

9 *R v Sinclair*, 2010 SCC 35 at paras 37-38. The case was part of a trilogy of cases released by the Supreme Court, along with *R v Willier*, 2010 SCC 37 and *R v McCrimmon*, 2010 SCC 36. See also *R v Dussault*, 2022 SCC 16 and *R v Alix*, 2010 QCCA 1055, application for leave to appeal dismissed (2010) SCCA No 278, where the accused's statements were admitted notwithstanding the police refused to allow her counsel to be

These cases created some concern within the defence community that the police will now trample on suspect rights, especially those of vulnerable individuals who are either immature or who have language or mental health issues. In addition these decisions will change the manner in which lawyers practice because it gives the police "no disincentive at all from over-reaching and engaging in potentially oppressive tactics."[10]

However, with the courts expecting and even mandating the continuous videotaping of all interviews and interrogations of suspects, such arguments are no longer as substantial as they once might have been. In fact, all of the interviews were audio and video taped, providing the court with an accurate and unbiased account of what transpired in the interview room including the actual words used and the manner in which they were spoken.

In addition, the rules regarding voluntariness still apply and "in some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused' s repeated assertions of the right to silence denied the accused the accused a meaningful choice whether to speak or to remain silent." One example cited by the Court in both *Singh* and *Sinclair* was *R. v. Otis*, where four times was too many for an individual with an intellectual disability.[11]

Although some commentators had been suggesting prior to the Court's decision in *Singh* that the police were actually losing their right to question suspects in the absence of their lawyer (if they could at all) once they had invoked their right to silence, the case law was actually "going the other way"

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present during interrogation and not suspending questioning when she asked to contact counsel again after already being afforded that opportunity.

10 See Helen Burnett, "Decision Creates Concern – Police Can Speak to those Asserting Right to Silence" (2007) 18:36 Law Times at 1-2.

11 *R v Otis*, *infra,* note 73. Cited by Justice Charron in *Singh*, *supra* note 7 at para 50-51. However, see *R v Cleveland*, 2019 MBQB 28, where the accused's assertion of his right to counsel up to 110 times was not sufficient in and of itself to rule the statement involuntary. However, it was the cumulative effect of a hypothetical scenario, undermining his counsel's knowledge of his situation, and whether he may or may not be charged and released, that tipped the scales in ultimately excluding the statement as involuntary. It was disingenuous of the Canadian Civil Liberties Association to suggest it was only the assertion of the right to counsel 110 times that resulted in the statement being ruled inadmissible.

and defence lawyers should have been better prepared for the decision in this case.[12]

In fact, the courts in Canada want to hear trustworthy and highly probative evidence, especially when it is a voluntary confession. As noted by the majority in *Singh* "the suspect may be the best source of information and it is in society's interest to tap into this source."[13]

In this article, I will attempted to canvass a number of court decisions dealing with the constitutional right to remain silent leading up to the Court's decisions in *Singh*, *Sinclair*, *Willier*, *McCrimmon*, and its eventual rulings this year, 2022, in *Dussault* and *LaFrance* that, subject to exceptional circumstances, excluding counsel from actually being present during the interview process, either as a silent witness or as a "coach" is not unconstitutional.

Furthermore, while the Canadian Civil Liberties Association (CCLA) has suggested that the accused's lawyer should be present during the interview to provide advice as in similar jurisdictions, one must be careful in "adopting procedural protections from other jurisdictions in a piecemeal fashion that risk upsetting the balance that has been struck by Canadian courts and legislatures."

In fact, while the United Kingdom's *Police and Criminal Evidence Act 1984*, s. 58,[14] and *Code C, Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers*, s. 3.21A(b)(i),[15] provides for a solicitor to be present during a suspect's voluntary interview, the *Criminal Justice and Public Order Act 1994*, at s. 34 allows for adverse inferences to be

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12 See e.g. Kelly Enright, "The Right to Silence During Police Interrogation: No is Starting to Mean No" (2004) 25:3 For the Defence: Criminal Lawyers' Association at 21-25. See also Benissa Yau "Making the Right to Choose to Remain Silent a Meaningful One" (2006) 38 CR (6th) 226.

13 *Singh*, *supra* note 7 at para. 45. Also see *R v B(KG)*, [1993] 1 SCR 740, in which Mr. Justice Cory stated "a trial must always be a quest to discover the truth. Irrational and unreasonable obstacles to the admission of evidence should not impede that quest. In order to reach a true verdict, a court must be able to consider all the relevant admissible evidence."

14 *Police and Criminal Evidence Act 1984* (UK), s 58.

15 *Police and Criminal Evidence Act 1984* (UK), Code C, Revised, Code of Practice for the detention, treatment and questioning of persons by Police Officers, s 3.21A(b)(i) [Code C], online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf> [perma.cc/8HLP-44LF].

drawn in circumstances for a failure to mention facts later relied on at trial.[16] Furthermore, the solicitor may be required to leave the interview if their conduct is such that the interviewer is unable properly to put questions to the suspect.[17]

In addition, the police may forego having the solicitor present where there are reasonable grounds for believing that it, or a delay in their arrival, will

- lead to interference with, or harm to, evidence connected with an offence;
- lead to interference with, or physical harm to, other people;
- lead to serious loss of, or damage to, property;
- lead to alerting other people suspected of having committed an offence but not yet arrested for it;
- hinder the recovery of property obtained in consequence of the commission of an offence.

However, the adverse onus provisions of the statute will no longer apply.[18]

As the Supreme Court of Canada has consistently held that, as a general rule of law, no independent weight is to be attached to the silence of the accused at trial as it violates both the right to silence and the presumption of innocence, simply adopting the UK model displaces a different set of Charter protections.[19]

Nevertheless, the majority of the Supreme Court in *LaFrance* said it was inaccurate to describe the request as having "a lawyer be present with him during the interview," disposing of the appeal on the grounds that a second contact with legal counsel was required in light of the accused's "vulnerabilities." These included his age (19), minority status (Indigenous), and level of sophistication, aggravated by the overwhelming power imbalance and history of discrimination between the state and the accused, possibly rendering his initial legal advice inadequate and impairing his

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16 *Criminal Justice and Public Order Act 1994* (UK), s 34.

17 Code C, *supra* note 15, s 6.9.

18 *Ibid* s 6.6; Annex B(A)(1).

19 See *R v Noble*, [1997] 1 SCR 874, 146 DLR (4th) 385. See also *R v Bhander*, 2012 BCCA 441, where the Court declined to apply a similar practice to that in the UK (the Rome Statute) as never been replicated in Canadian law, or applied in Canadian jurisprudence on investigative procedures.

ability to make an informed choice whether to cooperate with the police. As such, he was entitled to an additional consultation with counsel.[20]

On the other hand, the four dissenting Justices held there was no ongoing right to legal assistance during the interview and that "s. 10(b) is [not] intended to shield the detainee from legitimate interrogation by police." They felt consultation with legal counsel had been properly implemented by the police and Mr. LaFrance was not entitled in law to a further consultation with a lawyer (on the phone or otherwise).[21]

Therefore, the CCLA suggestion to adopt procedural protections from another jurisdiction that would require the accused's lawyer to be with him in the interview room was never considered by either the majority or the dissent. As such, I will canvass the law as it has stood for many years in Canada without the need to resort to the piecemeal (mis-)application of laws from other jurisdictions.

II. Adults Have No Right to Counsel in the Interview Room

Once an adult has been arrested and received advice from counsel the police can begin questioning them. Generally, there is no right for an adult suspect to have counsel present before questioning can take place.

While an adult has no right to have his lawyer present during a police interview, by virtue of s. 146(1) of the *Youth Criminal Justice Act* (YCJA)[22] or s. 56 of its predecessor, the *Young Offender's Act* (YOA),[23] a youth does have the right (if they choose) to have both an adult relative and a lawyer present during such interviews.

The police are entitled to tell an adult suspect that they will not accept counsel being present as a condition of the interview. The suspect must decide for themselves whether to speak to the police or not. Of course some police investigators may actually encourage counsel's presence when they

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20 *LaFrance*, *supra* note 3 at paras 79, 83.

21 *Ibid* para 169.

22 *Youth Criminal Justice Act*, SC 2002, c 1, s 146(1) [YCJA].

23 *Young Offenders Act*, RSC 1985, c Y-1, s. 56 [YOA].

believe it might assist in their investigation. Nevertheless they are not there as the accused's bargaining agent. [24]

Nevertheless, the police must be careful to ensure that their actions cannot be interpreted as an interference with the right to remain silent. If the accused repeatedly asserts his right to remain silent, continued questioning may render the statement involuntary.

As noted by Justice Fish, for the Quebec Court of Appeal in *R. v. Timm*: "detention until confession is an unacceptable form of persuasion."[25]

A. Right to Counsel

The right to retain and instruct counsel prior to the *Charter* was previously enshrined in s. 2(c) of the Canadian *Bill of Rights* (1960). Even under that legislation the police could and did question an accused person without counsel being present. This is no more evident than the decision of the Saskatchewan Court of Appeal in *R. v. Settee*:

> In the present case, Mr. Agnew, counsel for the accused who was first called, told the police officers not to question the accused unless he was present. Such direction, in my view, was not one which the police officers were required to follow. While counsel had every right to advise the accused to give no statement to the police, and while the accused had every right to follow that advice, counsel could not prevent the police officers from following the investigation of the alleged offence, including proper interrogation of the accused.[26]

Although an opposite view was taken by Justice DuPont in *R. v. Greig* after passing the *Charter*,[27] that where an accused has retained counsel no further interrogation can take place without reasonable notice to counsel. Failure to do so constituted an infringement of the accused's rights under ss. 7 and 10(b) of the *Charter*. However, most courts of appeal have held that the decision in *Greig* was wrong, especially after the decision of the Supreme Court of Canada in *R. v. Hebert* where the Court stated:

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24 See *R v Richard (DR) et al.*, 2013 MBCA 105, at para 54. Leave to appeal dismissed September 4, 2014. Docket: 35705. Also see *R. v. Ekman*, *infra* note 56 that counsel is not "entitled to interject or interrupt during the interview or to override or 'assist' with answers offered by the client."

25 *R v Timm*, (1998), 131 CCC (3d) 306 (Que CA) [*Timm*], aff'd [1999] 3 SCR 366. Although in dissent, Fish's comments were subsequently adopted by a unanimous Court of Appeal in *R v Otis* (2000), *infra* note 73. See also *R v Papadopoulos*, 2006 CanLII 49050 (ON SC) at para 116-120.

26 *R v Settee* (1974), 22 CCC (2d) 193 (Sask CA), at p 205, 3 WWR 177.

27 *R v Greig* (1987), 33 CCC (3d) 40 (Ont SC).

> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
>
> ...
>
> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is the right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtain appropriate advice with respect to the choice he faces.
>
> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.[28]

Indeed, even before the decision in *Hebert*, several justices of the Manitoba Court of Appeal felt that DuPont "went too far" and that they "harbour[ed] doubt as to [the] soundness" of his decision.[29] Even the Newfoundland Court of Appeal in *R. v. Cuff* dismissed DuPont's comments in *Greig* a year before the decision in *Hebert*, stating that:

> [O]nce counsel has been retained and instructed there is no reason why the police should not question the suspect. It is part of the process of criminal investigation ...Where a person has been arrested and advised of his right to retain and instruct counsel and has either waived that right or has retained and instructed counsel, he may be questioned by the police in the absence of counsel.[30]

Nevertheless there were recent attempts by the courts in Manitoba to change this position subtly and without reference to the decision in *Creig*. For example, in *R. v. Guimond*, Justice Oliphant concluded that:

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[28] *R v Hebert*, [1990] 2 SCR 151 at 181-186 [emphasis added], 47 BCLR (2d) 1.

[29] See e.g. *R v FJC*, (1987), 46 Man. R. (2d) 92; *R v J(JT)*, (1988), 40 CCC (3d) 97, 50 Man R (2d) 300 (MB CA).

[30] *R v Cuff* (1989) 49 CCC (3d) 65 (Nfld CA) at p 72-73.

> [...] [T]he right to silence and the right to counsel are equal rights. If the police must stop questioning a suspect when he or she asserts the right to counsel, it follows, I think, that they must also stop questioning the suspect when the right to silence is asserted by him or her.
>
> ...
>
> It seems to me that once the police are told by the suspect that he or she wishes to remain silent, the questioning by police must also stop. Otherwise, the suspect will likely feel that his or her right to silence is of no effect and may feel compelled to speak to the police despite the suspect's having made a meaningful choice to the contrary.[31]

However, as noted by Professor Lee Stuesser, this argument is without any legal foundation and "with respect, Justice Oliphant may be outlining what he wished the law to be. This, however, is not the law."[32]

Oliphant had relied on the decision of Justice Quijano in *R. v. Olson* and the Supreme Court decision in *R. v. Manninen*. However, Stuesser stated his reliance was "misplaced" and that "there was no detailed analysis other than using *Manninen* by way of analogy, but it is a false analogy."[33]

While it is true that Justice Lamer (as he then was) in *R. v. Manninen* stated, "where a detainee has positively asserted his desire to exercise his right to counsel and the police have ignored his request and proceeded to question him, he is likely to feel that his right has no effect and he must answer," the issue in that case was not that the police should cease questioning the accused once he has indicated his desire not to speak to them, but rather the duty on the police not to question him further once he has stated he wishes to retain counsel. [34]

Not only were these comments out of step with the decision in *Hebert* ("there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent ...

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31 *R v Guimond*, [1999] MJ No 214 at para 40-44 [emphasis added], 137 Man R (2d) 132 (MBQB). Also see *R v McKay* 2003 MBQB 141 at para 99; *R v Flett and Thomas*, 2004 MBQB 143 (although Schulman, J. did not rely on this paragraph specifically he quoted other excerpts from the decision in *Guimond*); *R v Reader*, 2007 MBQB 136.

32 Lee Steusser, "The Accused's Right to Silence: No Doesn't Mean No" (2004) Man LJ 29:2 150 at 158 [emphasis added]. See also *R v FJP*, 2002 BCSC 106 in which the accused unsuccessfully attempted to argue that the police had to refrain from interrogating the accused after he had retained counsel and after he had specifically told them that he was advised by his lawyer not to speak to them.

33 *Ibid.*

34 *R v Manninen*, [1987] 1 SCR 1233 at para 25, 41 DLR (4th) 301.

Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence"),[35] it was out of step with most appellate courts across Canada.

In fact, most appellate court decisions supported the proposition that the police are free to question an accused person, notwithstanding their right to silence and in the absence of counsel, so long as the accused has been informed of the following:

(1) His or her right to retain and instruct counsel; and

(2) The available free services of duty counsel and Legal Aid before being expected to assert the right; and

(3) The accused has been given a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and

(4) As long as the police refrain from eliciting evidence from the accused until the accused has had a reasonable opportunity to retain and instruct counsel.[36]

This statement of the law was re-affirmed by the Saskatchewan Court of Appeal in *R. v. MacKay* when deciding whether an accused's *Charter* rights had been violated when the police questioned him outside the presence of his lawyer:

> The appellant had had an opportunity to speak to duty counsel after his first warning. The investigator then carried on with the interrogation of the appellant, understanding that there was a possibility that there might be a further call by counsel to speak to the appellant ... As counsel for the Crown correctly pointed out the right to counsel need not necessarily precede every encounter with the police; the true question is whether the accused has been advised of his rights and particularly the right to silence. It is clear from the course of the interrogation that when the examination resumed the appellant was aware of his right to remain silent and said that he would make no comment until a lawyer was present.[37]

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35 *Hebert*, *supra* note 28 at 181.

36 See e.g. the elements of the right to counsel summarized in *R v Loung*, 2000 ABCA 301 at para 12.

37 *R v MacKay*, 2004 SKCA 24, at para. 20-21. Application for leave to appeal to the SCC granted on April 21, 2005, but not on this point (appeal dismissed 2005 SCC 75). See also *R v Weeseekase*, 2007 SKCA 115; *R v Edmondson*, 2005 SKCA 51, where the accused brought up his lawyer's advice not to speak, but the officer encouraged him to continue with the interview, noting that the lawyer was not the one being charged and that he needed to decide for himself whether or not to speak. The Saskatchewan Court of Appeal held that the subsequent confession admissible as "it cannot be said that the officer's remarks served to effectively or unfairly deprive the accused of his right to

However, it is also clear that the police must not employ tactics denying the accused the right of choice or of depriving the accused of an operating mind. For example, in *R. v. Playford*, the Court held that where police officers were in full view of and close to the accused and overheard parts of his telephone conversations (even with the lawyer's secretary), will substantially prejudice the accused in making use of his right to retain and instruct counsel in private.[38]

B. Persuading the Accused to Give a Statement

> Bringing about a guilty suspect to admit guilt in a statement is not in itself an improper activity. It is only to be repressed if it is done in a way that offends our basic values, that is in a manner which would be contrary to the rules of law we have developed for their protection and furtherance. Our criminal justice system has vested the Courts with two responsibilities: the protection of the innocent against conviction; and the protection of the system itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society. These concerns have brought about the elaboration by Judges and Legislatures of procedural and evidentiary safeguards.[39]

While the police must be careful to ensure that their actions, following a decision to exclude counsel from the interview room, cannot be interpreted as an interference with the right to remain silent, they are entitled to use any "legitimate means of persuasion to encourage the suspect to [give a statement]."[40]

In fact, in *R. v. Oickle* the Supreme Court of Canada stressed that few criminals confess to serious crimes without some persuasion. The courts are much more receptive to police interview techniques than lawyers might imagine, particularly where the interview process has been videotaped. As noted by Justice Iacobucci, in discussing the application of the modern confessions rule:

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choose to remain silent. The officer employed legitimate techniques of persuasion, repeatedly telling the accused it was up to him to decide whether to disclose or not disclose what had happened" at para 43.

38 *R v Playford* (1987), 40 CCC (3d) 142, 3 WCB (2d) 301 (Ont CA). However, see *R v Coaster*, 2014 MBCA 108, at para. 33 that "s. 10(b) of the Charter is infringed when the detainee has a reasonable belief that he or she cannot speak to counsel in private, unless it can be shown that the detainee was, in fact, able to speak to counsel in private".

39 Rene J Martin, *Admissibility of Statements*, 9th ed binder/looseleaf (Toronto: Thompson Reuters, 2022) at p 7-7.

40 *Hebert*, *supra* 28 at 186. Approved by the majority in *Sinclair*, *supra* note 9 at para 25.

> [The] courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interest to confess. This becomes improper only when the inducements, whether standing alone or in combination with other facts, are strong enough to raise a reasonable doubt about whether the will of a subject has been overborne. On this point, I found the following passage from *R v. Rennie* (1981) 74 Cr. App. R. 207 (C.A.) at page 212, particularly apt:
>
> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases, the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case, the confession will not have been obtained by anything said or done by a person in authority. More commonly, the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.[41]

Justice Iacobucci then went on to deal with the relevance of oppression to the confessions rule. The factors that he identified which might create an atmosphere of oppression, that is, depriving a suspect of food, clothing, water, sleep or medical attention, the denial of access to counsel, being excessively aggressive or intimidating over a prolonged period of time, or a police use of non-existent evidence in confronting a suspect. He subsequently goes on to adopt Justice Lamer's comment in *R v. Rothman* that "what should be repressed vigorously is conduct on their [the police] part that shocks the community."[42]

In *R. v. Paternak* the Alberta Court of Appeal further illustrated the increasingly sympathetic trend of the courts to police interview techniques. In this case the court held that police persuasion, including the use of subtle and sophisticated ploys, is not enough to render a statement involuntary so long as the accused has been informed of his right to counsel and has been afforded the opportunity to exercise that right. As noted by Justice Kerans:

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41 *R v Oickle*, 2000 SCC 38 at para. 57 [emphasis added].

42 *R v Rothman*, [1981] 1 SCR 640 at 697, 121 DLR (3d) 578.

> For an otherwise healthy and mature human to be deprived of an "effective choice" (as to whether or not to talk) the police influence must be so overbearing that it can be said that the subject has lost any meaningful independent ability to choose to remain silent, and has become a mere tool in the hands of the police.[43]

Justice Kerans continued that while an accused's effective choice whether or not to give a statement to the police can be influenced through torture, brainwashing, or by totalling breaking the individual, Justice Kerans states:

> [A]ll human communication usually does involve a degree of influence ... and the opinion of the hearer can be influenced in many ways, sometimes very subtly, by what the speaker says or does. Moreover, in my view, the Supreme Court did not intend to forbid an agent of the state even to attempt to influence the detainee to speak. On the contrary, if that were the rule, one may as well forbid the admission of any statements by detainees because the mere facts of detention and interrogation can influence one to speak. In other words, if there is to be absolutely no influence, there must be no communication. Similarly, I cannot accept the suggestion, implicit in the position of the defence, that the rule permits the police to interrogate, but not to interrogate effectively or with sophistication.[44]

In *R. v. Timm*, a majority of the Quebec Court of Appeal also found that police persuasion which does not deprive the suspect of his right to decide to speak or not does not contravene his right to remain silent and, therefore, that nothing prevents the police from obtaining a confession from a suspect who previously invoked his right to remain silent, provided no reprehensible means were used to obtain them.[45]

On November 1, 2007, in *Singh*, the Supreme Court confirmed that nothing prevents the police from obtaining admissions from a suspect who has previously invoked his right to silence:

> [To hold otherwise] would overshoot the protection afforded to the individual's freedom of choice both at common law and under the *Charter*. More importantly, this approach [respects] the state interest in the effective investigation of crime. The critical balancing of state and individual interests lies at the heart of this

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43 *R v Paternak*, 1995 ABCA 356 at para 27. Rev'd on other grounds, [1996] 3 SCR 607, 2 CR (5th) 119.

44 *Ibid* at 28.

45 *Timm*, *supra* note 25, per Proulx, J.A. In this case the accused was held in custody for 40-hours, during which he was repeatedly interrogated. Although the accused did not say anything incriminating, the accused argued that his right to silence was nevertheless undermined by the length and conditions of his detention. However, see *R v Auclair* (2004), 183 CCC (3d) 273 (QC CA) where an interrogation occurring almost 24-hours after arrival in the police station created an atmosphere of intimidation.

> Court's decision in *Hebert* and in subsequent s. 7 decisions. There is no reason to depart from these established principles.[46]

In *R. v. Borkowsky* the Manitoba Court of Appeal was one of the first appellate courts to consider the decision in *Singh*. In this case the accused, who had been appropriately cautioned on two separate occasions and who had spoken with his lawyer, declined to make a statement or speak with the police on the advice of counsel. However, against the objections of the accused, who raised on nine occasions the advice he had received from his lawyer, the interviewing officer continued to speak with the accused until he began discussing the allegations of the offence.

It was argued that the officer had skilfully engaged the accused in a conversation about irrelevant matters, intermingled with relevant issues, thereby effectively overcoming his right to remain silent. However, the Court of Appeal affirmed the trial judge's ruling that the questioning was not oppressive and that "the police are permitted to endeavour to persuade an accused or suspect to break his or her assertion of the right to silence by legitimate means."[47]

C. Is Refusing Defence Counsel the Right to Sit in the Interview Room Reprehensible?

Does influencing an adult accused to speak after he has consulted with legal counsel and asserted his right to counsel breach his right to silence if he is denied the opportunity to have his counsel present during the interview?

Historically, because of concerns surrounding the "sinister" interrogation practices of the police such as their use of oppressive tactics, force, or the "third degree" when their lawyers or other witnesses were absent, at least one author suggests that "counsel's presence at interrogation could serve as a substantial guard against such practices."[48]

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46 *Singh*, *supra* note 7.

47 *R v Borkowsky*, 2008 MBCA 2 at para 46-48.

48 See Charles Donahue Jr, "An Historical Argument for the Right to Counsel During Police Interrogation" (1964)73 Yale LJ 1000 at 1044. The term "third degree" is "an overarching term that refers to a variety of coercive interrogation strategies, ranging from psychological duress such a prolonged confinement to extreme physical violence and torture." See Richard Leo, "The Third Degree and the Origins of Psychological Interrogation" in editor, G Daniel Lassiter, *Interrogations, Confessions and Entrapment*, (New York: Springer Publications, 2004) 37.

However, with the courts now expecting and even mandating the continuous videotaping of all interviews and interrogations of suspects, such arguments are no longer as substantial as they once were.[49]

For example, in *R. v. Therrien*, the accused, a francophone, was arrested in connection with a double murder. He was read his rights in French and English and informed he could contact counsel anywhere he chose. He consulted with a legal aid lawyer in Vancouver by phone who told him not to say anything. He was subsequently interviewed by the police in English for more than five hours, during which he confessed to the murders. A *voir dire* was held to determine whether the statements were voluntary, and a videotape of the interview revealed that the accused freely chose to speak and was comfortable proceeding in English. Nothing in the police conduct went beyond permissible persuasion or created an atmosphere of oppression and the statement was held voluntary.[50]

Generally, once an adult accused has received advice from counsel the police can begin questioning. The accused has no right to have the lawyer physically present during the interview and the police are entitled to tell the accused that they will not accept a condition that counsel be present for the interview, nor are they required to let them consult with counsel repeatedly unless his jeopardy changes.[51] This is elaborated upon in *R. v. Friesen*:

> [Any] firm rule of law ... that the police would violate the Charter if they ever did anything under any circumstances which by any means to any degree dissuaded a detained accused from again speaking to a lawyer or from answering questions without a lawyer present ... [is too] broad and rigid [and] would do much more harm than good.
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> ...
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> The law does not exclude all statements to the police; a suspect has a choice in the matter. We should not (and cannot) change the law of Canada so as to forbid the police to talk to a detained suspect unless defence counsel sits in and rules on each

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49 See John Burchill and Elizabeth Patts "Video Interrogation: Losing the Evidence ~ A Comprehensive Look at the Legal Use of Video Statements in Canada" (2003) reprinted in (2005) 16:2 IALEIA J. Also see *R v Nikolovski*, [1996] 3 SCR 1197, in which the Supreme Court pointed out the benefits of the video camera – "it records accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all it observed ... [it] can provide the most cogent evidence not only of the actual words used but in the manner in which they were spoken" at para 21.

50 *R v Therrien*, 2006 BCSC 1739.

51 *Ibid* at 53.

question. Given that, I cannot see how an accused could be in a better position to decide whether to talk to the police than this accused was.[52]

This fact was further articulated by Justice Rosenberg in *R. v. Mayo*:

[A]s the law now stands, the Charter does not guarantee an adult offender the right to have a lawyer present during questioning. McLauchlin J. made that clear in *R. v. Hebert*, in the following excerpt from her summary of the right to silence rule:

> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.

Since the appellant did not have the right to have counsel present during the questioning, the officer was not obliged to cease questioning the appellant in the face of such a request. Accordingly, the appellant's rights were not infringed merely because the officer continued to question the appellant.[53]

The Court in *Mayo* expressly contrasted the situation with s. 56(2) of the *Young Offenders Act* (now s. 146(1) of the *Youth Criminal Justice Act*) which provided, in part, that a young person has not only the right to consult with counsel, but also that they be given a reasonable opportunity to make the statement in the presence of that person. Implicit in this comparison is that Parliament, if they had so chosen, could have granted the same right to adults – but they did not. Other acts have similar conditions.[54]

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52 *R v Friesen*, 1995 ABCA 320. at 179-182 [emphasis added]. Leave to appeal to SCC denied [1996] 2 SCR vi. See also *R v Wood*, 1994 NSCA 239 , leave to appeal to SCC denied (1995); *R v Roper* (1997), 32 OR (3d) 204 (Ont CA); *R v Ekman*, 2000 BCCA 414, leave to appeal to SCC denied (2001); *R v Gormley* (1999), 140 CCC (3d) 110 (PE SCAD); *R. v Legato* (2002), 172 CCC (3d) 415 (Que CA); *R v Plata* (1999), 136 CCC (3d) 436 (Que CA); *R v Delmore*, 2005 NWTSC 53.

53 *R v Mayo* (1999) 133 CCC (3d) 168 (Ont CA) at 175-76 [emphasis added]. Also see *R v Wells* (2001), 139 OAC 356 (Ont CA), in which *Mayo* was cited with approval at para 37. See also *R c Racine*, [2003] JQ no 7751 (Que SC).

54 See e.g. s 24(1)(k) of the *Workplace Safety and Health Act*, CCSM c W210, which provides that any person interviewed may nominate another person to be present during that interview (i.e. legal counsel). Also consider s. 2(d) of the *Rome Statute of the International Criminal Court*, Article 55, which provides that a person being question has the following rights ... "to be questioned in the presence of counsel unless the person has

It was also clearly articulated by the B.C. Court of Appeal in *R. v. Ekman* when they were called upon to address the appropriateness of a police officer's comment to an accused that "in Canada, a lawyer doesn't have a right to be present when someone is questioned by the Police, okay. They have a right to give you advice on whether or not to speak to the Police."

In this case, the accused had already consulted with counsel, but on the advice of counsel, the accused requested that he be present when interviewed. The police denied the request as it was up to the accused, not his counsel, whether he spoke with them. The accused subsequently confessed to murder.

In upholding the confession, the Court of Appeal rejected the "American sense of a right to the assistance of counsel apparently on a continuing basis,"[55] stating that:

> Whilst an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, after consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing a suspect (again within reasonable limits), nor bound to advise counsel they intend to question the detainee.
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> In my view ... The officer's statements were correct: a lawyer cannot insist on being present when the police question an accused who has obtained counsel; and the cases discussed above do not support the proposition that if counsel were in attendance, he or she would be entitled to interject or interrupt during the interview or to override or "assist" with answers offered by the client. Sergeant Adam's statements that a lawyer may advise an accused on whether or not to speak to the police, and that the decision was up to Mr. Ekman, were also correct - despite Mr. Orris's suggestion, equally correct, that a lawyer can provide advice on many issues and any decision must be a properly informed one. [56]

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voluntarily waived his or her right to counsel." Although Canada is a signatory to the Rome Statute (signed Dec. 18, 1998 - ratified July 7, 2000) and created the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, as a result, Parliament did not provide for a right to the presence of counsel for such a prosecution. Again, if they had so chosen, Parliament could have granted this right as they have in the UK – but they did not.

55 The Court quoted this passage from *R v Logan* (1988). 46 CCC (3d) 354(Ont CA) at 380-1.

56 *R v Ekman*, 2000 BCCA 414 at para. 26-28 [emphasis added]. Leave to appeal SCC dismissed Feb. 22, 2001 (80 C.R.R. (2d) 186). *Ekman* was followed in *R v Lisi*, 2001 BCCA 514, a case in which the accused had already spoken with a lawyer, indicated that he understood the charge and knew what he was doing, and what he wanted was for everyone (himself, the lawyer and the police) to sit down and go over everything. This was not a request to speak to counsel again, but rather a request for the lawyer to

The issue arose again before the B.C. Court of Appeal in *R. v. Osmand*. However, Justice Donald, speaking for a unanimous Court, stated that he "would not embark upon a determination of the asserted right to the presence of counsel under custodial interrogation [because] the declaration of such a right would reverse clear authority to the contrary: see, for example, *R. v. Ekman*, and would have to be considered by a five-member division of the Court."[57]

The American cases regarding the "right to the assistance of counsel apparently on a continuing basis" is best articulated in *Minnick v. Mississippi*. In that case a majority of the United States Supreme Court held that "police-initiated interrogations [are prohibited] unless the accused has counsel with him at the time of questioning … when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has [already] consulted with an attorney."[58]

However, the reasoning of the majority is not persuasive and it is the dissenting opinion of Justice Scalia, concurred with by Chief Justice Rehnquist, that is perhaps more consistent with Canadian jurisprudence.

While the majority claims the rule ensures that statements are not the result of coercive pressures, such a rule also makes it easier on the Court by "conserve[ing] judicial resources which would otherwise be expended in making difficult determinations." Unfortunately such a bright-line rule (acknowledged by the majority), will also result in "the suppression of trustworthy and highly probative evidence even though the confession might be voluntary."[59]

Justice Scalia, on the other hand, found that such a "prophylactic rule" which simply excludes all confessions (including the trustworthy and probative) from persons in police custody must be assessed not only on the basis of what is gained, but also on the basis of what is lost:

> Police questioning [is] a tool for effective enforcement of criminal laws. Admissions of guilt … are more than merely desirable; they are essential to society's

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come to down to the police detachment and be present during the investigation. The Court held that since the accused was not entitled to have counsel present during the questioning, the police were not obliged to cease their questioning in face of such a request.

57 *R v Osmond*, 2007 BCCA 470 at para 6.

58 *Minnick v Mississippi*, *supra* note 5 at 153.

59 *Ibid.*

> compelling interest in finding, convicting and punishing those who violate the law.[60]

More recently, in *R. v. Bhander,* the accused argued that in addition to United States jurisprudence, the *International Covenant on Civil and Political Rights*,[61] and the *Rome Statute of the International Criminal Court*,[62] should also apply in Canada. Specifically, the *Rome Statute*, which expressly provides for counsel during interrogations. However, the Court of Appeal stated, the *Rome Statute* has never been replicated in Canadian law, or applied in Canadian jurisprudence on investigative procedures. Whatever the animating reasons for that provision in the context of the International Criminal Court, the Court stated, "Canadian law measures the admissibility of a confession on the standard of voluntariness and of a willing mind of an individual who has had the opportunities to be informed of his rights." Applying the majority decision in *Sinclair,* the Court of Appeal affirmed that "adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures."[63]

In *R. v. Roper*,[64] the accused was informed of his right to counsel and taken to the police station. During that time, he made three statements and asked for more information about the allegations against him. At the end of the third statement the accused asserted his right to counsel and gave the police the name of his lawyer. The lawyer subsequently spoke to the accused on the telephone for approximately two minutes. The lawyer advised the appellant of his right to silence and urged the appellant to exercise that right. The lawyer advised the police officer that the appellant intended to exercise his right to silence. The police officer gave no assurance that the investigation, including questioning of the appellant, would not continue.

The officer subsequently resumed his investigation and about two hours later re-entered the interview room. The accused stated, "I just better speak to my lawyer" at which time the officer replied "there are two sides to every

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60 *Ibid* at 161.

61 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9-14.

62 *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF 183/9, 37 LLM 999, art 55.

63 *R v Bhander,* 2012 BCCA 441, application for leave to appeal dismissed without costs May 9, 2013. Docket: 25237 (SCC) at para 52.

64 *R v Roper* (1997), 32 OR (3d) 204 (Ont CA), 33 WCB (2d) 423 [*Roper*].

story and we would like to hear yours." Although not literally denying the accused access to counsel, the effect was the same and the accused ultimately confessed.

In addition, at some point while this interview was being conducted, the lawyer called the police station and asked to speak to the accused. He was told that it was impossible as the accused was being interviewed. About two hours later the appellant made several further comments that were not sparked by any questioning other than some small talk by the officer. The comments made by the accused were subsequently admitted at trial and on review the Court of Appeal found that the accused

> [...] [H]ad been fully advised of his rights by the lawyer, that he had been given an adequate opportunity to consult counsel at that time and that accordingly, there had been no initial violation of his right to counsel. In addition, as found by the trial judge, there was no change in circumstances thereafter that required the police to cease questioning of the appellant until he had a further opportunity to consult with counsel. Accordingly, there was no subsequent violation of s. 10(b) of the *Charter of Rights and Freedoms*. Even if there was a violation there is much to be said for the Crown's submission in its factum that the admission of these statements would not bring the administration of justice into disrepute in view of the appellant's continuing desire to talk to the police notwithstanding the advice he had been given, in strong terms, by his lawyer.[65]

Unlike the case in *Roper,* where the police did not acknowledge the lawyers request to not interview his client, in *R. v. Kerr* counsel told the investigating officer "I don't want you interviewing my client unless I'm there." To this the constable replied that he would not be interviewing the accused. After the accused's lawyer left, the same officer asked the accused if he would submit to a breathalyser test in his lawyer's absence, to which request the accused agreed. The Court held that the actions of the police did not breach the accused's right to fair treatment under s. 7 of the *Charter*. In arriving at that conclusion, the Court referred to *R. v. Hebert,* where the Court stated:

> The right to silence conferred by s. 7 reflects these values. The suspect, although placed in the superior power of the state upon detention, retains the right to choose whether or not he will make a statement to the police. To this end, the *Charter* requires that the suspect be informed of his or her right to counsel and be permitted to consult counsel without delay. If the suspect chooses to make a statement, the suspect may do so. But if the suspect chooses not to, the state is not

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65 *Ibid* at 209.

> entitled to use its superior power to override the suspect's will and negate his or her choice.[66]

However, where the police have afforded the accused the opportunity to speak with counsel, they cannot later prevent the lawyer from continuing to speak with his client in private simply because he left the room to make a phone call. As noted by Justice O'Connor in *R. v. Hunter*:

> The police provided Mr. Hunter with his right to counsel on three occasions, the first two by facilitating telephone calls to duty counsel. That may well have been sufficient to meet their obligations to him under the Charter. They may not have violated his s. 10(b) rights if they had refused him access to Mr. Sakran. Once the police have fulfilled their obligation under s. 10(b), they need not necessarily do so a second time ... However, in this case the police acceded to Mr. Hunter's request that he see Mr. Sakran. They provided a private room for the interview. They obviously did not take the position their right to counsel obligations had been fulfilled.
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> ...
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> [Mr. Sakran] asked, and was granted permission to use a telephone to make some calls, to whom, and about what we are not aware. When he completed the calls, he and his client simply wished to continue the consultation process ... [However, by preventing him from returning to the interview room] the police action denied Mr. Hunter the opportunity to receive advice as to his options. The denial by the police of Mr. Hunter's right to consult with counsel in private violated his s. 10(b) Charter rights.[67]

As noted above, the police should be careful in the methods they use when excluding the lawyer from the interview room. Threats, use of force and/or trickery to get counsel out of the interview room may interfere with the accused's right to consult with counsel. For example, in *R v Burlingham* the Supreme Court concluded that the accused's right to counsel was violated when the police belittled his lawyer.[68]

D. Can the Accused Stop and Delay the Interview by Requesting Counsel's Presence?

As noted above, where there is no change in circumstances the police are not required to cease questioning the accused until he has had a further opportunity to consult with counsel unless there is an indication that he

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66 *R v Kerr*, 2000 BCCA 209 at para 17.

67 *R v Hunter* (2004), 116 CRR (2d) 170 (Ont SC) at p 178-79 [emphasis added].

68 *R v Burlingham* [1995] 2 SCR 206, 124 DLR (4th) 7. See also *Dussault*, *supra* note 3; *Cleveland*, *supra* note 11.

did not understand his rights or that the lawyer advised him they should speak in person.

However, where the accused is informed of his right to counsel but declines to call his lawyer in the evening, indicating his desire to remain silent during questioning until he sees his lawyer in the morning, any statements he makes "off the record" are subsequently admissible where the accused has failed to be reasonable diligent in the exercise of his rights. As noted by the Supreme Court in *R. v. Smith*:

> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in *R. v. Manninen*, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.
>
> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks.[69]

Furthermore, while an accused always has a right to a reasonable opportunity to consult counsel, once he is informed, he cannot, without more, stop an interrogation or investigation merely by purporting to exercise his right to counsel again. This is especially true when the clock is ticking for taking breath samples within the statutory time frame for impaired driving cases. As noted by the court in *R. v. Hunter*:

> The courts usually agree with the police officer's interpretation that the multiple requests for counsel or the over-lengthy consultation is a delaying tactic to forgo the breathalyser tests until the expiry of the two hours. [70]

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69 *R v Smith*, [1989] 2 SCR 368, 61 DLR (4th) 462 per Lamer and Gonther, JJ [emphasis added]. Also see *R v Sinclair*, *supra* note 9 at para 58, where the majority, citing *Smith*, stated "the purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay 'needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [for whatever reasons, made] impossible to obtain.'"

70 *Hunter*, *supra* note 67 at p 178. See e.g. *R v Turiff*, [1998] 82 OTC 180, 40 WCB (2d) 234 (ONCJ); *R v Green* (1999), 213 NBR (2d) 68, 546 APR 68 (NB CA.); *R v Littleford*

An accused can, of course, stop the interview by exercising his right to remain silent and, thus, withdraw further participation in it. However, the right to counsel is not something that can be asserted without reasonable limits. "Police pressure, short of denying the right of choice or of depriving the detainee of an operating mind does not breach the right of silence once the detainee has been advised."[71]

In *R. v. Whitford* the accused was arrested for sexual assault. After being given a Charter warning on arrest, the accused asked to telephone a lawyer. He then had telephone contact with a lawyer. Almost immediately thereafter he refused to speak with the police until he spoke to legal aid. One of the issues before the court was whether or not the accused had been deprived of his right to retain and instruct counsel contrary to s. 10 (b) of the *Charter*. Justice Berger for the Court stated:

> Here the Appellant invoked the right to counsel and was reasonably diligent in exercising it. We ought not to adopt a rule that would artificially limit reasonable opportunity to exercise the S.10 (b) *Charter* right to a single phone call to a law office. An accused who wishes to make two or three successive phone calls in the exercise and pursuit of his right to retain and instruct counsel must be permitted to do so unfettered by police questioning. The relevant inquiry after an initial phone call to a law office is not simply whether the accused did nor did not speak to a lawyer. After all, the lawyer might tell the accused that he is too busy, too expensive, or simply not interested in acting for and advising the accused. He might even recommend that the accused contact Legal Aid. An accused is entitled to a reasonable opportunity to have meaningful contact with and advice from counsel. I decline to approve police questioning after completion of a first telephone call to a law office when the accused has clearly said that he does not wish to speak to the police until he has *also* spoken with Legal Aid.
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> ...
>
> It was certainly open to Constable Zol to seek clarification from the Appellant in order to determine, with certainty, whether he had satisfied his desire to retain and instruct counsel without delay. I do not say that the police are, in all

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(2001), 86 CRR (2d) 148, 50 WCB (2d) 261 (ONCJ); *R v Melfi* (2001), 22 MVR (4th) 248, 52 WCB (2d) 82 (ONSC); *R v Neziol* (2001), 22 MVR (4th) 299, 51 WCB (2d) 474(ONSC).

71 *R v Wood*, 1994 NSCA 239 at 222-223, 225, leave to appeal SCC refused, [1995] 99 CCC (3d) vi. In this case the accused asserted on some 53 separate occasions that he did not wish to make a statement (at least at that time). It was evident that he understood his right to choose whether or not to do so and while he frequently asserted his right not to make a statement, he still elected to continue engagement in the conversation and ultimately to make one. See also *R v Baidwan*, 2001 BCSC 1412, aff'd 2003 BCCA 351, leave to appeal SCC dismissed 328 NR 199 (note), January 8, 2004.

> circumstances, under a duty to seek such clarification. I say only that where the accused has asserted his s. 10(b) rights, has contacted a law office, and immediately thereafter has refused to speak to the police until he has spoken to Legal Aid, the police are obliged to refrain from eliciting evidence until they have provided the accused with a reasonable opportunity to contact Legal Aid.[72]

E. Is Being Interviewed Without Counsel Present Oppressive?

In *R. v. Otis*, Justice Proulx recognized that the court in *Hebert* acknowledged the police have the right to pursue their investigation and to try to convince a person to make a confession, or provide statements despite the fact the person has indicated his or her decision to remain silent:

> Although the police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice. I will grant that a person persuaded to confess for personal reasons or due to the talent of the investigator may well have done so freely despite his previous silence. It is this choice and the respect of free will, which are the principal underpinnings of the rules relating to confessions. — What is abusive in the present matter might not be with respect to another individual. The power of resistance to police persuasion will vary according to circumstances and individuals. Certainly it is always prudent to bear in mind that any tension or pressure observed with a subject faced with his interrogator, either due to discomfort, embarrassment or shame, which he may feel following arrest, detention or confrontation with an investigator who brings him back to a reality he would prefer to forget at any price, must be deemed to be in the normal course of events.[73]

In this case the accused clearly stated four times over thirty-five minutes that he did not want to say any more and wanted to talk to his lawyer. The Court of Appeal found that the while the "police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice."

Interestingly, although the trial judge found that the accused had a "complete emotional disintegration," the Court of Appeal found that this was not relevant to the issue of an operating mind as the emotional disintegration may have been as a result of confessing, not as a result of police pressure:

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72 *R v Whitford,* 1997 ABCA 85.), at 59-60.

73 *R v Otis* (2000), 151 CCC (3d) 416 (Que CA) at 437, 37 CR (5th) 320. Leave to appeal SCC dismissed June 21, 2001.

> While presenting an "operating mind aware of his right", the [accused] could easily have plunged into a state of "complete emotional disintegration" for reasons which may be attributed to police action, without, however, altering his operating mind ... in the same manner one can easily conceive of police "oppression" which nevertheless does not deprive the subject of an "operating mind."[74]

However, the Quebec Court of Appeal did raise the question: How many times is a person such as the accused, who sufferers from a limited cognitive capacity and low intellect, required to assert his right to remain silent before it is respected? Mr. Otis asserted his right on four occasions. The Court considered it significant that these assertions were expressed consecutively and within a brief period of time that should have left no doubt as to the accused's wish that the interrogation cease. These objective observations by the Court were bolstered by the trial judge's findings with respect to subjective factors, related to the accused's intellectual and cognitive capacity.

While four times was sufficient cause to rule the statement inadmissible in this case (compared to 53 times in *R. v. Wood*, where the statement was admissible), the Court found that *Otis* had "limited cognitive capacity" and was "intellectually deprived." As a result, the police actions, while "abusive in the present matter might not be with respect to another individual." This is a very important distinction when one considers the subsequent decision of the very same Court in *R. v. Legato.*

In *R. v. Legato* the accused, after killing another individual, attempted to commit suicide by stabbing himself four times in the abdomen. He was operated on and afterwards administered morphine on several occasions to ease the pain. While in the intensive care unit the accused spoke with counsel on the phone and then was interrogated by the police. The accused told the police he would only speak in the presence of his lawyer and that he had nothing more to say in her absence. Nevertheless, he made an incriminating remark after being asked further questions by the police.

On appeal the accused complained that he was interrogated at the hospital while under sedation and, furthermore, after having stated to the police that he would only speak in the presence of his layer. However, the Court ruled that "that there was no evidence submitted to the judge which would lead to the conclusion that the accused was not in full possession of his faculties ... In fact, the responses given indicate that appellant had

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74 *Ibid* at 432. See for example *Paternak*, *supra* note 43.

retained the advice of his lawyer and was quite capable of following his lawyer's instructions."[75]

The Court further considered the principles laid out in *Otis* regarding the law of confessions, however they stated that the police in this case "did not use their superior power to ignore the will and deny the appellant his choices ⋯ on the contrary the police officer was particularly respectful of his will."[76]

As such, where an accused does not have "limited cognitive capacity"; is not "intellectually deprived"; has not been deprived of food, clothing, water, sleep or medical attention; the interrogation is not excessively aggressive or intimidating over a prolonged period of time; or that the police used non-existent evidence in confronting the accused (see *R. v. Oickle*), then the likelihood of the interview being found oppressive is significantly remote.

This is precisely the reasoning employed by the Alberta Court of Appeal in *R. v. Bohnet*,[77] which found that, unlike the accused in *Otis*, Bohnet was not intellectually deficient.

> [While] he was not given a second opportunity to talk with his lawyer before he confessed, [it] was not a Charter breach in the contest of this case ... The fact that he police successfully engaged him in further discussions after he stated he would follow his lawyer's advice not to say anything, and after he once more said that discussions should cease, does not constitute a breach of his rights.[78]

Without citing any of the above cases, the Ontario Court of Appeal also upheld the admission of comments by an accused that was interviewed by the police over an eight-hour period in the absence of counsel. While it was a prolonged interview, the Court not only took into consideration the police officer's stated intention to keep the accused talking, but also the accused's own "game plan" of answering some questions, declining to answer others and posing questions to the investigating officer as he saw fit. In the end, the Court agreed with the trial judge's ruling that "there is no prohibition against police questioning an accused in the absence of counsel after the accused has retained counsel. And there is nothing wrong with

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75 *Legato*, *supra* note 52 at 25-6. See also *Plata*, *supra* note 52.

76 *Legato*, *ibid.*

77 *R v Bohnet*, 2003 ABCA 207, leave to appeal SCC refused (February 5, 2004). See also *R v Russell*, 1998 ABCA 184, aff'd on other grounds 2000 SCC 55.

78 *Bohnet*, *ibid* at para 16.

police trying to persuade an accused to speak to them about a crime. But investigators must not deny the accused the right to choose, or deprive him of her of an operating mind." [79]

However, as noted by the Ontario Court of Appeal in *R. v. Hoilett*:

> [O]ppressive conduct by the police [stripping him of his clothing and leaving him naked in the interview room], in and of itself, will not in every case render a statement of an accused inadmissible as involuntary. There may be circumstances where an accused person has the self-confidence to withstand the more subtle intimidation that is communicated by the police through an atmosphere of oppression. Or an accused may have his or her own reasons for believing that it is in their best interest to speak to the police so that oppressive police conduct may not have the effect of making a statement involuntary.[80]

More recently, in *R. v. Richard* the Manitoba Court of Appeal considered a number of factors raised by the accused why his confession to murder should have been deemed involuntary:

- he told the police officer on a number of occasions during his first interview that he did not want to talk to police about the incident;
- he had been held in a cold cell overnight and the interview room was warm;
- he did not have his anti-anxiety medication on the day of the second interview;
- he did not sleep well the prior night and could not eat on the morning of the second interview;
- cigarettes were progressively given to him as the interviews unfolded, which he urges the Court to find were an enticement to cooperate.[81]

The accused argued that the environment surrounding the interviews caused by the continued questioning, despite his assertions of his right to silence was exacerbated by the oppressive conditions created by police.

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79 *R v Roy* (2003), 15 CR (6th) 282 at para 10, 59 WCB (2d) 253 (Ont CA), aff'ing [2002] OJ No 5541.

80 *R v Hoilett* (1999), 136 CCC (3d) 449 at para 24, 26 CR (5th) 332 (Ont. C.A. See also *R v Owen* (1983), 4 CCC (3d) 538, 56 NSR (2d) 541 (NS CA); *R v Serack* (1974), 2 WWR 377 (BCSC). But see *R v Flintoff* (1998), 126 CCC (3d) 321, 16 CR (5th) 248 (Ont CA).

81 *Richard*, *supra* note 24 at para 27. See also *Cleveland*, *supra* note 11, where the accused's assertion of his right to counsel up to 110 times was not sufficient in and of itself to rule the statement involuntary. However, it was the cumulative effect of a hypothetical scenario, undermining his counsel's knowledge of his situation, and whether he may or may not be charged and released, that tipped the scales in ultimately excluding the statement as involuntary.

However, in upholding the admissibility of the confession, the Court of Appeal found that the trial judge had properly considered all the evidence, including having viewed the video interviews. The Court of Appeal agreed with the trial judge's conclusion that "there was nothing in the circumstances of [Donald's] almost 24 hours in custody, nor in [Sells'] actions, that in any way could be said to be inhumane or otherwise oppressive." She found that the cold cell amounted to a minor discomfort, cigarettes had not been used as a reward or punishment for cooperation, and she did not observe Donald to be anxious or feeling any negative effect from not having his medication.[82]

Nevertheless, where both the accused and his lawyer are told by one police officer that it would be "no problem" for the lawyer to attend to the police station to continue their conversation in person, the confession will be excluded where another police officer then refuses to allow the lawyer to continue that conversation when he does arrive. The offer (and then refusal) to allow the conversation to continue provides objectively observable indicators that the police conduct had the effect of undermining the legal advice that the lawyer had originally provided the accused during their telephone call.[83]

Although the decision of the Supreme Court was unanimous (9:0), they were clear in their ruling that the circumstances in this case were unique. Generally, the Court stated, once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice.[84]

> Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Although other jurisdictions recognize a right to have counsel present throughout a police interview, that is not the law in Canada. Canadian courts and legislatures have taken a different approach to reconciling the personal rights of detainees with the public interest in effective law enforcement: *Sinclair* [2010 SCC 35] at paras. 37-39.[85]

III. Do Young Offenders Have the Same Rights?

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82 *Richard*, *ibid* at para 36.

83 *Dussault*, *supra* note 3.

84 *Ibid* at paras 3, 34.

85 *Ibid* at para 33.

Any consideration of the voluntariness of a statement given by a youth to a police officer or a person in authority must begin with an understanding of the particular vulnerabilities of young persons, and the need to ensure that their rights are carefully safeguarded.

That the young person does not seem vulnerable does not affect the obligations of the police to scrupulously observe the requirements of the *YCJA*, including s. 146, which protect and enforce those rights. Nor does it mean that the relevant legal principles are somehow lessened in his case. As Justice Cory wrote in *R. v. J.(J.T.)* in reference to s. 56 of the *YOA*:

> It may seem unnecessary and frustrating to the police and society that a worldly wise, smug 17-year-old with apparent anti-social tendencies should receive the benefit of this section. Yet it must be remembered that the section is to protect all young persons of 17 years or less. ...
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> S. 56 itself exists to protect all young people, particularly the shy and the frightened, the nervous and the naïve. Yet justice demands that the law be uniformly applied in all cases. The requirements of s. 56 must be complied with whether the authorities are dealing with the nervous and naïve or the street-smart and worldly-wise. ... Principles of fairness require that the section be applied uniformly to all without regard to the characteristics of the particular young person. [86]

In this case, the accused, a 17-year-old who had been living in a common law relationship and who had fathered a child, was tried in adult court and convicted of first-degree murder. After a lengthy evening interrogation at the police station, he made an oral inculpatory statement and was then asked if he wanted an adult relative present. The relative attended and was present for about three minutes of the interrogation. The accused was charged with murder and informed of his right to counsel. His clothing was seized and hair and fingernail scrapings were taken before his lawyer arrived after midnight.

The lawyer spoke with the accused and then with the adult relative. The police again interrogated the accused when neither his lawyer nor the adult relative was present. In fact, the police this time did not ask him if he wished to have an adult relative present.

The Court ruled that s. 56 of the *YOA* recognized the problems and difficulties that beset young people when confronted with authority. The section is to protect <u>all</u> young people of 17 years or less and must be applied uniformly without regard to the characteristics of the particular young

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86 *R v J(JT)*, [1990] 2 SCR 755 at paras 18, 20, 79 CR (3d) 219.

person. Notwithstanding their bravado, young people would not appreciate the nature of their rights to the same extent as would most adults and are more susceptible to subtle threats arising from their surroundings and from persons in authority. It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted. Under s. 56(2) no statement given by a young person to a person in authority is admissible without compliance with its enunciated requirements (i.e.: that they have the right to choose to have a lawyer or adult present when giving a statement).

In *R v. I.(L.R) and T.(E.)* the Supreme Court again ruled on the obligations of the police under the *YOA*:

> Section 56 sets out strict requirements which must be complied with in order to render a statement made by a young person to a "person in authority" admissible in proceedings against him or her. The rationale for this lies in Parliament's recognition that young persons generally have a lesser understanding of their legal rights than do adults and are less likely to assert and exercise fully those rights when confronted with an authority figure.[87]

The Court then went on to say:

> In my opinion, the purpose of the requirement that the explanation prescribed by Section 56 precede the making of the statement is to ensure that the young person does not relinquish the right to silence except in the exercise of free will in the context of a full understanding and appreciation of his or her rights.[88]

In this case the accused was charged with second-degree murder of a cab driver. His great-aunt, a First Nation band elder with little formal education, accompanied him on his arrest to the police station. The police informed her that there would be time to look for a lawyer upon their arrival at the police station but, on their arrival, both were taken to an interview room where the investigating constable began taking a statement over the course of four and a half hours.

Prior to taking the statement, a "Statement to Person in Authority Form" required by s. 56 of the *YOA* was completed. The officer tried to explain the right to counsel, the right to have an adult present, and the fact that any statement could be used in proceedings against the accused. A statement was made without the advice of a lawyer. Later, the accused, at his request, met with a lawyer for a half hour. The next day, the accused

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87 *R v I(LR) and T(E)*, [1993] 4 SCR 504, 109 DLR (4th) 140.

88 *Ibid* at para 35.

informed the investigating constable that he had information to add to his statement and, after speaking with his lawyer; he and the constable went through the process of completing the "Statement to Person in Authority" form. The accused indicated that he did not want a lawyer or other adult present. The second statement included an exchange about the plan the appellant and his co-accused's had to murder a cab driver. The trial judge excluded the first statement but admitted the second. The accused appealed and both statements were ruled inadmissible and the charges were stayed. In reaching their decision the Court held that:

> Section 56 not only incorporates the common law of voluntariness but also imposes statutory requirements with respect to the right to consultation and the presence of counsel or an adult. The requirement that the explanation as to the accused's rights precede the making of the statement is to ensure that the young person does not relinquish the right to silence except in the exercise of free will in the context of a full understanding and appreciation of his or her rights.
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> A previous statement may operate to compel a further statement notwithstanding explanations and advice belatedly proffered. If, therefore, the successor statement is simply a continuation of the first, or if the first statement is a substantial factor contributing to the making of the second, the condition envisaged by s. 56 has not been attained and the statement is inadmissible.[89]

A. *Youth Criminal Justice Act* (*YCJA*)

Pursuant to section 146(1) of the *YCJA*, any statement made by a young person is required to be made in the presence of counsel and any other person consulted, if any, unless the young person decides otherwise. In addition, the young person has, before the statement is made, been given reasonable opportunity to consult with counsel, and with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect to the same offence; and if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

As this section is similar in substance to s. 56 of the *YOA*, the police would be required to have a lawyer or another adult representative present when a statement is made (see *R. v. J.(J.T.)* and *R v. I.(L.R) and T.(E.)*), unless the young person decides otherwise. While this might seem like a daunting

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89 *Ibid,* headnote.

task, the police in *R. v. K.* were successful in getting a statement admitted under the *YCJA*.

In this case the accused (Mr. T.) was fully aware of his right to silence, his right to speak to counsel and a parent, and his right to have them present at an interview if he so chose. He had received legal advice, and had been put on the phone to speak to his mother. He knew that even if someone had promised him something, including specifically his being released, in exchange for giving a statement, that such a promise wasn't valid. There was nothing about his physical condition that prevented him from thinking clearly and making a valid decision to waive any of his rights. He was articulate and mature for his age. He nonetheless decided to waive his rights and to give a statement. His conduct throughout the interview shows him to be unintimidated and confident, and voluntarily offering information to the police about this investigation and other criminal matters – statements admitted.[90]

Nevertheless, trying to exclude a lawyer or adult from the interview room against the wishes of the young person will result in any subsequent statement being ruled inadmissible, especially if the actions of the police can in any way be seen as belittling the accused's choice of lawyer or lawyers in general.[91]

However, while the language of the *YCJA* states that a lawyer or adult may be present, it makes no mention of a right to "participate," "coach," or otherwise assist the young person in providing that statement. As previously noted in *R. v. Ekman* "the cases [involving adults] discussed above do not support the proposition that if counsel were in attendance, he or she would be entitled to interject or interrupt during the interview or to override or "assist" with answers offered by the client."

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90 *R v K et al*, 2004 BCPC 210.

91 See *Burlingham supra* note 68 at n 29. The Supreme Court of Canada concluded that the accused's rights to counsel were violated when the police belittled the accused's lawyer and continued to question him despite his repeated statements that he would say nothing, absent consultation with his lawyer. See also *R v McKinnon*, 2005 ABQB 303, where it was determined the police undermined the accused's confidence in her lawyer or the solicitor-client relationship by "failing to clarify there would be further opportunity to consult counsel." See also *R v Timmons*, 2002 NSSC 113 for other inappropriate comments concerning counsel.

VI. CONCLUSION

Although some commentators had been suggesting prior to the Supreme Court's decisions in *Singh, Sinclair*, *Willier*, and *McCrimmon* that the police were actually losing their right to question suspects in the absence of their lawyer (if they could at all) once they had invoked their right to silence, the case law was actually "going the other way" and defence lawyers should have been better prepared for the decisions in these cases than relying on United States jurisprudence in the area.

As noted by Justice MacKenzie in *R. v. Therrien*,[92] who summarized the state of the law four years prior to the decisions in *Sinclair*, *Willier*, and *McCrimmon* being released in 2010 and 16 years before *Dussault* and *LaFrance* in 2022, the following four basic principles could be ascertained from the case law:

1. The police have a duty to investigate crimes, and it includes questioning people: *R. v. Oickle*, *R. v. Smith* and *R. v. Cuff*;
2. The police have the right to try to persuade suspects or accused persons to speak to them: *R. v. Hebert* and *R. v. Ekman*;
3. The right to silence is really the right to choose whether to remain silent: *R. v. Ertmoed* and *Ekman*; and
4. Once an accused has exercised his s. 10(b) right, the police are not required to terminate an interview simply because the accused says he does not want to speak to them: *R. v. Baidwan*, *R. v. Singh* (BCCA), *R. v. Bohnet*, and *R. v. Gormley*.

Subject to exceptional circumstances, these principles were all confirmed by the Supreme Court in *Singh*, *Sinclair*, *Willier*, and *McCrimmon*, and again in *Dussault* and *LaFrance*. While some police investigators may on occasion encourage counsel's presence during questioning when they believe it might actually assist in their investigation, in such instances it is obviously desirable to have the suspect answer the questions, not counsel. However, where counsel's answers appear to be "adopted" by the suspect they may still be used as evidence. While defence counsel may choose not to be present to avoid becoming a compellable witness against their own client, participating in the interview is not a bar to defending the case, particularly if there is no dispute over what was said.

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92 *Therrien*, *supra* note 50 at para 74-75.

The Balancing Approach to *Charter* Interpretation: Theoretical and Practical Problems in the Context of Detention and Interrogation

ALANAH JOSEY*

ABSTRACT

This paper explores different methods of interpreting the rights triggered upon custodial detention with particular reference to the right to counsel and the right to silence under ss. 10(b) and 7 of the *Charter*, respectively. This paper will discuss the common law and statutory antecedents of those rights to highlight the perceived need in the case law to adopt to a generous approach to interpretation in the wake of the *Charter*. Early in the case law, the Supreme Court of Canada adopted the purposive approach to delineate the scope of the *Charter*'s legal rights. The purposive approach was designed to ensure that individuals enjoy the full benefit of the procedural protections available under the *Charter*, which were intended to safeguard the principle against self-incrimination.

This paper takes the position that a second method of *Charter* interpretation emerged subsequently in the case law coming out of the Supreme Court of Canada. The analysis adopted in the case law shifted from assessing the purpose of the right to balancing the respective interests of the state with the interests of the individual engaged during custodial interrogation. This paper takes the position that balancing interests to delineate the scope of the *Charter*'s legal rights is inappropriate from a

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theoretical and practical perspective. The balancing approach should be abandoned in favour of a return to the purposive approach.

Keywords: *Charter of Rights and Freedoms*; *Bill of Rights*; Legal Rights; Right to silence; s 7; Right to counsel; s 10(b); Principle against self-incrimination; Constitutional interpretation; Purposive approach; Balancing; Custodial detention; Interrogation

I. INTRODUCTION

During custodial interrogation, the detainee is afforded certain rights to safeguard their interests. The principle against self-incrimination maintains that, where the state alleges criminal wrongdoing, the state cannot force the target of the allegation to assist the state in proving it. Human dignity and autonomy require that the individual remains free to choose whether to cooperate with the state, and if they choose not to cooperate, to be left alone by the state.[1]

The principle against self-incrimination is supported during police interrogation by procedural protections, such as the right to retain and instruct counsel and the right to silence, which have attracted constitutional status under the *Canadian Charter of Rights and Freedoms*[2] ("*Charter*"). The purpose of the *Charter* in its entirety is to constrain government action to conform with fundamental rights and freedoms. This is considered to be essential to a democratic society in which the basic dignity of all individuals is recognized.[3] In the context of custodial interrogation, this places an obligation on the state to respect the principle against self-incrimination.

Following the entrenchment of the *Charter*, a substantial body of Supreme Court of Canada case law developed on the right to counsel under s 10(b). Subsequently, the right to silence under s 7 of the *Charter* developed its own case law more slowly. In the early *Charter* jurisprudence, the Supreme Court of Canada adopted a relatively generous approach to interpretation, which was premised on recognizing the disadvantaged position of the individual during detention. The Court gave meaning to the

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1 See *R v D'Amour* (2002), 166 CCC (3d) 477, 163 OAC 164 (ONCA) at para 25 [*D'Amour*].

2 *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*].

3 See *R v Singh,* 2007 SCC 48, [2007] 3 SCR 405 at para 76 [*Singh*].

right to counsel under s 10(b) by holding that the right involved free and immediate legal advice or immediate consultation with counsel of choice, during which time the police are required to hold off from investigation. These protections are intended to protect the detainee's vulnerable position by ensuring fair treatment during detention so as to safeguard the principle against self-incrimination.

Subsequently, the Court endorsed a different approach to *Charter* interpretation. This emerged as a subtle shift beginning in 1989 with the Supreme Court of Canada decision in *R v Smith*,[4] which culminated in three decisions collectively referred to as the interrogation trilogy: *R v Oickle*, *R v Singh*, and *R v Sinclair*.[5] The new approach is fundamentally a balancing act. Instead of assessing the purpose of the right to delineate its scope, the new approach interprets *Charter* rights by attempting to reconcile the state's interest in law enforcement with the individual's interest in freedom from state intrusion. This paper will refer to the new approach as the "balancing approach."

The balancing approach is problematic from both a theoretical and a practical perspective. The balancing approach departs from accepted *Charter* interpretation by giving constitutional weight to societal interests at the stage of delineating the scope of the right rather than at the remedial stage of the analysis. This places an internal limitation *Charter* rights based on collective interests, which is wholly inconsistent with the very nature of fundamental freedoms, which are inherently individualistic rights.[6]

From a practical perspective, the balancing approach results in a narrowing of the protections available under the *Charter*'s legal rights. This is insufficient to safeguard the principle against self-incrimination for the average detainee. Under the balancing approach, the Supreme Court of Canada interprets ss 7 and 10(b) in a way which fails to recognize fully the practical realities of interrogation.[7] The case law envisions relatively easy exchanges between officer and detainee, which minimizes the impact of the

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4 *R v Smith*, [1989] 2 SCR 368, 39 BCLR (2d) 145 [*Smith*].

5 *R v Oickle*, 2000 SCC 38, [2000] 2 SCR 3; *Singh*, *supra* note 3; *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310 [*Sinclair*].

6 See Vanessa A MacDonnell, "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter" (2012) 38 Queen's LJ 137 (QL) at para 35 [MacDonnell].

7 See Steven Penney, "Triggering the Right to Counsel: "Detention" and Section 10 of the *Charter*" (2008) 40 SCLR (2d) 271 at 272 [Penney].

inherently coercive nature of detention. The case law seems to presume that the average detainee not only understands the scope of their rights, but how to assert and exercise them confidently and effectively. Practitioners will appreciate that this is inconsistent with their experience, even in respect of sophisticated clients. It is also inconsistent with empirical data on police interactions. The practical effects of the balancing approach are more restrictive than the case law which endorses the balancing approach seems willing to acknowledge.

This paper will explore the problems inherent in the balancing approach by analyzing the right to counsel under the *Canadian Bill of Rights*[8] and under the *Charter*'s purposive approach. This paper will then assess the right to counsel and the right to silence under the early case law which endorsed the balancing approach. This paper will conclude that the balancing approach should be abandoned in favour of a return to the purposive approach whereby consideration of the state's interest in law enforcement is reserved for the remedial analysis under ss 1 and 24 of the *Charter*.

II. THE RIGHT TO COUNSEL UNDER THE *BILL OF RIGHTS*

The right to counsel did not originate with the *Charter*. It was recognized at common law and ultimately codified under the *Bill of Rights* in 1960. The *Bill of Rights* provided under s. 2(c)(ii) that no law of Canada would be construed so as to deprive a detainee of the right to retain and instruct counsel without delay. Prior to the entrenchment of the *Charter*, however, the right to counsel was interpreted narrowly, as a result of which the detainee's procedural protections during the investigative stage of the criminal process were tenuous at best.

Under the *Bill of Rights*, the police were not required to advise the detainee of the right to counsel or to facilitate its exercise.[9] The right to counsel was not usually interpreted as imposing limitations on the investigative powers of the state. The case law tended to bolster investigative powers unless the police demonstrated flagrant disregard for the detainee's right to counsel.[10] In the decision in *R v Steeves*,[11] Chief Justice Ilsley held

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8 *Bill of Rights*, SC 1960, c 44 [*Bill of Rights*].

9 See *R v Gray* (1962), 132 CCC 337 at para 16, 1962 CarswellBC 223 (BCCC) [*Gray*].

10 See Brian Donnelly, "Right to counsel" (1968) 11 Crim LQ 18 at 19 and 21 [Donnelly].

11 *R v Steeves*, [1964] 1 CCC 266, 42 DLR (2d) 335 (NSSC) [*Steeves*].

that violations of pre-trial rights generally did not undermine trial fairness or the admissibility of evidence, stating that:

> [T]he mere fact that the police have obtained in any case knowledge of a relevant fact as the result of holding out an improper inducement does not of itself render evidence of that fact inadmissible... No more, it seems to me, should the acquittal of an accused person or the dismissal of the charge against him necessarily result because at some pre-trial stage of the proceedings after he was arrested he was deprived of the right to instruct counsel without delay. Whatever the remedies, civil or criminal, may be against those who deprived him of the right to instruct counsel, the right to acquittal or dismissal of the charge does not, in my opinion accrue to him.[12]

In *R v O'Connor*,[13] the detainee was detained for impaired driving. When placed in a cell for the night, he asked to contact counsel. He was unable to reach his lawyer and was denied further opportunity to consult with counsel. On appeal from conviction, Justice Haines commented that he was "considerably disturbed as to the timeliness" of the detainee's request to contact counsel given that the police were under no obligation to inform him of that right or to facilitate it.[14] The conviction was upheld.

On appeal to the Supreme Court of Canada,[15] Justice Ritchie did not assess the meaning of the right to counsel, but proceeded straight to the remedial analysis. He did not consider whether the illegally-obtained evidence should be admitted or excluded, but asked whether the right, if properly exercised, could have affected the outcome of the trial. Notwithstanding that the violation deprived the detainee of the opportunity to obtain legal advice on the breathalyzer, the breath sample was admissible at trial.[16]

Under the *Bill of Rights*, the case law tended to blend the delineation stage of the analysis with the remedial stage. Other than outlining what the right did not include, little attention was paid to interpreting the scope of the right. To compound this problem, the case law highlighted a basic doctrinal unavailability of any remedy at all. A breach of the right to counsel under the *Bill of Rights* generally did not give rise to a remedy. This underscores the tenuous nature of the right to counsel under the *Bill of*

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12 *Ibid* at paras 12-13.

13 *R v O'Connor,* [1965] 1 OR 360, [1965] 1 CCC 20 (OHCJ) [*O'Connor* OHCJ].

14 *Ibid* at para 6.

15 *R v O'Connor,* [1966] SCR 619, [1966] 4 CCC 342 [*O'Connor*].

16 *Ibid* at para 16.

Rights. If a breach of a right has no real bearing on the way in which police conduct their investigations or the manner in which the prosecution unfolds, the right itself counts for little.

The narrow scope of the right to counsel began to shift in Justice Laskin's concurring opinion in the Supreme Court of Canada decision in *R v Brownridge*.[17] In that case, the detainee's request to contact counsel was denied, and he refused to provide a breath sample. On appeal from conviction, Justice Laskin that the right to counsel could not be interpreted so as to empower an arresting officer to determine, at their discretion, whether or when to permit the detainee to exercise the right. Justice Laskin's opinion was that the right to counsel could only have meaning if it was taken as raising a correlative obligation on the police to facilitate contact with counsel by providing access to a telephone if one was requested.[18]

On the admissibility of the illegally-obtained evidence, Justice Laskin stated that the Crown's need to have the benefit of the evidence was not more important than the detainee's need to have the benefit of counsel.[19] In Justice Laskin's view, police could not be permitted to assert their powers, as if lawfully exercised, when that assertion amounted to a denial of legal rights. His opinion was that the rights of the detainee had to be affirmed, which meant that the state could not be permitted to use the violation of a right as an exercise of law enforcement powers to support the charge of a criminal offence.

Justice Laksin's comment on the Crown's need for the evidence and the detainee's need for legal counsel bespeaks the idea of balancing interests, albeit at the remedial stage of the analysis. As noted, the case law under the *Bill of Rights* tended to blend the delineation and remedial stages of the analysis, and certain decisions did endorse a balancing exercise. For example, in the decision in *R v Gray*,[20] Justice Ostler's opinion was that the interests of the community mandated that criminal investigations could not be "cramped" by the invocation of legal rights. This was because the "business of police officers in investigating offences is difficult enough without unnecessary obstacles being placed in the path."[21]

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17 *R v Brownridge*, [1972] SCR 926, 7 CCC (2d) 417 [*Brownridge*].

18 *Ibid* at para 70.

19 *Ibid* at para 72.

20 *Gray*, *supra* note 9.

21 *Ibid* at para 14.

At the appellate level in the *O'Connor* decision, Justice Haines similarly stated that:

> Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from illegal invasions of his liberties by the authorities, and (b) the interest of the state to ensure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground... This right of the public to be free and safe from the depredations of other citizens is often overlooked in our zeal to accord those charged with crime what we consider to be certain basic rights or freedoms, which are nothing more than guarantees of balance between the exercise of police powers and individual rights. In the last analysis it is for our Courts to exercise a broad discretion to find that balance in each case and protect those competing interests.[22]

The language employed is evocative of the balancing approach endorsed by the Supreme Court of Canada some 30 years later under the *Charter*. This might support recognition of a custom of balancing interests to delineate the scope of rights to which the Supreme Court of Canada ultimately returned. However, even if balancing interests influenced the interpretation of the right to counsel under the *Bill of Rights*, balancing interests to delineate the scope of constitutional rights is inappropriate.

In the decision in *R v Therens*,[23] Justice Le Dain noted that, while the framers of the *Charter* adopted the wording of s. 2(c)(ii) of the *Bill of Rights*, the framers could not be presumed to have intended for those words to be given the exact same meaning and interpretation.[24] The task of expounding a constitution is fundamentally different from that of construing a statute. For Justice Le Dain, this conclusion follows naturally from s. 52 of the *Constitution Act, 1982*, whereby any law which is inconsistent with the provisions of the constitution is of no force and effect, as well as from s. 24 of the *Charter*, which furnishes trial judges with broad discretion to remedy *Charter* violations.

Importantly, the *Charter* represents a new affirmation of legal rights. The narrow interpretation of the right to counsel under the *Bill of Rights*

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22 *O'Connor OHCJ, supra* note 15 at para 5.

23 *R v Therens*, [1985] 1 SCR 613, 40 Sask R 122 [*Therens*].

24 *Ibid* at para 47.

had to be abandoned in the face of a clear constitutional mandate to render decisions which could limit and qualify the traditional sovereignty of the state.[25] A new approach to the interpretation of legal rights was required whereby the delineation of the scope of a right and the remedial analysis to be applied on its breach remained separate inquiries. To meet this need, the Supreme Court of Canada developed the purposive approach.

III. THE PURPOSIVE APPROACH TO THE INTERPRETATION OF *CHARTER* RIGHTS

The purposive approach to *Charter* interpretation was adopted by the Supreme Court of Canada shortly after the *Charter*'s entrenchment. In the decision in *R v Big M Drug Mart*,[26] Justice Dickson held that the meaning of a *Charter* right is to be ascertained through analysis of the right's purpose.[27] The interpretation must be generous rather than legalistic to secure the full benefit of the *Charter*'s protection. Justice Dickson cautioned, however, that the analysis cannot overshoot the intended purpose of the right. While a narrow approach to interpretation risks impoverishing a *Charter* right, an overly generous approach risks expanding the protection beyond its intended scope.[28]

Justice Dickson determined that, to assess the scope of a *Charter* right according to its purpose, the right must be placed in its proper linguistic and philosophic context. This must be done with a view to the larger objectives of the *Charter* itself and the historical origins of the concepts enshrined, as well as the meaning and purpose of other related rights and freedoms.[29]

While the historic origins of a *Charter* right bear upon the delineation of its scope, prior conceptions of its scope are not determinative. Justice Le Dain made clear in the *Therens* decision that the constitutional status of the right to counsel meant that the right had to take on additional importance in the wake of the *Charter*.[30] The principles of statutory interpretation employed to construe the *Bill of Rights* was inappropriate for the *Charter*,

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25 *Ibid*.

26 *R v Big M Drug Mart*, [1985] 1 SCR 295, 37 Alta LR (2d) 97 [*Big M Drug Mart*].

27 *Ibid* at para 117.

28 See *R v Grant*, 2009 SCC 32 at para 17, [2009] 2 SCR 353.

29 *Big M Drug Mart*, *supra* note 26 at para 117.

30 *Therens*, *supra* note 23 at para 48.

which required a broader approach. A statute defines present rights and obligations, but a constitution is drafted with an eye to the future. Its provisions must be capable of growth and development over time.[31] Thus, narrow or technical approaches to interpretation, such as those employed under the *Bill of Rights*, risked subverting the goal of ensuring that each individual enjoys the full benefit and protection of the *Charter*.[32] The result is that the scope of s. 10(b) of the *Charter* is not limited to the confines of s. 2(c)(ii) of the *Bill of Rights*. The historical origins of a *Charter* right are simply one factor to consider.

The purpose of the *Charter* right is the dominant concern when tasked with delineating its scope.[33] This requires consideration of the larger objective of the *Charter*'s legal rights, which are enshrined under ss. 7–14. In the early *Charter* case law, the Supreme Court of Canada held that the purpose of the *Charter*'s legal rights was to constrain government action to ensure that the detainee is treated fairly during the pre-trial criminal process.[34] The *Charter*'s legal rights acknowledge that the detainee, who possesses far fewer resources than the state, has been taken into state control and is at risk of self-incrimination. The goal is to limit the investigative powers of the state. This is necessary to protect the principle against self-incrimination.

IV. The Purposive Approach to s. 10(b) of the *Charter*

Section 10(b) of the *Charter* provides that, on arrest or detention, everyone has the right "to retain and instruct counsel without delay and to be informed of that right." The right to counsel is among the earliest of the *Charter*'s legal rights to develop a settled case law, which delineated the contours of s. 10(b).[35] The early case law interpreted the right as encompassing a wide range of protections in favour of the detainee, as well as concomitant obligations on the part of the police. This included

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31 *Hunter v Southam Inc.*, [1984] 2 SCR 145, 33 Alta LR (2d) 193 at para 16 [*Hunter v Southam*].

32 *Big M Drug Mart, supra* note 26 at para 16.

33 *Ibid.*

34 *Clarkson v R* [1986] 1 SCR 383 at para 26, 69 NBR (2d) 40 [*Clarkson*].

35 See Steve Coughlan & Robert J Currie, "Sections 9, 10 and 11 of the Canadian *Charter*" (2013) 62 SCRL (2d) 143 at para 37 (QL) [Coughlan and Currie].

categorizing the legal protections conferred by the right into informational and implementational components, as well as recognizing the right to counsel of choice and developing a test for waiver.

A. The Informational Component

The informational component of the right to counsel provides the detainee with an opportunity to obtain basic information about the protections conferred by s 10(b). The police are required to advise the detainee of the right itself, as well as the availability of legal aid and duty counsel.[36] This enjoins the police from providing misinformation on the right to counsel. A breach of s. 10(b) will be made out where police belittle the legal advice the detainee has received with the goal of undermining the detainee's confidence in their relationship with counsel.[37]

The early case law established that the right to counsel is triggered by the act of detention within the meaning of ss. 9 and 10 of the *Charter*, which includes investigative detention.[38] Effective community policing must allow officers to approach persons in the community to ask questions of a general nature, in which case there is no obligation to inform the citizen of their legal status or rights. However, if the conversation shifts from general inquiries to a focused investigation, the law recognizes that the individual needs immediate legal protection.[39]

In the decision in *R v Bartle*,[40] Chief Justice Lamer recognized that, pursuant to s. 10(b), the detainee requires information about their legal rights in a timely and comprehensive manner to make an informed decision on whether to exercise their legal rights.[41] As a result, "without delay" under s. 10(b) of the *Charter* means "immediately". The immediacy requirement can only be displaced by urgent and compelling circumstances, such as medical emergency or legitimate concerns for officer or public safety.[42] The desire for investigatory and evidentiary expediency cannot suffice.[43]

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36 See *R v Bartle*, [1994] 3 SCR 173 at para 18, 19 OR (3d) 802.

37 See Coughlan & Currie, supra note 35 at para 52.

38 See *R v Prosper*, [1994] 3 SCR 236 at para 41, 133 NSR (2d) 321 [*Prosper*].

39 *Grant*, *supra* note 28 at para 22.

40 *Bartle*, *supra* note 36.

41 *Ibid* at paras 20–21.

42 *Ibid* at para 2.

43 *Prosper*, *supra* note 38 at para 42.

The detainee must be informed of their right to counsel as soon as detention arises to give meaning to the right to counsel.[44] This is highlighted by the Supreme Court of Canada decision in *R v Evans*.[45] The detainee was asked if he understood his right to counsel as read, and he replied in the negative. The officer made no attempt to explain the substance of right and proceeded with a nine-hour interview. On appeal from conviction, Justice Wilson held that, if the detainee indicates that they do not understand their rights as the police have read them, the officer must take steps to facilitate satisfactory comprehension.[46] A mechanical recitation of the right to counsel, as read from the standard *Charter* card, was insufficient given that the detainee unequivocally expressed his lack of comprehension.[47] The officers should have done more under the circumstances in order to facilitate understanding.

Pursuant to s. 10(b), the police are required to follow up or make further inquiries if the detainee demonstrates a lack of understanding about the information provided on their right to counsel. A sufficient level of understanding is necessary for a detainee to assert and exercise their legal rights effectively. In reality, the operational determinant is knowledge of the right itself: those lacking knowledge or understanding about their right to counsel will ultimately cease to have the right.[48] Insofar as s 10(b) is intended to foster fairness in the pre-trial criminal justice process, knowledge and understanding on the part of the detainee is necessary to give full effect to the right to counsel.

B. The Implementational Component

Similar to the informational component, the implementational component of the right to counsel under s. 10(b) of the *Charter* affords the detainee certain entitlements and imposes correlative obligations on the police. The implementational component recognizes that, once the detainee is informed of the right to counsel, the detainee requires an opportunity to exercise the right. From the police obligation to facilitate the right to counsel flows the concomitant "hold off" duty, which prohibits

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44 See *R v Suberu*, 2009 SCC 33, [2009] SCR 460 [*Suberu*].

45 *R v Evans*, [1991] 1 SCR 869, 63 CCC (3) 289 [*Evans*].

46 *Ibid* at para 39.

47 *Ibid*.

48 Alan Gold, "Chief Justice Lamer and the Right to Counsel under Section 10(b) of the *Charter*; an Admirable Legacy" (2000) 5 Can Crim L Rev 91 at 93 [Gold].

police from eliciting evidence from the detainee until a reasonable opportunity to consult with counsel has been provided.

This was confirmed in the seminal Supreme Court of Canada decision in *R v Manninen*.[49] In that case, the detainee invoked his right to counsel at the scene of his arrest. The officers immediately proceeded with interrogation on scene, and the detainee made inculpatory statements constituting the basis of his conviction at trial. On appeal to the Supreme Court of Canada, Justice Lamer considered that the right to counsel is intended to afford the detainee an opportunity to obtain advice on how to exercise their legal rights more generally. He concluded that the right to counsel could only be effective and meaningful if the detainee receives access to legal advice before they are questioned or otherwise required to give evidence.[50]

In keeping with this, Justice Lamer determined that the right to counsel imposes a positive obligation upon police to facilitate contact with counsel. He noted that, in *Manninen*, a telephone was readily available where the detainee had been arrested, which the police had used themselves, and there were no exigent circumstances precluding the detainee's use of the telephone.[51] Under the *Bill of Rights*, the detainee was only entitled to use a telephone if such a request was made and a telephone was available.[52] The purpose of s. 10(b), however, mandated enhanced procedural protections in favour of the detainee. Under the purposive approach, s. 10(b) recognizes that, insofar as the detainee is in the control of the state, the detainee cannot realistically exercise their right to counsel unless the police provide an opportunity to do so.[53] A request for a telephone to contact counsel is therefore unnecessary; its provision should be standard and automatic.

The case law recognizes that, for safety reasons, police are generally not expected to provide the detainee with their own cell phone at roadside.[54] However, the case law also recognizes that circumstances may require cell phone use at roadside to facilitate contact with counsel in order to give meaning to s 10(b). This was considered by the New Brunswick Court of

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49 *R v Manninen*, [1987] 1 SCR 1233, 61 OR (2d) 736 [*Manninen*].

50 *Ibid* at para 23.

51 *Ibid* at para 25.

52 *Ibid* at para 22.

53 *Ibid* at para 21.

54 *R v Taylor*, 2014 SCC 50 at para 32, [2014] 2 SCR 495 [*Taylor*].

Appeal in its decision in *R c Landry*.[55] In that case, the detainee requested to use his own cell phone to contact counsel at roadside after he was arrested for impaired driving. He was advised that he could only contact counsel at the detachment. The detainee's trial position was that he had no choice but to provide samples of his breath.

On appeal, Justice LaBlond considered that the "overarching purpose" of s. 10(b) is to avoid involuntary incrimination.[56] With respect to telephone use, Justice LaBlond stated that:

> [T]he case law could not be clearer on the issue of when an accused is entitled to avail himself or herself of his or her right to counsel. The right applies immediately following arrest and reading of constitutional rights, insofar as the circumstances of the case allow. No evidence may be obtained before the right is exercised. The Supreme Court of Canada clearly stated in *R. v. Manninen*, [1987] 1 S.C.R. 1233, [1987] S.C.J. No. 41 (QL), that the right requires the police officer to allow the accused to use any available telephone... In *Manninen*, the Supreme Court cited *R. v. Dombrowski*, [1985] S.J. No. 951 (QL) (Sask. C.A.), in which the Saskatchewan Court of Appeal held there is no justification for the police to insist that the right can be exercised only upon arrival at the police station.[57]

Justice LaBlond confirmed that, under the existing circumstances, the accused was entitled to use his own cell phone at roadside to contact counsel. For Justice LaBlond, the right to counsel cannot be effectively exercised unless the detainee "is in a position to receive legal advice".[58] If the accused was not entitled to avail themselves of the right to counsel immediately following arrest, s.10(b)'s purpose of protecting the principle against self-incrimination would be frustrated.

C. The Right to the Counsel of Choice

The right to counsel under s. 10(b) includes the right to consult with one's counsel of choice. This was initially recognized in the Supreme Court of Canada's decision in *R v Ross*.[59] In that case, the detainee was unsuccessful in reaching counsel via telephone, and he was not asked if he wished to contact another lawyer. On appeal, Justice Lamer affirmed that the purpose of the right to counsel is to ensure that detainees are advised of their legal

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55 *R v Landry*, 2020 NBCA 72, 2021 CarswellNB 27 [*Landry*].

56 *Ibid* at para 20.

57 *Ibid* at para 19.

58 *Ibid* at para 20.

59 *R v Ross*, [1989] 1 SCR 3, 46 CCC (3d) 129 [*Ross*].

rights and how to exercise them when dealing with the authorities. His opinion was that the purpose of s. 10(b) would be subverted if it was open to police to proceed with the investigation when the right to the counsel of choice had been clearly invoked.[60] There were no urgent circumstances requiring the police to investigate before providing an opportunity to contact counsel of choice during regular business hours the following morning.[61]

Under the purpose approach, s. 10(b) was interpreted as including the right to decline to speak with alternative counsel and to wait to speak with counsel of choice if counsel is not immediately available. During that time, the police are required to hold off from investigation.[62] The detainee can only be expected to exercise s. 10(b) by contacting another lawyer if counsel of choice cannot be available within a reasonable time.[63] These entitlements and obligations ensure that the detainee is in a position to obtain legal advice and information, which facilitates fairness in the process and protects against the risk of self-incrimination.

D. Waiver

While the informational component of the right to counsel is triggered upon detention, the implementational obligations on the part of the police are triggered by the detainee's choice to exercise the right. The detainee in the *Manninen* decision invoked his right to counsel, but he was not afforded an opportunity to exercise the right. Justice Lamer reasoned that, where a detainee asserts their intention to exercise the right to counsel and police ignore the request by proceeding with interrogation, the detainee is likely to feel that their rights have no effect such that they must answer.[64] As a result, it could not be said that the detainee in *Manninen* actually intended to waive his right to counsel simply because he answered the questions posed by police.

However, if the detainee chooses not to exercise the right to counsel or is not reasonably diligent in exercising the right, the police's implementational obligations either do not arise or are suspended

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60 *Ibid* at para 23.

61 *Ibid* at paras 16, 21.

62 See *R v Willier,* 2010 SCC 37 at para 35, [2010] 2 SCR 429 [*Willier*].

63 *Ross*, *supra* note 59 at para 16.

64 *Manninen, supra* note 49.

altogether.[65] Under those circumstances, the police are not required to hold off and may proceed with the investigation. Given the consequences of failing to exercise the right to counsel, the Supreme Court of Canada made clear in a number of early *Charter* decisions that the threshold for a valid waiver is high.[66] Before a detainee can be said to have waived the right to counsel, the detainee must have enough information to allow them to make an informed choice on whether to exercise the right or to waive it.[67]

In *R v Clarkson*,[68] the highly-intoxicated detainee responded that there was "no point" in consulting with counsel when her aunt encouraged her to contact a lawyer during police interview. On appeal from conviction, Justice Wilson considered that the purpose of the right to counsel is to ensure that the accused is treated fairly in the criminal process. In keeping with this purpose, the test for a valid waiver must encompass principles of adjudicative fairness.[69] Justice Wilson's view was that the continued interrogation of a detainee who incriminates themselves without being aware of the consequences is incompatible with the need for fairness in the process.[70]

Justice Wilson held that, for s. 10(b) purposes, waiver must be clear and unequivocal in terms of the detainee's understanding that they are waiving a constitutional safeguard. This requires voluntarily action on the part of the detainee, which must have been based upon full knowledge of both the nature of the right and the effect that waiver will have on the right.[71] Waiver of the right to counsel is only valid if it is voluntary and informed.

E. The Purposive Approach and Self-Incrimination

Justice Wilson's reasons emphasize that adjudicative fairness is the pivotal function in the test for waiver. This underscores the importance attributed to procedural fairness by the purposive approach more generally. Under the purposive approach, s. 10(b) confers legally-protected entitlements in favour of the detainee and imposes correlative obligations on the part of the police because s. 10(b) is aimed at protecting against

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65 See *Bartle*, *supra* note 36 at para 19.
66 See *Clarkson*, *supra* note 34; *R v Brydges*, [1990] 1 SCR 190, 1045 Alta LR (2d) 145.
67 See Gold, *supra* note 48 at 97.
68 *Clarkson*, *supra* note 34.
69 *Ibid* at paras 19, 26.
70 *Ibid* at para 21.
71 *Ibid* at para 24.

involuntary incrimination, which is the overarching purpose of s. 10(b).[72] The goal is to limit the investigative power of the state to foster fairness during the pre-trial criminal process. The scope of the right to counsel must be broad enough to incorporate the necessary procedural protections to achieve that goal.

The right to counsel must therefore afford the detainee an opportunity to learn about the charge they face, as well as the limits of legitimate police power and the extent of their legal rights under the circumstances existing at the material time. This includes information on whether the detainee should or must submit to police power. The right to counsel was viewed under the *Bill of Rights* as an inconvenient barrier to the search for truth. Under the *Charter*, the right to counsel is an indispensable protector of the principle against self-incrimination, which acknowledges the autonomy and dignity of each person. The principle against self-incrimination maintains that allowing the state to employ any and all means to enforce the law would give rise to an undemocratic state in which few people would want to live.[73] People are not simply a vehicle through which to obtain evidence. They are vested with constitutional rights, which must be respected.

The right to counsel is necessarily a limitation on the state's investigative power. The purposive approach begins with that premise. Despite its breadth, however, the right to counsel does not prohibit self-incrimination. It provides an opportunity to consult with counsel, but it does not demand consultation.[74] The detainee is free to make their own choices, and they may waive the right to counsel so long as that waiver is voluntary and informed. The detainee is equally free to ignore any and all legal advice obtained by exercising the right to counsel. This is consistent with *Charter* values of dignity and autonomy.

V. THE BALANCING APPROACH

A diverging approach to constitutional interpretation eventually emerged in the case law, which is referred to as the "balancing approach." While the purposive approach assesses the purpose of a *Charter* right in light of its historical, linguistic, and philosophic context, as well as the larger

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72 See *Landry*, *supra* note 55 at para 20.

73 See Alan D Gold & Michelle Fuerst, "The Stuff that Dreams are Made of! – Criminal Law and the Charter of Rights" (1992) 24 Ottawa L Rev 13 at 16 [Gold and Fuerst].

74 See Penney, *supra* note 7 at 275.

objectives of the *Charter* itself, the balancing approach is fundamentally a balancing act. It employs an exercise whereby the interests of the individual are weighed against the interests of the state. The assessor attempts to reconcile the competing interests in order to delineate the scope of the *Charter* right. Under the balancing approach, the nature and extent of the procedural protections conferred to the individual are achieved by striking the proper balance between individual and collective interests.

The balancing approach initially emerged in a s. 10(b) decision, *R v Smith*,[75] which considered the hold off duty. The balancing approach then re-emerges in the decision in *R v Hebert*,[76] and subsequently in the interrogation trilogy. The interrogation trilogy governs the current framework for procedural safeguards available to the detainee during custodial interrogation. Use of the balancing approach has highly influenced the current legal landscape.

A. The *Smith* Decision

In *Smith,* the detainee expressed the intention to exercise his right to counsel outside of normal office hours. The private phone number for his counsel of choice was not listed in the phone book, and he decided to wait until morning to place the call, despite urging from the police. During the night, the detainee was interrogated. He invoked his right to counsel three times but was not afforded an opportunity to contact counsel.

On appeal from conviction, the issue was whether police provided the detainee with a reasonable opportunity to exercise the right to counsel. Justice Lamer noted that, when the detainee asserted his s. 10(b) right upon arriving at the detachment, the police's implementational duties were triggered. However, Justice Lamer held that such duties were suspended because the detainee had not been reasonably diligent in exercising same. While the detainee believed it was useless to call his lawyer given the late hour, it could not be said that it was impossible to contact counsel. Justice Lamer noted that defence lawyers are typically available outside of normal office hours, and calling the office number may have provided another phone number by which to reach counsel.[77]

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75 *Smith*, *supra* note 4.

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

77 *Ibid* at paras 12-14.

This suggests that, if the detainee had attempted to contact counsel but failed to reach him, he would have been entitled to wait until morning to call counsel again and subsequently decide whether to call another lawyer. The police would have been required to hold off from interrogation until that time. The decision not even to try to contact counsel was fatal.[78] For Justice Lamer, the fact that the detainee invoked his right to counsel repeatedly was inconsequential. A detainee who has been given a reasonable opportunity to exercise their right but who fails to do so with reasonable diligence cannot expect the police to continue to suspend their investigation.[79]

In Justice Lamer's view, reasonable diligence is an essential limitation on the right to counsel; without it, the detainee would be empowered to delay the investigation endlessly, which risks the destruction or loss of evidence.[80] Justice Lamer drew a distinction between the right to counsel on the one hand and the police duty to provide an opportunity to exercise the right and to hold off from interrogation on the other. He stated that:

> One who is not diligent in the exercise of his right to retain counsel does not lose this right; one can always exercise it. However, one cannot require that the police respect the duty imposed on them to cease questioning until he has had a reasonable opportunity to exercise his right. The duty imposed on the police to refrain from attempting to elicit evidence from a person until this person has had a reasonable opportunity to communicate with counsel is suspended and is not again "in force" when the arrested or the detained person finally decides to exercise his right. A different conclusion would render meaningless the duty imposed on a detained or arrested person to be diligent in the exercise of his rights. This would enable one to do exactly what this obligation seeks to prevent, that is, delaying needlessly and with impunity the investigation and, in certain cases, to allow for an important piece of evidence to be lost, destroyed or, for whatever reasons, made impossible to obtain.[81]

In his dissenting opinion, Justice La Forest followed *Manninen* and held that the detainee in *Smith* did not waive his right to counsel simply by answering the questions put to him by police. Pursuant to the decision in *Ross*, if the detainee invokes the right to the counsel of choice, the burden of establishing waiver rests with the Crown.[82] The inculpatory statement in *Smith* was given after the detainee invoked the right to the counsel of choice,

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78 *Ibid* at paras 16-17.

79 *Ibid* at para 18.

80 *Ibid* at para 15.

81 *Ibid* at para 19.

82 *Ibid* at para 34-36.

and the detainee purported to give a statement "off the record." Insofar as the police did nothing to disabuse the detainee of that notion, it could not be said that he was fully aware of the consequences of making the statement without first consulting with counsel.[83]

Imbuing the s. 10(b) analysis with law enforcement concerns fails to confer the necessary procedural protections to safeguard the principle against self-incrimination. The detainee loses the benefit of the implementational duties, which includes the hold off duty. Justice Lamer reasoned that the detainee will not lose the right to counsel because they can always exercise it; the detainee simply cannot expect police to hold off from interrogation if the detainee is not reasonably diligent. This is a *non sequitur*. A lack of reasonable diligence ultimately amounts to an implied waiver of the right in a situation where the validity of the waiver is assessed by the state official who stands to benefit from the waiver itself. This approach fails to recognize that, if police are permitted to interrogate without any correlative duty to implement the right invoked, the detainee is effectively powerless to exercise their rights.

Justice Lamar's approach is fundamentally a balancing act, which gives effect to law enforcement concerns and investigative expediency. This is in direct conflict with the purpose of the *Charter*'s legal rights. Justice Lamer's application of the balancing approach is further complicated by the fact that he did not outline what constitutes reasonable diligence in exercising the right to counsel. A finding of a lack of reasonable diligence will depend on the circumstances of the case, but little assistance was afforded to lower courts in making that determination. This cast the scope of the detainee's right to counsel into ambiguity, which rendered the law on s. 10(b) somewhat uncertain and unpredictable. What was certain, however, was that the detainee would lose their right to counsel if the detainee did not indicate a desire to exercise the right and take positive steps to exercise same expeditiously. This fails to recognize fully the power imbalance inherent in custodial detention.

B. The Right to Silence

Section 7 of the *Charter* provides that:

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[83] *Ibid* at para 31.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The right to silence is closely related to the right to counsel. One of the most important functions of legal advice upon detention is to ensure that the detainee understands their rights, and chief among them is the right to silence.[84] A crucial piece of legal advice the detainee will receive from counsel on arrest or detention is the right to remain silent during interrogation.

Similar to the right to counsel, the right to silence safeguards the principle against self- incrimination by entitling the detainee not to incriminate themselves with their own words.[85] When faced with interrogation, the detainee may choose to say nothing and they cannot be compelled to speak. The trier of fact cannot draw an inference of guilt from the fact that the detainee remained silent during interrogation. Even if the circumstances of an accusation cry out for an explanation, silence is not evidence to be used against the detainee.[86]

This is because the right to silence hinges on the premise that the individual cannot be forced to assist the state in making out the case against them. The right acknowledges that compelling self-incrimination amounts to treating the detainee as a mere means to the state's objective of law enforcement.[87] In order to recognize the individual's dignity and autonomy, the right to silence is triggered whenever the coercive power of the state is brought to bear upon the individual during interrogation.[88]

Unlike the right to counsel, the right to silence did not attract a substantial body of Supreme Court of Canada jurisprudence immediately following the entrenchment of the *Charter*. In 1988, the Ontario Court of Appeal held that the right to silence was a well-settled principle in its decision in *R v Woolley*.[89] The Court recognized that, at common law, the detainee was under no legal obligation to speak to the authorities during the investigate stage of the criminal process. The Court made clear that the

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84 *Ibid* at para 109.

85 *Ibid* at para 20.

86 *Ibid* at para 20.

87 See Hamish Stewart, "The Confessions Rule and the *Charter*" (2009) 54 McGill L J 517 at 521 [Stewart].

88 Gold & Fuerst, *supra* note 73 at para 5.

89 *R v Woolley*, (1988), 40 CCC (3d) 531, 25 OAC 390 (CA) [*Woolley*].

right to silence constitutes a basic tenant of the criminal justice system such that it comes within the purview of s. 7 of the *Charter*.[90]

C. The Hebert Decision

The Supreme Court of Canada initially recognized the right to silence under s. 7 of the *Charter* in the *Hebert* decision. In that decision, Justice McLachlin reinforced the balancing approach to the interpretation of *Charter* rights, which emerged in the *Smith* decision.

In *Hebert*, Justice McLachlin examined the historical origins of the right in keeping with the purposive approach. She concluded that the right to silence is informed by the common law privilege against self-incrimination and the voluntary confessions rule. She noted that, unlike the right to silence, the privilege against self-incrimination arises only at trial by enjoining the state from forcing the accused to testify.[91] Similarly, however, the right to silence and the privilege against self-incrimination are premised on the proposition that it is the Crown's obligation to prove its case; the accused cannot be compelled to assist the state in doing so.[92]

The voluntary confessions rule shares certain characteristics with the right to silence, but bears important differences. The voluntary confessions rule is primarily concerned with the reliability of evidence at trial. The common law has long recognized that coercive police tactics do not extract truthful statements from detainees, but are wont to elicit statements designed to alleviate the pressure of interrogation so as to bring about its conclusion. Pursuant to the voluntary confessions rule, coerced confessions are inadmissible at trial due to their inherent unreliability.[93] The issue is whether the accused's decision to speak to the police was freely made and prompted by personal reasons, or otherwise arose as a result of coercive and oppressive police conduct, such as threats, promises, or violence.[94]

Both the privilege against self-incrimination and the voluntary confessions rule are concerned with the choice to remain silent when the power of the state is brought to bear against the individual. In terms of the scope of the right to silence under the *Charter*, however, the privilege against

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90 *Ibid* at paras 19-20.
91 *Hebert*, *supra* note 76 at para 19.
92 *Ibid* at para 101.
93 See Stewart, supra note 87 at 522.
94 *Ibid* at 544.

self-incrimination and the voluntary confessions rule could not be determinative. Echoing Justice Le Dain's comments in the *Therens* decision, Justice McLachlin reasoned that it would be incorrect to assume that the fundamental guarantees of the *Charter* are to be interpreted according to the law as it stood in 1982.[95] The *Charter* fundamentally changed the Canadian legal landscape, and to define *Charter* rights in accordance with their common law and statutory antecedents denies the supremacy of the cconstitution.[96] As a result, Justice McLachlin held that the scope of the right to silence under s. 7 of the *Charter* extends beyond the relevant common law doctrines.[97]

Justice McLachlin concluded that the right to silence cannot be limited to the trial stage of the criminal process. A person whose liberty is in jeopardy because of detention cannot be forced by the state to give evidence against themselves. The right to silence is informed by *Charter* values, such as dignity and autonomy. Under the *Charter*, compelled statements are not rejected simply because they are unreliable, but because the detainee is importantly not a resource to be exploited for law enforcement purposes. Thus, the right to silence under s. 7 must be available during custodial interrogation. The protection conferred by a legal system which grants immunity from self-incrimination at trial, but offers no protection with respect to pre-trial statements would be illusory.[98] The right to silence must include not only a negative right to be free from coercive and oppressive investigative tactics, but must denote a positive right to make a free choice to remain silent or to speak during interrogation.[99]

The right to silence under s. 7 of the *Charter* therefore mandates that, where the detainee chooses not to make a statement, the state is precluded from using its superior power to override the detainee's will so as to negate that choice.[100] The choice is defined objectively: where the right to silence is invoked, the focus shifts to the conduct of the authorities to determine whether police effectively deprived the detainee of the right to choose to speak.[101]

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95 *Hebert*, *supra* note 76 at para 73.
96 *Ibid* at paras 26, 75.
97 *Ibid* at para 104.
98 *Ibid* at paras 102-104.
99 *Ibid* at para 111.
100 *Ibid* at para 122.
101 *Ibid* at para 126.

However, Justice McLachlin held that s. 7 does not require that police act in a manner so as to protect the detainee from making a statement, and s. 7 does not enjoin police from using means of persuasion, which fall short of coercion, to encourage the detainee to speak.[102] Justice McLachlin reasoned that a right to silence, which could only be discharged by waiver, would be "absolute" and overshoot the purpose of the right, thereby expanding it beyond its intended scope.[103] In Justice McLachlin's view, s. 7 simply requires that police allow the detainee to make an informed choice on whether to speak by providing an opportunity for the detainee to exercise their right to counsel.[104]

In her reasons, Justice McLachlin employed some aspects of the purposive approach to delineate the scope of the protections conferred under s. 7, such as considering the historical origins of the right to silence. Her analysis, however, was importantly a balancing exercise. While Justice McLachlin noted that the *Charter*'s legal rights are aimed at limiting the superior power of the state vis-a-vis the individual, she invoked the internal balancing component of s. 7 to support the position that s. 7 seeks to strike a balance between the individual's interests and those of the state. She noted that s. 7 is not absolute; the wording acknowledges that the state may deprive an individual of certain interests in conformity with the principles of fundamental justice. Justice McLachlin reasoned that the purpose of s. 7 is to balance the individual's interest in protection from unfair use of state power with the state's interest in maintaining power to deprive life, liberty, and security of the person.[105] On that basis, Justice McLachlin saw fit to consider the state's interest in law enforcement when delineating the scope of the right to silence.

In her minority opinion, Wilson J took issue with McLachlin J's approach to the right to silence. Wilson J's opinion was that, in order to determine whether police conduct offends principles of fundamental justice contrary to s 7, the focus should be on the police conduct and not on the state's objective of law enforcement.[106]

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102 *Ibid* at para 110.
103 *Ibid* at para 129.
104 *Ibid*.
105 *Ibid* at paras 119-121.
106 *Ibid* at para 8.

Justice Wilson followed the decision in *Big M Drug Mart* and reaffirmed that *Charter* rights must be given a generous interpretation, which is aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. In her view, it was inappropriate to qualify a *Charter* right by balancing the interests of the state against the interests of the right holder. She stated that it was contrary to the purposive approach to inject into the analysis of the right's scope justificatory considerations for placing limits upon the right.[107] Justice Wilson would have held that the interests of the state are relevant only to the remedial stage of the analysis after the scope of the right has been considered and a breach of the right has been established. She made clear that the state's interests have no bearing on delineating the scope of the right itself.[108]

Even in the context of s. 7 of the *Charter*, which includes an internal balancing component, employing a balancing exercise to delineate the scope of legal rights is problematic. The language of s 7 provides that the state may only deprive an individual of their right to life, liberty and security of the person in accordance with the principles of fundamental justice. In *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*,[109] Chief Justice Lamer held that the meaning of "principle of fundamental justice" must be determined by reference to the interests that s. 7 is meant to protect. Principles of fundamental justice are found in the basic tenants of the legal system; they do not lie in the realm of public policy or public interest, but are contained within the inherent domain of the judiciary as guardian of the justice system and the constitution.[110] This indicates that the state's interest in law enforcement does not constitute a principle of fundamental justice, which should influence the interpretation of the right to silence. Nor could it be used to justify a restrictive interpretation of the right to silence.

It is implicit in the balancing exercise that s. 7 intends to maintain the state's ability to use its law enforcement powers in a fair manner. A finding that s. 7 supports unfair uses of state power would violate principles of fundamental justice. Even if s. 7 only supports fair uses of state power, it appears unfair for interrogation to proceed where the detainee has positively invoked their right to silence even where the state's means of persuading

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107 *Ibid* at paras 7-8.

108 *Ibid* at para 9.

109 *Reference re s 94 of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 69 BCLR 145 [*Reference re* MVA *BC*].

110 *Ibid* at paras 30, 37.

the detainee to speak are "legitimate." Proceeding with interrogation under those circumstances suggests very heavily that the right to silence has little meaning and cannot be exercised effectively. Any distinction between legitimate means of persuasion and negating the detainee's choice to speak arguably boarders on semantics. If the state's interest lies in its law enforcement power and the individual's interest lies in seeing that power limited, it is unlikely that these competing interests can be truly reconciled.

D. The Interrogation Trilogy

Despite Justice Wilson's cautions, the balancing approach to the interpretation of the *Charter*'s legal rights did not end with the decision in *Hebert*. As noted, the balancing approach was employed as the interpretative tool of choice for analyzing the legal rights enshrined under ss. 7 and 10(b) of the *Charter* in the interrogation trilogy.

1. The Oickle Decision

In *Oickle,* the first decision in the interrogation trilogy, Justice Iacobucci considered the voluntary confessions rule in light of the *Charter*. He noted that, while s. 10 is triggered only upon arrest or detention, the confessions rule applies whenever an individual speaks with a person in authority. An involuntary statement is strictly inadmissible under the confessions rule, but illegally-obtained evidence may still be admitted at trial under s. 24(2) of the *Charter*.[111] Justice Iacobucci determined the voluntary confessions rule constitutes a protection offered at common law, which extends beyond the protections guaranteed by the *Charter.* His opinion was that the common law rule is broader than the *Charter*'s guarantees. The *Charter* is not an exhaustive catalogue of rights, but a floor below which the law cannot fall.[112]

Justice Iacobucci's view of the *Charter* as a minimal source of protections underscores the impetus to give a broader definition to the common law rule. In his view, the confessions rule is not strictly concerned with evidential reliability; like the *Charter's* legal rights, it is imbued with concerns of adjudicative fairness. Interestingly, Justice Iacobucci's reasons make little reference to the right to silence, yet his analysis of the voluntary confession's rule was evocative of Justice McLachlin's analysis of the right to silence in *Hebert*.

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111 *Oickle*, *supra* note 5 at para 30.

112 *Ibid* at paras 31-32.

For Justice McLachlin, the right to silence protects the detainee's power to make a free and meaningful choice on whether to speak to police. For Justice Iacobucci, the voluntary confessions rule overlaps considerably with that purpose. His opinion was that, like the right to silence, the voluntary confessions rule is a manifestation of the broader principle against self-incrimination.[113] *Quid pro quo* inducements are impermissible because the detainee may confess so as to gain the benefit offered by the interrogator rather than based upon the personal desire to confess.[114] The *quid pro quo* is prohibited because it effectively empowers the state to negate the detainee's free choice to decide whether to speak with police. According to the reasons in *Hebert*, this is exactly what the right to silence is intended to protect.

Justice Iacobucci's approach to the voluntary confessions rule expanded the rule's scope; however, the procedural protections available to the detainee remained largely unchanged. The rule clearly prohibited coercive police tactics, but the threshold for coercion and oppression is very high. Coercive conduct is improper only when it is strong enough to raise a reasonable doubt as to whether the will of the detainee has been overborne.[115] Subjecting the detainee to utterly intolerable conditions or offering inducements strong enough to produce an unreliable confession will meet this threshold, but eliciting a statement under false pretenses will not.

Justice Iacobucci held that confronting the detainee with inadmissible or fabricated evidence to convince them to speak will not offend the rule. So long as there is no *quid pro quo* or egregious conduct, coercive behaviour on the part of police may be permitted under the voluntary confessions rule. Indeed, Justice Iacobucci found that the detainee's statements in *Oickle* were voluntary despite the fact that the police subjected him to investigative tactics which arguably constituted inducements or threats, including making suggestions of packing/bundling charges and offering psychiatric help, as well as threatening to interrogate the detainee's girlfriend if he did not confess.

2. The Singh Decision

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113 See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence*, 4th ed (Markham: LexisNexis Canada Inc., 2014) at §8.43 [Lederman, Bryant & Fuerst].

114 *Oickle*, *supra* note 5 at para 56.

115 *Ibid* at para 57.

The low threshold under the voluntary confessions rule is important for *Charter* purposes given the doctrinal muddling which occurred in *Singh*. Justice Charron employed the balancing approach to expand upon Justice McLachlin's analysis of the right to silence in *Hebert*. The detainee in *Singh* repeatedly expressed that he did not wish to discuss the incident constituting the subject matter of the investigation with police, invoking his right to silence a total of 18 times during interrogation.[116] On appeal, the detainee invited the Supreme Court of Canada to hold that s. 7 includes a hold off duty whereby police cease questioning if the right to silence is invoked. Justice Charron rejected that interpretation on the grounds that it ignored the "critical balancing of state and individual interests which lies at the heart of this Court's decision in *Hebert*."[117]

Justice Charron held that s. 7 recognizes the individual's right not to speak; unlike s. 10(b), it does not confer the right not to be spoken to by state authorities.[118] Justice Charron reasoned that the right to silence is, by its very nature, exercised differently from the right to counsel. While the detainee is dependent upon police to facilitate the right to counsel, exercising the right to silence is fully within the control of the detainee. Justice Charron reasoned that hold off duties and waiver requirements are therefore unnecessary. In Justice Charron's view, the law recognizes the detainee's freedom of choice, but it was their responsibility to decide to speak or to remain silent.

The distinction between being made to listen and being forced to speak allowed Justice Charron to interpret the right to silence in a manner which gave effect to the state's interest in law enforcement.[119] She characterized the detainee as an important, fruitful source of information in the state's search for truth. While detention triggers the detainee's immediate need for protection, the interests of the state and society more broadly mandate that the police are empowered to "tap this valuable source."[120] For Justice Charron, the power to use legitimate means of persuasion to encourage the

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116 *Singh*, *supra* note 3 at para 58.

117 *Ibid* at paras 6-7.

118 *Ibid* at para 28.

119 See Lisa Dufraimont, "The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law" (2011) 54 SCRL (2d) 1 at para 31 [Dufraimont].

120 *Singh*, *supra* note 3 at para 45.

detainee to speak gave effect to the "critical" balance between individual and societal interests.[121]

Justice Charron held that whether persuasion is legitimate would be assessed under the voluntary confessions rule. She reasoned that the common law rule denotes respect for individual freedom of will and overall fairness in the process by supporting the detainee's right to make a meaningful choice on whether to speak with a person in authority.[122] Where a person in authority interrogates a detainee, the voluntary confessions rule and the right to silence would be functionally equivalent such that a finding of voluntariness would be determinative of the s. 7 issue.[123]

Justice Charron cautioned that voluntariness is highly fact-driven. She recognized that, in some cases, continued interrogation in the face of repeated assertions of the right to silence would effectively deny the detainee's *Charter* rights and call into question the voluntariness of the statement made. However, Justice Charron made clear that the frequency with which the right is asserted only constitutes part of the analysis and is not itself determinative. She held that the ultimate question is whether the accused exercised their free will by choosing to make a statement.[124] An application of this approach to the right to silence led Justice Charron to find that the detainee's rights in *Singh* had not been breached. This gave rise to a very strong dissent.

In his dissenting opinion, Justice Fish took issue with the conflation of the right to silence and the voluntary confessions rule. In his view, the purposive approach made plain that the right to silence under s. 7 was not eclipsed by the voluntary confessions rule under *Oickle*.[125] Justice Fish's opinion was that the right to silence extends beyond the common law rule because it rests on a different foundation of principles. Even under its broader formulation in *Oickle,* the voluntary confessions rule remained primarily concerned with the reliability of evidence. Under the purposive approach, the *Charter*'s aim was to constrain government action, which is essential for a democratic society in which the basic dignity of all persons is recognized.[126]

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121 *Ibid* at para 47.
122 *Ibid* at paras 30, 35.
123 *Ibid* at paras 37, 39.
124 *Ibid* at para 53.
125 *Ibid* at para 77.
126 *Ibid* at paras 56, 76.

For Justice Fish, it was the Court's duty to ensure that the right to silence is respected by interrogators once it has been unequivocally asserted. He stated that the right to silence cannot be disregarded by police or insidiously undermined as an investigative stratagem.[127] Given the low threshold for voluntariness under the voluntary confessions rule, it could not be said that a confession passing common law muster invariably represents a free and meaningful choice to speak to the police for the purposes of the *Charter*. In Justice Fish's view, the majority opinion's concern with police powers was incongruous with the approach mandated by the *Charter*. Justice Fish stated that:

> The work of the police would be made easier (and less challenging) if police interrogators were permitted to undermine the constitutionally protected rights of detainees, including the right to counsel and the right to silence — either by pressing detainees to waive them, or by "unfairly frustrat[ing]" their exercise. More draconian initiatives might prove more effective still. Nonetheless and without hesitation, I much prefer a system of justice that permits the effective exercise by detainees of the constitutional and procedural rights guaranteed to them by the law of the land. The right to silence, like the right to counsel, is in my view a constitutional promise that must be kept.[128]

The rights enshrined in the *Charter* were not given constitutional status on the condition that they remain unexercised, lest the investigation of crime is impeded.[129] In the *Manninen* decision, the Court acknowledged that, where the right to counsel is invoked and police proceed with interrogation, the detainee will conclude that their rights have no effect such that they must answer. This applies equally to the right to silence. Detainees who are left alone to face interrogators, who persistently ignore assertions of the right to silence, are powerless and bound to feel that their rights have no meaning such that they have no choice but to speak.[130] Justice Fish's opinion was that there was no support in the common law for the proposition that the police may press detainees to waive their *Charter* rights or to frustrate deliberately their effective exercise. On a purposive approach, the policy of the law is to facilitate, not to frustrate, the effective exercise of *Charter*

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127 *Ibid* at para 57.

128 *Ibid* at paras 96-97.

129 *Ibid* at para 87.

130 *Ibid* at para 81.

rights.[131] Justice Fish would have allowed the detainee's appeal from conviction.

The combined effect of the decisions in *Oickle* and *Singh* dictates that the right to silence provides no protection beyond that already offered by the voluntary confessions rule. The *Charter* right was entirely subsumed by the common law rule of evidence. Interestingly, this is contrary to Justice McLachlin's opinion in *Hebert* that the scope of the right to silence should extend beyond the relevant common law doctrines.[132] The doctrinal muddling in *Singh* results in narrowed protection against the risk of self-incrimination. In the decision in *R v McKay*,[133] Justice Duval questioned the efficacy of the right to silence in the wake of the *Oickle* and *Singh* decisions, noting that:

> Other than covering his ears and standing mute in response to anything said by the police, how is the detained person to exercise his/her right to remain silent? How long is he to be detained in an interview room after he has stated that he has nothing to say while police persist with an interrogation? At what point in time will the assertion of a right to remain silent be respected by ceasing questioning?[134]

Under the authority of s. 503 of the *Criminal Code*, police are empowered to hold a detainee for up to 24 hours. During that time, police are permitted to persuade the detainee to speak so long as the persuasion is "legitimate." *Oickle* and *Singh* addressed disconcerting police conduct, which pushed the line between persuasion and coercion, but such conduct was endorsed as legitimate by the Court.[135] This suggests that police are permitted to exploit emotions and conscience, as well as family or romantic ties. A confession may be voluntary if the interrogation continues for hours over and above the detainee's protests that they wish to remain silent. Sustained efforts to override the assertion of the right to silence, to obtain a confession "no matter what," are acceptable.[136] 24 hours is a very long time for the detainee to exercise their free choice to withstand these investigative tactics.

3. The Sinclair Decision

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131 *Ibid* at paras 71 & 87.

132 *Hebert*, *supra* note 76 at para 104.

133 *R v* McKay, 2003 MBQB 141, 175 Man R (2d) 121 [*McKay*].

134 *Ibid* at para 100.

135 See Dufraimont, *supra* note 119 at para 40.

136 See Don Stuart, Faculty of Law, Queen's University, Annotation of *R v Singh* 2007 SCC 48, [2007] 3 SCR 405 [Stuart].

In *Sinclair*, the Supreme Court of Canada further constrained the protections available during custodial interrogation. On appeal, the detainee's position was that s. 10(b) gives rise to a duty on the part of the police to hold off from questioning where a detainee asserted the desire to speak with counsel after previously exercising the right. The detainee also contended that s. 10(b) requires police to facilitate requests for counsel's presence during interrogation. The detainee submitted that the plain wording of s. 10(b) did not restrict the right to initial, preliminary consultation, but affords ongoing protection, similar to the *Miranda* rights, which included hold off duties and the right to speak with counsel at any time.[137] The Crown's position on appeal was that s. 10(b) concerns only a specific point in time, not a continuum.[138]

In *Hebert*, Justice McLachlin justified a balancing approach to the right to silence based upon s. 7's internal balancing component. Despite the absence of an internal balancing component contained in s. 10(b), the majority in *Sinclair* applied the balancing approach to the right to counsel. Chief Justice McLachlin and Justice Charron purported to apply a purposive approach to construe s. 10(b), but their analysis hinged on balancing the individual's interests against those of the state. They reasoned that, in defining the contours of s. 10(b) of the *Charter* "consideration must be given not only to the protection of the rights of the accused but also to the societal interest in the investigation and solving of crimes."[139]

For Chief Justice McLachlin and Justice Charron, the scope of the right to counsel had to strike a balance between the state's interest in law enforcement and the detainee's interest in being left alone.[140] They stated that the purpose of the right to counsel is to provide preliminary advice on the right to silence so that the decision to speak with police is free and informed. Section 10(b) of the *Charter* simply gives the detainee the opportunity to access legal advice relevant to that choice.[141]

Chief Justice McLachlin and Justice Charron held that s. 10(b) is satisfied by a one-time-only consultation with counsel, after which police are

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137 See *Michigan v Mosley*, 423 US 96 at 103, 96 S Ct 321 (US Sup Ct 1975) [*Michigan v Mosley*].

138 *Sinclair*, *supra* note 5 at para 21.

139 *Ibid* at para 63.

140 *Ibid*.

141 *Ibid*. at paras 24–25.

free to question the detainee. The detainee is only entitled to exercise s. 10(b) a second time where a reasonably-observable change in circumstances makes re-consultation necessary to fulfill the purpose of s. 10(b) to inform the detainee of the right to silence, such as a change in the jeopardy or where there is reason to believe that the detainee did not understand the initial advice received from counsel.[142] Chief Justice McLachlin and Justice Charron held that s. 10(b) does not afford the right to counsel's presence during interrogation. They reasoned that recognizing protections such as those conferred by American law would upset the proper balance between the respective interests of the state and those of the individual.[143]

Under Chief Justice McLachlin and Justice Charron's approach, it is assumed that the initial legal advice given by counsel was sufficient. A simple request for re-consultation, without more, is not enough to trigger police implementational duties to facilitate the right to counsel and to hold off from investigation. Largely, the police are entitled to assume that their duties have been satisfied following a single consultation, even where the jeopardy is serious and the detainee consulted with counsel for only a few minutes.[144] As noted, re-consultation will only be facilitated where there is some observable change in the circumstances, which is assessed by the interrogating officer himself. This gives rise to the possibility that the right to re-consultation will only be recognized on a *voire dire*. An *ex post facto* acknowledgement of the right does little to provide sufficient protection to the detainee, especially since any inculpatory statement made by the detainee may still be admitted at trial under s. 24(2) of the *Charter*.

The majority's interpretation of the right to counsel gave rise to two dissenting opinions. In his opinion, Justice Binnie noted that the majority's approach disproportionately favoured the interests of the state in the investigation of crime over the rights of the individual.[145] He felt that the majority conflated the right to silence and the right to counsel, thereby resulting in an unduly impoverished view of s. 10(b), which belies the liberal, generous interpretation applied in earlier *Charter* case law.[146] Justice Binnie noted that the right to counsel was intended to ensure fair treatment in the criminal process. The analysis to be applied must consider the

142 *Ibid* at paras 50-52, 57.
143 *Ibid* at para 38.
144 See Coughlan & Currie, *supra* note 35 at para 63.
145 *Sinclair*, *supra* note 5 at para 77.
146 *Ibid* at para 84.

integrity of the justice system rather than focusing on the need for short-term results in the interrogation room. Justice Binnie felt that the six minutes of legal advice enjoyed by the detainee in connection with a murder charge could hardly be said to exhaust the right to counsel.[147]

In their separate dissenting opinion, Justices LeBel and Fish stated that the majority's interpretation placed limitations on s. 10(b), which were inconsistent with its purpose.[148] In their view, there was nothing to suggest that the phrase "on arrest or detention" limited s, 10(b) to a single point in time. Read in its entirety, the right signified ongoing entitlement to legal assistance.[149] This was evidenced by the French "*l'assistance d'un avocat*", which is triggered "*en cas d'arrestation*". *L'assistance* connoted a broader role for counsel than simply advising the detainee to "keep quiet" during interrogation. As such, s. 10(b) could not be confined to a single consultation for the sole purpose of informing the detainee to remain silent. Such an interpretation was minimalistic and redundant in terms of the s. 7 right to silence. It suggested that the role of counsel could be achieved by playing for the detainee a recorded message on an answering service, which instructs the detainee to remain silent.[150]

An interpretation of s. 10(b) which conceives of the right in such a way that it could be replaced with a recording undermines the integrity of the right. The role of defence counsel under s. 10(b) should be broader than the majority would have it. The advice given by counsel at the pre-trial stage is crucial; the events surrounding detention determine whether the detainee can be charged, prosecuted, and convicted. By prohibiting the detainee from consulting with counsel at this time, the majority recognizes a new police power of virtually unfettered access for the purposes of seemingly endless interrogation in the name of law enforcement.

The result is that the constitution empowers the police to compel the detainee to speak until a confession is obtained, which undermines the effective exercise of s. 10(b). For Justices LeBell and Fish, to suggest that the right to counsel and its exercise must be interpreted so as to assist the state in securing a conviction "turns the system of criminal justice on its head."[151]

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147 *Ibid* at para 79, 83.
148 *Ibid* at para 170.
149 *Ibid* at paras 145-47.
150 *Ibid* at para 151.
151 *Ibid* at para 128.

In their view, if the effective exercise of the right to counsel truly constitutes a threat to law enforcement such that the two must be reconciled, it is the system of justice, not the right to counsel, which should be openly and honestly questioned.[152]

4. The Culmination of the Balancing Approach

The majority opinion in *Sinclair* represents the culmination of the balancing approach, which displaced the purposive approach as the interpretive tool of choice to analyze the *Charter*'s legal rights in the interrogation trilogy. Since the Supreme Court of Canada handed down the interrogation trilogy, the balancing approach has been applied in the context of arbitrary detention cases under s. 9 of the *Charter* and unlawful search cases under s. 8. In *R v Grant*,[153] Chief Justice McLachlin and Justice Charron stated that the ambit of detention for constitutional purposes is informed by the need to safeguard the individual's choice not to cooperate with the police without impairing effective law enforcement. In *R v Saeed*,[154] Justice Moldaver recognized warrantless penile swabs as a valid search under s. 8 on the grounds that the state's interest in law enforcement outweighs the individual's interest in privacy.

The easy manner with which the Supreme Court of Canada continued to embrace the balancing approach is troubling. Justices LeBel and Fish stated in the *Sinclair* decision that the interrogation trilogy resulted in significant and unacceptable consequences for the constitutional rights triggered upon detention.[155] Justice Binnie expressed that the majority tightened "the noose" around *Charter* rights such that police are afforded more power over the detainee than the *Charter* actually intended.[156] In the aftermath of the interrogation trilogy, the detainee may be detained, isolated, and interrogated for hours on end, during which time the interrogator may ignore assertions of the right to silence and the right to counsel. Interrogation amounts to an endurance contest, a battle of the wills, in which the police hold all the important legal cards.[157]

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152 *Ibid* at para 204.

153 *Grant*, *supra* note 28.

154 *R v Saeed* 2016 SCC 24, [2016] 1 SCR 518 [*Saeed*].

155 *Sinclair*, *supra* note 5 at para 180.

156 *Ibid* at para 84.

157 *Ibid*.

The balancing approach is therefore problematic from a theoretical and practical perspective. It violates established constitutional norms and leaves the detainee with diminished protections, which is contrary to the purpose of the *Charter*'s legal rights. This results in an unworkable approach to constitutional interpretation.

VI. Theoretical problems with the Balancing Approach

From a theoretical perspective, the balancing approach is problematic due to the very act of balancing itself. Giving weight to societal and state interests at the stage of delineating the scope of legal rights, rather than at the later stage of remedial analysis, is contrary to established modes of constitutional analysis.[158]

Balancing interests occurs as a matter of course under ss. 1 and 24 of the *Charter*. This was made clear in the seminal s. 1 decision in *R v Oakes*,[159] as well as the *Grant* decision on s. 24(2). Since the Supreme Court of Canada's decision in *Oakes, supra*, analysis under s 1 has followed a standard form. First, the scope of the right is determined according to its purpose. There is no balancing at the delineation stage. The issue is then whether an infringement of the right is established. If so, the analysis shifts to the remedial stage. At that stage, the issue is whether the infringement can be saved under s. 1 of the *Charter*, which provides that the state may enact *Charter*-infringing laws so long as those laws can be justified in a free and democratic society. The Court in *Oakes* held that an infringing law is justified if the state can prove that: the limit imposed on the right is prescribed by law, the limit supports a pressing and substantial objective, the limit is minimally impairing, and the limit is proportional in that the associated benefits outweigh its costs.

The "prescribed by law" requirement may preclude an application of s. 1 in the context of *Charter* breaches arising during custodial interrogation. A limitation is prescribed by law within the meaning of s. 1 if it is expressly provided by statute or regulation, or otherwise results by necessary implication from the terms of a statute, regulation, or its operating requirements. A prescribed limitation may also result from the application

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158 MacDonnell, *supra* note 6 at paras 1, 4.

159 *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

of a common law rule.[160] When police questioning creates a coercive environment or frustrates access to counsel, such actions do not a constitute a limitation prescribed by law. Police have statutory and common law powers, but exerting undue pressure on a detainee to elicit a confession is not an action undertaken in the execution of a statutory or regulatory duty, and it does not result from the application of a common law rule.[161] The justificatory analysis of s. 1 is largely unavailable unless statutory police powers are squarely at issue.[162]

In the context of the *Charter*'s legal rights, the remedial analysis will typically involve application of ss. 24(1)-(2). Section 24(1) of the *Charter* furnishes courts of competent jurisdiction with the discretion to grant such relief "as the court considers appropriate and just in the circumstances." Whether a mistrial should be granted, for example, involves balancing the injustice inflicted upon the accused as a result of the *Charter* breach with the seriousness of the offence and the public's interest in law enforcement.[163] Under s. 24(2), illegally-obtained evidence may be excluded from trial if its admission would bring the administration of justice into disrepute. Pursuant to the decision in *Grant*, the court is required to weigh three factors: the seriousness of the *Charter*-infringing conduct, the impact on the accused's *Charter*-protected interests, and society's interest in adjudication on the merits.[164] The remedial analysis under s. 24 of the *Charter* hinges on balancing the state's interests against those of the individual.

Regardless of whether the remedial analysis occurs by way of ss. 1 or 24, standard *Charter* interpretation reserves balancing interests for the remedial stage. As Justice Wilson noted in her dissenting opinion in *Hebert*, it is inappropriate to qualify a *Charter* right by balancing the interests of the state against it.[165] Imbuing the analysis with societal or state interests imposes an internal limitation on the *Charter* right, which is inconsistent with the very nature of individualistic rights themselves. The *Charter*'s substantive

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160 See *Therens*, *supra* note 23 at para 60.
161 See *Hebert*, *supra* note 76 at para 141
162 See MacDonnell, *supra* note 6 at para 2.
163 *R v Burke*, 2002 SCC 55, [2002] 2 SCR 857 at para 75 [*Burke*].
164 See *Grant*, *supra* note 28 at paras 72-86.
165 See *Hebert*, *supra* note 76 at para 7.

guarantees are simply not designed to protect state and collective interests.[166]

While each *Charter* right must necessarily have an outer boundary, the scope of the right must be considered in light of its purpose.[167] Justice Dickson held in *Big M Drug Mart,* that the purpose of a right must be assessed with a view to the larger objectives of the *Charter* itself as well as the meaning and purpose of other related rights and freedoms.[168] Such related rights and freedoms does not include the state's interest in law enforcement. Under the purposive approach, the case law has consistently held that the purpose of the *Charter*'s legal rights is to acknowledge the vulnerable position of the detainee by limiting the investigative powers of the state to ensure procedural fairness.[169] Importantly, locating the boundary of the *Charter*'s legal rights before the point at which their effective exercise could restrict the state's investigative power substantially undermines the purpose of the *Charter* in its entirety. The state's interests should have no bearing on delineating the scope of the *Charter* right and should be reserved for the remedial analysis.

Adopting an approach to *Charter* interpretation which is contrary to established constitutional theory raises the issue of the court's role. The concern with police powers and law enforcement bespeaks the proposition that there is no need to augment the detainee's rights by applying a generous interpretation in newly emerging factual situations. It underscores the public perception that criminals enjoy too many protections and entitlements, which should not be allowed to hamper the state's search for truth. Lee Stuesser notes that this perception results in legislative inertia; while it is always open to Parliament to provide for greater individual protections, there is no political will to do so. There are simply too few votes to be had in basing a political campaign on protecting the rights of people who come into conflict with the law.[170] Ultimately, getting "tough" on crime is good for politics. Politicians may be content to leave protecting the detainee to the judiciary.[171]

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166 See MacDonnell, *supra* note 6 at paras 4, 36.

167 *Ibid* at para 43.

168 *Big M Drug Mart*, supra note 26 at para 117.

169 See *Sinclair*, *supra* note 5 at para 85.

170 Lee Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002) 29 Man LJ 149 at 149-150 [Stuesser].

171 *Ibid* at 149.

In the early decisions following the entrenchment of the *Charter*, the judiciary embraced this responsibility as the "guardian of constitutional rights", which was a titled coined by Justice Dickson in the decision in *Hunter v Southam Inc.*[172] As Justice Le Dain noted in the *Therens* decision, the *Charter* is not only a new affirmation of protected rights, but an affirmation of judicial power and responsibility by virtue of s. 52 of the *Constitution Act, 1982*.[173] The *Charter* signified a shift from a system of Parliamentary supremacy to constitutional supremacy. The separation of powers mandates the independence of the judiciary from the legislative and executive branches of government, thereby empowering the judiciary to make decisions according to the dictates of the constitution alone.[174] Judicial independence denotes the complete freedom to hear and to decide cases independent of any outside interference or influence, whether arising from another judge, individual, group, or branch of government.[175] This independence is limited only by the requirements of the law and justice.[176]

Under the *Charter*, the judiciary has been assigned an interpretive, remedial role to settle disputes on the meaning of constitutional rights.[177] This includes the authority to determine the limits of state power to ensure that the rights of individual citizens are respected during interactions with the authorities in which the coercive power of the state is brought to bear upon the individual.[178] Application of the balancing approach undermines the Court's proper role as the guardian of *Charter* rights. It implicitly supports, if not bolsters, police powers.[179] Limiting the protection afforded to individuals by constitutional mandate for the sake of law enforcement ultimately amounts to making a policy choice. This blurs the line between judicial and political spheres, which is inconsistent with the court's role as the defender of *Charter* rights.[180] The role of the judiciary is to uphold and

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172 *Hunter v Southam, supra* note 31 at para 16.

173 *Therens, supra* note 23 at para 47.

174 See *Vriend v Alberta,* [1998] 1 SCR 493 at para 131, 136, 67 Alta LR (3d) 1 [*Vriend v AB*].

175 *R v Beauregard* [1986] 2 SCR 56, 30 DLR (4th) 481 at para 21 [*Beauregard*].

176 *Mackin v New Brunswick (Minister of Justice)* [2002] 1 SCR 405, 245 NBR (2d) 299 at para 37 [*Mackin*].

177 See *Beauregard*, *supra* note 175 at paras 131-134.

178 See MacDonnell, *supra* note 6 at para 53.

179 *Ibid* at paras 36 & 55.

180 *Ibid* at paras 50 & 55.

affirm the constitution.[181] It is importantly not the task of the judiciary to make policy choices which prefer law enforcement over individual rights.

VII. Practical Problems with the Balancing Approach

Under the balancing approach, the expansion of police powers and concomitant restriction of individual rights occurred at the expense of constitutional law theory. The Supreme Court of Canada did not subject the police powers it legitimized in the interrogation trilogy to any concrete justificatory process.[182] No criteria were identified to govern the balancing exercise under this approach.[183] This has a direct impact on the way in which investigations and prosecutions unfold, from preliminary advice to plea bargaining and *Charter* applications. From a practical perspective, the efficacy with which *Charter* rights confers the intended protection to the detainee is suspect.

The power to detain for law enforcement purposes is one of the most invasive powers the state possesses.[184] During detention, the average detainee will tend to perceive a police direction or question as a demand mandating compliance.[185] The fact that a command or line of questioning is not justified in law does not make it any less of an imperative in the eyes of the detainee.[186] The detainee is likely to err on the side of caution by acting in a manner so as to comply with the police's wishes.[187]

This problem is compounded when the detainee is disenfranchised person or a member of a marginalized group. Visible minorities are at a particular risk of police intervention.[188] Aboriginal and Black Canadians are placed under the microscope of police surveillance and are subjected to interactions with the police at disproportionality higher rates than members

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181 See *Beauregard*, *supra* note 175 at para 136.

182 See *Sinclair*, *supra* note 5 at para 191.

183 See MacDonnell, *supra* note 6 at para 54.

184 See A Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L J 329 at 329 [Young].

185 See *Grant*, *supra* note 30 at para 171.

186 See *Suberu*, *supra* note 46 at para 61.

187 *Ibid* at para 57.

188 See *Grant*, *supra* note 28 at para 154.

of other racial groups.[189] Unfortunately, state intrusion in the name of law enforcement is not always undertaken to foster the search for truth. It can be used as a tool to exert social control of marginalized groups.[190]

In the aftermath of the interrogation trilogy, the courts have stated in their reasons that detention and interrogation are inherently coercive.[191] However, the perceived need to safeguard investigative powers suggests an implicit unwillingness to recognize fully the disadvantaged position of the individual from a practical perspective. This is not only contrary to the purpose of the *Charter*'s legal rights, but irreconcilable with the need to recognize *Charter* values of dignity and autonomy when interpreting legal rights.

Charter values, such dignity and autonomy, resound with Lockean notions of liberalism.[192] The individual is not simply a vehicle through which to obtain evidence. Defining the right to silence as the choice to speak is premised on the proposition that individuals are free, equal, and autonomous. If the detainee is weak-willed and succumbs to the temptation to answer police questions, that is their right and their problem. In *Sinclair,* the majority associated the free choice to speak with power over the interrogation process. Insofar as the detainee has the right to decide to speak by answering questions put to them, the majority felt that the detainee was vested with "ultimate control over the interrogation."[193]

This does not align with reality. It cannot be said that the accused in *Singh,* who invoked the right to silence 18 times and asked repeatedly to be returned to his cell exerted ultimate control over the interrogation process. He was under the control of the state and was not free to leave. The only way in which the detainee in *Singh* could have controlled the process was to bring about its end by making an inculpatory statement. The reality of custodial detention is that, if the detainee's autonomy is to be preserved and respected during interrogation so as to safeguard the risk against self-incrimination, which is s. 10(b)'s over-arching purpose, procedural protections must be amplified, not limited.

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189 See 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 162 [Tanovich].

190 Young, *supra* note 184 at 333.

191 See e.g. reasons in *Grant, supra* note 28, and *Suberu, supra* note 44.

192 Young, *supra* note 184 at 343.

193 *Sinclair, supra* note 5 at para 58.

Insofar as the balancing approach affords restricted protections, it cannot be said that the detainee has any power to control the interrogation process unless they truly understand the nature of their rights and the scope of police power. The detainee is unlikely to be legally trained, and they are unlikely to be a resilient, sophisticated opponent for the police, who is capable of confidently and effectively exercising their rights. In *Evans, supra*, the detainee spoke with his brother via telephone during custodial detention and was asked if he knew about his rights. The detainee responded by mimicking the *Miranda* rights caution and added "I watch TV, man, I know what's going on."[194] This distorted understanding of the right to counsel is not an isolated phenomenon. The very fact that s. 10(b) was interpreted to furnish the detainee with information on that right recognizes that the average person cannot be expected to know their *Charter* rights, the scope and nature of the protections afforded under the *Charter,* or the scope of legitimate police power.

Experimental studies demonstrate that it is rare for a detainee to understand their rights when those rights are read to them. A study[195] conducted by three forensic psychologists examined 126 police interviews of adult suspects, which were obtained from police organizations in Atlantic Canada between 1995—2009. The *Charter* cards used in the interviews remained unchanged over the time period explored in the study.[196] The study determined that information on the right to silence was missed or read incorrectly in 4.5% of the interviews. Nearly 98% of the detainees responded affirmatively when asked if they understood their right to silence.[197] In approximately 24% of the interviews, information on the right to counsel was missed or stated incorrectly. Only 52% of the detainees were asked if they understood the right to counsel, and 94% of those detainees responded affirmatively.[198] Very few attempts were made by police to explain the rights contained in each caution.[199]

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194 *Evans, supra* note 45 at para 18.

195 Brent Snook, Joseph Eastwood & Sarah MacDonald, "A Descriptive Analysis of How Canadian Police Officers Administer the Right to Silence and the Right to Legal Counsel Cautions" (2010) 52:5 CJCCJ 545 [Snook, Eastwood & MacDonald].

196 *Ibid* at 549.

197 *Ibid* at 552.

198 *Ibid* at 553.

199 *Ibid* at 554.

The authors of the study determined that the average rate of speed at which the *Charter* cards were read exceeded rates allowing for adequate comprehension. The authors noted that there is a rapid decrease in comprehension on the part of the listener when the speaker's rate of speech exceeds 200 words per minute. In the study, 65% of the cautions on the right to silence exceeded that benchmark by a rate of 31%. In 32% of interviews, information on the right to counsel was delivered at a rate that was 2% faster than that benchmark. This suggests that a significant number in the sample struggled to understand their legal rights, despite their own claims of comprehension.[200]

This is consistent with controlled, experimental studies in which individuals claim comprehension regarding legal rights when comprehension is in fact low.[201] The authors pointed to an experiment in which only 4% of a sample understood the right to silence when the right was read. Only 7% of the sample understood the right to counsel. Another study conducted in 2002 found that none of the participants in its sample demonstrated full comprehension of the content of police cautions, yet 96% of the sample claimed to understand.[202]

Insofar as comprehension of rights is low in controlled settings, it is reasonable to conclude that comprehension levels are equally low or lower during real police interviews. The authors of the study noted that comprehension becomes increasingly difficult during interrogation due to the stressful environment. Moreover, detainees have low literacy levels and high rates of cognitive impairments compared to the general population.[203] This suggests that detainees may struggle to understand their *Charter* rights even when police cautions are administered at an acceptable rate.

The problem of low comprehension is compounded by high levels of acquiescence. The authors of the study noted that acquiescence, despite a lack of comprehension, can result from a desire on the part of the detainee to take the path of least resistance. Acquiescence in general occurs more frequently where the individual has poor intellectual functioning and faces uncertain situations. Admitting a lack of comprehension may lead to an unpredictable and undesirable outcome, such as feelings of embarrassment, police frustration, or a lengthier process. By asserting comprehension, the

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200 *Ibid* at 555.

201 *Ibid* at 555-556.

202 *Ibid*.

203 *Ibid* at 555.

detainee feels that they are providing the police with the response they desire, and cooperation is believed to expedite the process and even to provide a better outcome overall.[204]

A superficial understanding of *Charter* rights paired with a willingness to assert comprehension is problematic given the restrictive interpretation the balancing approach gives to the right to counsel and the right to silence. If the detainee acquiesces when they do not truly understand, the detainee may fail to avail themselves of the right to counsel or the right to silence. It cannot be said that this choice is made in a way which protects against self-incrimination or supports *Charter* values like dignity and autonomy.

The detainee will be hard-pressed to prove on a *Charter* application that their rights were violated. They will be unable to prove that they requested an opportunity to consult with counsel, but were denied the opportunity. The detainee will be found not to have been reasonably diligent in exercising s 10(b), which results in a loss of that right altogether. If the detainee consults with counsel and affirms their understanding and satisfaction when they are in fact confused or uncertain, the detainee is precluded from a second consultation. It is at the discretion of the police.

This seriously impairs the detainee's ability to decide how they will participate in the investigation process. Even under the balancing approach, this is exactly what the right to silence purports to protect. This results in a gap between the state of the law as enunciated by the Supreme Court of Canada and the practical effects of its application.[205]

VII. Conclusion

This paper has discussed differing approaches to the interpretation of the *Charter*'s legal rights to explore the problems inherent in adopting a balancing exercise to delineate the scope of constitutional rights. A balancing approach to the interpretation of the *Charter*'s legal rights is theoretically problematic and results in impoverished rights, which offers insufficient protection to the principle against self-incrimination.

The primary concern animating the balancing approach is the perceived need to reconcile state and individual interests, which are diametrically-opposed. By delineating the scope of *Charter* rights in a manner which gives

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204 *Ibid* at 556.

205 Tanovich, *supra* note 189 at 177.

meaning to state interests, the balancing approach bolsters police investigative powers while restricting the protections available to the detainee. This tips the scale in favour of the state.

Under the balancing approach, the right to counsel is exhausted by a single phone call, which may be waived inadvertently without any appreciation of the consequences of waiving a constitutional right. Moreover, the right to silence under the balancing approach cannot be effectively exercised. The interrogation trilogy created a state of affairs whereby detention and interrogation amount to an endurance contest in which the police invariably possess the upper hand. The state's interest in detaining and questioning the detainee relentlessly and aggressively in order to secure a conviction "no matter what" simply cannot be reconciled with the individual's interest in being free from governmental interference.

From a theoretical perspective, the balancing approach departs from the standard mode of interpretation by giving weight to the state's interest in law enforcement at the delineation stage of the analysis. This undermines the proper role of the courts as well as the very purpose of the *Charter*'s legal rights themselves. Under the balancing approach, the Court conceives of the detainee's primary concern as the interest in being left alone. This is minimalistic in terms of the overarching purpose of s. 10(b) particularly, which is to protect against self-incrimination. Insofar as the purpose of the *Charter*'s legal rights in their entirety is to limit the state's law enforcement powers to secure fairness in the process, this necessarily precludes consideration of the state's interest in law enforcement when assessing the scope of the right. Under the purposive approach, this allows the police more investigative powers than the drafters of the *Charter* intended.

Despite the fact that s. 7 of the *Charter* contains its own internal balancing mechanism, balancing state interests against individual interests is not appropriate when assessing the scope of a constitutional right. Justice Lamer noted in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* that principles of fundamental justice do not lie in the realm of public interest, but within the inherent domain of the judiciary as the guardian of the constitution. The principle of against self-incrimination has been recognized as a principle of fundamental justice within s. 7 of the *Charter*. In the decision in *R v P(MB)*,[206] the Supreme Court of Canada reaffirmed that the accused cannot be forced to assist the state in making out the

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206 *R v P(MB)* [1994] 1 SCR 555, 89 CCC (3d) 289 [*P(MB)*].

Crown's case. It is a principle of fundamental justice that it is up to the state to investigate and prove the charge, and the detainee cannot be "conscripted into helping the state fulfill this task."[207]

Under the balancing approach, the state is empowered to treat the detainee as a resource to be exploited for the purposes of law enforcement, and repeated invocations of the right to silence may go unacknowledged. The detainee is powerless to exercise their rights in an effective manner, which suggests that *Charter* rights count for little and are meaningless. Empowering the police to negate the detainee's choice to remain silent is not consistent with the principles of fundamental justice. This raises the issue of the constitutionality of the interpretation of the right to silence coming out of the interrogation trilogy.

While all *Charter* rights are not absolute and must necessarily have limits and outer boundaries, the proper approach is to determine the boundary in light of the right's purpose and the interests it is intended to protect. As Justice Binnie noted in his dissenting opinion in *Sinclair*, the focus cannot be the need for short-term results in the interrogation room. As noted, Justice Dickson held in *Big M Drug Mart* that the purpose of a *Charter* right must be assessed with a view to the *Charter*'s larger objectives as well as the meaning and purpose of other related rights and freedoms. Importantly, this does not include the state's interest in law enforcement.

The state's interests in law enforcement and the collective interest in the search for truth must be reserved for the remedial analysis. This gives full effect to the interests that the *Charter*'s legal rights are intended to serve. The balancing approach should be abandoned in favour of a return to the purposive approach.

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[207] *Ibid* at paras 38, 41.

Trade Unions and Remediation Agreements – Does the Criminal Law Favour Management Over Labour?

DARCY L. MACPHERSON*

I. INTRODUCTION

Since 2019, much has been made of the pressure allegedly brought to bear on then-Attorney-General Jodi Wilson-Raybould to reconsider her decision not to offer a remediation agreement with respect to wrongdoing allegedly committed by SNC-Lavalin Group Inc.[1] However, this contribution is relatively unconcerned with the political fallout of the decisions made with respect to SNC-Lavalin. Rather, consider that the Prime Minister's repeated assertion that he was trying to protect jobs and the Québec economy by attempting to convince the Attorney-General to

* Professor, Faculty of Law, University of Manitoba, Winnipeg, Manitoba; Winnipeg, Manitoba. Thanks are owed to the driving forces behind RobsonCrim, namely Dean Richard Jochelson and Professor David Ireland, the student editors of the Manitoba Law Journal and the anonymous peer reviewers who provided their expertise. My colleague, Dr. Bruce Curran provided valuable feedback on a number of issues in one of the drafts. My research student, Ben Manness, provided editorial review. The contributions of each are acknowledged and appreciated. Of course, any errors that remain are solely my own.

1 See e.g. Amanda Coletta, "Canadian political Scandal deepens as ex-justice minister testifies that Trudeau's office pressured her in criminal case", *The Washington Post* (27 February 2019) online: <www.washingtonpost.com/world/the_americas/canadian-political-scandal-deepens-as-ex-justice-minister-testifies-that-trudeaus-office-pressured-her-in-criminal-case/2019/02/27/04587380-3ada-11e9-b10b-f05a22e75865_story.html?noredirect=on&utm_term=.5b6901267944> [perma.cc/E65D-F994]; Robert Fife & Steven Chase, "Wilson Raybould alleges 'consistent and sustained' effort by Trudeau, officials to 'politically interfere' in SNC-Lavalin case", *The Globe & Mail* (27 February 2019) online: <www.theglobeandmail.com/politics/article-wilson-raybould-said-she-was-subjected-to-veiled-threats-in-snc/> [perma.cc/HFC2-9NQ7].

offer a remediation agreement to SNC[2] would seem to suggest a desire to protect workers.[3]

This is a jumping-off point to consider whether the remediation provisions of the *Criminal Code*[4] expressly favour management over workers. Trade unions are specifically precluded from receiving remediation agreements from government prosecutors. This was not an oversight that created a lacuna within the legislative scheme. It was a deliberate choice. The basic question that I will attempt to answer here is: "Can this legislative choice be justified?" There are a number of reasons that this policy choice is suspect. This paper will question the clear legislative decision to exclude trade unions from accessing remediation agreements. As trade unions serve a vital role in protecting workers, the decision to preclude them from an agreement that is designed to consider workers interests is nonsensical. A constitutionally protected entity that is by its very design mandated to protect workers is left without the diversion from prosecution that the Prime Minister claims is to protect said workers, while the employer (which often antagonistic to the union) is granted the use of the workers interests as a shield when using a remediation agreement.

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2 See e.g. David Ljunggren, "Government has a responsibility to defend jobs, Trudeau says amid SNC-Lavalin allegations", *Global News* (22 February 2019) online: <globalnews.ca/news/4988388/justin-trudeau-snc-lavalin-jobs/> [perma.cc/S6KT-PVQ5]; Josh Wingrove, "Trudeau says fears of job losses drove SNC-Lavalin talks", *BNN Bloomberg* (15 February 2019), online: <www.bnnbloomberg.ca/trudeau-says-fears-of-job-losses-drove-talks-about-snc-lavalin-1.1215115> [perma.cc/9DM8-K97D].

3 For the purposes of this paper, I take this assertion at face value. A more cynical observer might legitimately point to the importance of the province of Quebec in establishing federal electoral success. To be clear, some of the articles referred to above (see *supra* note 1) make reference to the political implications of the choices made.

My goal here is not to resolve whether the Prime Minister did consider, or could legitimately consider, the potential electoral impacts of this decision. One could certainly make an argument that those might have been considerations for the Prime Minister (who is, after all, the leader of a political party, as well as the leader of the executive branch of government), that are not legitimate for a decision such as the one with respect to SNC-Lavalin. This is a legitimate question for lawyers, political scientists, and ethicists. My point is a simpler one: to analyze the appropriateness of the specific legislative exclusion of unions from the possibility of remediation agreements.

4 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], ss 715.3- 715.42. These provisions were added by the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 (originally Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, s 404 (assented to 21 June 2018)).

Part II will discuss the general amenability of trade unions to the criminal law, by considering both the historical common law position that existed prior to the current statutory language, and then the subsequent amendment to the *Criminal Code*[5] that created statutorily-based organizational criminal liability.[6] Part III of this paper turns to the legislative framework for remediation agreements under the recently-added Part XXII.1 of the *Criminal Code*, which will include a discussion of the non-availability of these agreements to public bodies, municipalities and trade unions. Part IV deals with trade unions in particular, and whether they should be excluded from the remediation agreement regime. Part V concludes.

II. ARE TRADE UNIONS SUBJECT TO THE CRIMINAL LAW AT ALL?

The short answer to the question posed in the title of this section is, that trade unions are subject to the criminal law. Under both the common law (in place up to March 2004), and the statutory language that has covered most of the field from March 31, 2004 onward, it is quite clear that trade unions are, in and of themselves, actors beyond the individual trade union members (who, as individuals, are certainly subject to the criminal law). Below, we examine the historical stance taken in common law and the current statutory language in turn:

A. The Historical Application of the Common Law to Trade Unions

While the current statutory language provides the answer, it is important to consider the route that led to the amendments. There are some common-law principles that indicate the amenability of trade unions to the criminal law. For example, as Justice Cory, dissenting in the result, but not on this point (Chief Justice Lamer concurring) explains somewhat tersely in *United Nurses of Alberta v. Alberta (Attorney General)*:

> (a) Are Unions Subject to Criminal Contempt?
>
> There can be no doubt that unions have the legal status to sue and to be sued in civil matters. They can and do present and defend cases before the courts. They

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5 *Ibid.*

6 See Bill C-45, *infra* note 13.

> make full use of the courts and the remedies they provide. If unions avail themselves of court facilities, they must be subject to the court's rules and restraints placed on the conduct of all litigants. It follows that they are subject to prosecution for the common law offence of criminal contempt. There can be no question that unions fall within the scope of the term "societies" in the *Criminal Code*'s definition of person and they must be equally liable for prosecution for a common law crime.[7]

Justice McLachlin (as she then was), writing for the majority in the same case, comes to a similar conclusion. She writes in part:

> I see nothing in the authorities to suggest that the general applicability of the law to unions should not extend to the common law offence of contempt. In so far as the common law denied unions legal status, it was to impede the effective enforcement of collective agreements: see *Young v. C.N.R.*, [1931] 1 D.L.R. 645 (P.C.). That notion has long since died. Having been given legal status for collective bargaining purposes, unions now find themselves subject to the responsibilities that go with that right. If they exercise their rights unlawfully, they may be made to answer to the court by all the remedies available to the court, including prosecution for the common law offence of criminal contempt.[8]

These paragraphs make clear that the majority of the Supreme Court of Canada viewed trade unions as being amenable to the criminal law, at least insofar as the law of criminal contempt was concerned. However, Justice McLachlin did not stop there. She addresses whether in fact trade unions should be amenable to the *Criminal Code* in general. Later in the same judgment, she continues:

> The union argues that while the *Criminal Code*, R.S.C., 1985, c. C-46, includes "societies" in its definition of "person",[9] the union is not a society because it is not so defined under the Alberta *Societies Act*, R.S.A. 1980, c. S-18. This argument depends on defining "societies" in the *Code* as limited to those entities recognized by provincial legislation. It also assumes that the definition of society in the Alberta Act is exhaustive. In fact, it is not. Section 1(c), provides that "In this Act . . . (c) `society' means a society incorporated under this Act". This clearly implies that there may exist societies which are not incorporated under the Act. Thus it appears that the union may be a "society" under the *Code*. If the union may be

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7 *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 [*United Nurses*] at 910, 89 DLR (4th) 609.

8 *Ibid* at 928-929.

9 At the time of *United Nurses*, *ibid.*, the relevant portion of the *Criminal Code* read as follows: "every one', 'person', 'owner', and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively".

> prosecuted for a criminal offence under the *Code*, there appears to be little basis for suggesting that it cannot be prosecuted for a criminal offence at common law.[10]

Despite the language of uncertainty ("Thus it appears that the union may be a 'society' under the *Code*. ... If the union may be prosecuted for a criminal offence under the *Code*, ..."), the fact is that this analysis by the majority is designed to hold the union liable for criminal concept. Thus, while it may appear to some that the Supreme Court left open the question of criminal liability more generally, the paragraph quoted should be taken to be, in fact, a very strong statement of the majority of the Supreme Court of Canada that under the then-current language of the *Criminal Code*, trade unions were amenable to the criminal law. After all, if Justice McLachlin meant only to suggest the possibility of amenability to the criminal law as codified in the *Criminal Code*, this would not provide much support for the idea that a non-codified offence could nonetheless be pursued against a trade union.

Furthermore, if that does not definitively determine the issue, consider turning Justice McLachlin's sentiment on its head. The argument would run as follows: as a general rule, most "true" criminal offences[11] are codified.[12] Given this statutory rule requiring codification, it follows that the exception to that general rule (criminal contempt) should not be more widely available to the courts than should its codified counterparts. As the courts have already determined that trade unions are amenable to the non-

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10 *United Nurses*, *ibid* at 929.

11 "True" criminal offences (as the term is used here) are to be contrasted with "public welfare offences." The former category would include most, if not all, of the offenses contained within the *Criminal Code*, *supra* note 4, where *mens rea* is generally required. The latter category, on the other hand, is generally more concerned with offences of strict liability or of absolute liability. For a more detailed discussion of this distinction, please see the judgment of Justice Dickson, as he then was, for the court, in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at 1309-1310, 85 DLR (3d) 161.

12 The notable exception to this general rule is that of criminal contempt. Section 9 of the *Criminal Code* reads as follows: "Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730, (a) of an offence at common law, (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada, but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court."

codified offence of criminal contempt, it should then follow that those offences that have been codified under the *Criminal Code* should at least apply no less broadly in terms of the offenders to which they can be applied (in this case, trade unions) than would their non-codified counterpart. Thus, the historical perspective forwarded by the common law supports the idea that trade unions were always amenable to the criminal law generally.

B. The Statute

Now turning to the language that was implemented following the common law position discussed above, which currently governs the issue. Under Bill C-45,[13] since March 30, 2004,[14] any remaining ambiguity as to the amenability of trade unions has been clarified. Section 2 of the *Criminal Code*[15] provides as follows in the relevant definitions:

> ***every one***, ***person*** and ***owner***, and similar expressions, include Her Majesty and an organization;
>
> ...
>
> ***organization*** means
>
> **(a)** a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
>
> **(b)** an association of persons that
>
> **(i)** is created for a common purpose,
>
> **(ii)** has an operational structure, and
>
> **(iii)** holds itself out to the public as an association of persons;

Thus, the general definition of "organization" specifically includes trade unions within its ambit, within paragraph (a).

Similarly, even if trade unions were not specifically mentioned, for the same reasons referred to by Justice McLachlin, as she then was, in *United Nurses*,[16] a trade union is likely also a "society" within the meaning likely to

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13 Bill C-45, 2nd Sess, 37th Parl, *An Act to Amend the Criminal Code (criminal liability of organizations)* (Royal Assent 7 November 2003), now SC 2003, c 21 [Bill C-45].

14 This is fixed as the date on which most of the operative provisions of Bill C-45 came into force. See Privy Council Minute 2004-90 (16 February 2004). One section of the Bill had come into force on assent.

15 *Criminal Code*, *supra* note 4, s 2, *sv* "every one" and *sv* "organization" [emphasis added].

16 *United Nurses*, *supra* note 7, at 928-929.

be ascribed to it under the definition of "organization." In my view, the definition of "***every one, person*** *and* ***owner,*** and similar expressions" was meant to expand the definition, and not to narrow, or contract, it.[17]

Furthermore, as a thought experiment on the application of the relevant terms above, even if we were to ignore paragraph (a) of the definition entirely, it is clear that a trade union fits the definition under paragraph (b). It is an "association of persons with a common purpose and an operational structure that holds itself out to the public as an association of persons," as those terms are used in paragraph (b) of the definition of "organization." The union, virtually by definition, requires more than one person to join it. Otherwise, it remains an individual, and nothing more. It has been clearly established that the associational aspect of union membership has been recognized and affirmed by the Supreme Court of Canada itself.[18] One of the most impactful statements with respect to the

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17 Underlining was added for emphasis by the author of the current article.

In other fora, I made the argument that the overarching purpose of Bill C-45 was to expand corporate criminal liability as it had been understood up to that point under the common law. On this point, see, for example, Darcy L. MacPherson, "Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45" (2004) 30 Man LJ 253; Darcy L. MacPherson, "Criminal Liability of Partnerships: Constitutional and Practical Impediments" (2010) 33 Man. LJ 329.

The reason for the question mark in the first of these titles was that not every element of Bill C-45 actually has the effect of extending liability to places where it did not previously exist. In a small number of examples, it is at least arguable, if not clear, that there were areas where corporate criminal liability became more difficult to establish, making corporate criminal liability narrower, rather than expanding it. However, in my view, it is equally clear, if not more so, that, overall and on balance, Bill C-45 did have the effect of expanding liability beyond the contours that were previously in place in the common-law version of corporate criminal liability.

The second article makes clear that whatever the intention of Parliament, the statute did not necessarily clear away all the impediments to achieving the goals that were set for the statute. Nonetheless, it is quite clear that the intention of the government of the day at the time of the introduction of Bill C-45 was to "clarify and expand" as well as to "modernize" corporate criminal liability. See Canada, Department of Justice, Press Release, "Justice Minister Introduces Measures to Protect Workplace Safety and Modernize Corporate Liability" (Ottawa, June 12, 2003).

18 See *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 [*Dunmore*]; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 (providing constitutional protection for collective bargaining); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4,

difference between the individual and the collective is in *Dunmore*, where Justice Bastarache, for the majority, writes as follows:

As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members.[19]

This would appear to be sufficient to satisfy the first of the requirements (that is, an association of persons). The second element of an operational structure would also be present in virtually any conceivable case. After all, to fulfil its legislative mandate of representing workers, administrative tribunals routinely treat unions as a singular actor, as opposed to a collection of workers.[20] The union is recognized by statute for this purpose.[21] Clearly, the third element is satisfied, as the union is the actor that negotiates the collective agreement on behalf of the employees.[22] Thus, it is held out to the employer (and to the general public) as representing the employees collectively in their dealings with the employer. Thus, either paragraph of the definition of "organization" would support the fact that trade unions are "organizations" for the purposes of the *Criminal Code* under the prevailing statutory language.[23]

III. WHAT IS A REMEDIATION AGREEMENT?

[2015] 1 SCR 245 (holding that the right to strike is an indispensable part of the constitutionally-protected right to bargain collectively).

19 *Dunmore, ibid* at para. 17.

20 See The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary*, 9th ed (Toronto: Irwin Law, 2018) at 538, para 7:100: "Collective bargaining law is concerned with the substantive requirements and procedural standards of *bargaining between the employer and the employees seen as a unit*. Collective bargaining is one of the principal reasons why employees join a union and why unions secure the right to represent employees through certification or voluntary recognition Once a union secures the status of collective bargaining agent, it supersedes individual bargaining between employer and employee…" [emphasis in original].

21 *The Labour Relations Act*, CCSM, c L10, para 4(1)(c).

22 *Ibid*, s 1 *sv* "bargaining agent".

23 *Criminal Code*, *supra* note 4.

As I have covered in other articles,[24] a remediation agreement is an agreement between an alleged organizational offender, on the one hand, and the prosecutor, on the other.[25] In this agreement, the organizational offender agrees to take certain steps, and if the organizational offender complies with the agreement, the prosecutor agrees to stay any charges which have already been laid.

In some cases, one group of persons which is sought to be protected by the adoption of a remediation agreement (in lieu of a criminal charge and trial) is employees. In fact, the relevant statutory language reads as follows [underlining for emphasis added by the current author]:

> 715.31 The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:
>
> ...
>
> (f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

In my view, part of the reason for this approach is that there may be certain cases where the harm to innocent third parties resulting from the conviction may be so severe and widespread that it could be legitimately taken into account in determining the value of calling the organization a "criminal." Often this harm may be borne by individuals who are in some way related to the organization who could neither avoid the wrongdoing, nor prevent it. With respect to employees, there is at least one example where a criminal trial (even where the conviction was later vacated by an

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[24] See e.g. Darcy L. MacPherson, "*When Is a Criminal Not Really a Criminal? When It Is a Corporation with a Remediation Agreement - Deferred Prosecution Agreements Come To Canada*" *Robson Crim Legal Blawg* (16 July 2018) online: <www.robsoncrim.com/single-post/2018/07/16/WHEN-IS-A-CRIMINAL-NOT-REALLY-A-CRIMINAL-WHEN-IT-IS-A-CORPORATION-WITH-A-REMEDIATION-AGREEMENT--deferred-prosecution-agreements-come-to-Canada> [perma.cc/ZAG7-9BXY]; Darcy L. MacPherson, "Politics, Discretion and the Rule of Law as Applied to the Criminal Law: A Case Study of SNC Lavalin" *Robson Crim Legal Blawg* (12 March 2018) online: < www.robsoncrim.com/single-post/2019/03/12/POLITICS-DISCRETION-AND-THE-RULE-OF-LAW-AS-APPLIED-TO-THE-CRIMINAL-LAW-A-CASE-STUDY-OF-SNC-LAVALIN> perma.cc/SE7C-EG75].

[25] *Criminal Code*, *supra* note 4, s-s 715.3(1) *sv* "remediation agreement."

appellate court[26]) led to massive job losses arising from the insolvency of the firm due to the charges, despite the fact that the firm was not ultimately convicted of a crime.[27] Thus, even the potential of ultimate acquittal does not necessarily protect workers. Such protection is even more tenuous when the crime is proven in court and the organized is properly punished.

A remediation agreement allows an organization to state (correctly) that it has not been convicted of, or punished for, a criminal offence.[28] The same cannot be said for the trade union that represents workers of a corporate employer. The language in the relevant section of the *Criminal Code*[29] provides as follows:

> 715.3(1) The following definitions apply in this Part [30].
>
> **organization** has the same meaning as in section 2[31] but does not include a public body, trade union or municipality.[32]

In other words, public bodies, trade unions and municipalities are "organizations" for the general purposes of the *Code*.[33] This means that these are all organizations that are subject to the criminal law, in the sense that the organization can be labeled as a "criminal" in appropriate circumstances. However, unlike other forms of organizations, such as corporations (which can enter into a remediation agreement if invited by the prosecutor[34]), trade unions have no access to this mechanism to avoid being labeled a "criminal" if the alleged conduct is substantiated.

Municipalities and public bodies should be excluded from accessing remediation agreements. Municipalities and public bodies are inherently keepers of the public trust. Any crime committed to their benefit is virtually by definition a violation of that very trust. A violation of the public trust should be dealt with very seriously. Furthermore, public bodies and

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26 *Arthur Andersen LLP v United States*, 544 US 696 (2005), per Chief Justice Rehnquist, for the Court.

27 *Ibid.* For an academic perspective on this point, see

28 *Criminal Code*, *supra* note 4, s. 715.4(2).

29 *Ibid*, s. 715.3(1).

30 The reference to "this Part" is a reference to Part XXII.1 of the *Criminal Code*, *supra* note 4, that is, the Part of the *Code* that deals with remediation agreements.

31 The definition of "organization" for the purpose of section 2 of the *Criminal Code* is reproduced in the text associated with note15, *supra*.

32 The underlining was added by the current author for the purposes of emphasis.

33 *Criminal Code*, *supra* note 4.

34 See Bill C-74, *supra* note 4, s 404, now *Criminal Code*, *supra* note 4, s 715.33(1).

municipalities can rely on government coffers to pay any financial penalty assessed due to criminal wrongdoing. A remediation agreement negotiated by one part of a government with respect to alleged wrongdoing by another part of the same government seems at best an exercise in futility, transferring the value from one government account to another. Additionally, a remediation agreement allows the public institutions at issue to avoid the label of "criminality." Commentators in the U.S. have made it clear that the appropriateness of the behaviour of public officials should be, at least in large part, decided through the electoral mechanism of the country.[35]

However, it also follows that government institutions should be subject to the same basic rules as are individuals. This is the very essence of the rule of law. The label of "criminality" is something that even the most unengaged voter can understand as being a statement about the morality of the actions undertaken.[36] Trying to explain that an agreement with the prosecutor can effectively mean the same thing may not be as easily understood by a large part of the electorate. The criminality of an administration may affect its chance of being re-elected. Allowing the government to essentially make a deal with itself (or to perhaps be perceived as doing so) in an effort to re-label the actions of that administration as being non-criminal could fundamentally alter the relationship between the governors and the governed in the electoral process.[37]

This fundamental relationship between public officials, on the one hand, and the electorate on the other, was described in very lucid fashion

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[35] See Richard Cohen, "Opinion: The best way to get rid of Trump? Beat him at the ballot box." (The *Washington Post*, March 25, 2019), online: < www.washingtonpost.com/opinions/the-best-way-to-get-rid-of-trump-beat-him-at-the-ballot-box/2019/03/25/ba98b344-4f2f-11e9-8d28-f5149e5a2fda_story.html?noredirect=on&utm_term=.e82be17497d1> [perma.cc/93FH-PEGH].

[36] With respect to the moral element inherent in the criminal law, see, for example, Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993) at 9-10.

[37] Examples of government largesse being used as a method to influence the political process are not uncommon, nor are they unique to people of any particular political stripe. For example: in 2015, then-Prime Minister Stephen Harper's Conservative government disproportionately allocated federal infrastructure funds to ridings represented by Conservative Members of Parliament in the months leading up to an election. See Chris Hannay, "Federal infrastructure fund spending favoured Conservative ridings" *The Globe and Mail* (29 June 2015) online: < www.theglobeandmail.com/news/politics/federal-infrastructure-fund-spending-favoured-conservative-ridings/article25172781/> [perma.cc/XAX7-VCSZ].

in the concurring opinion of Justice Hugo Black (Justice William O. Douglas concurring) of the United States Supreme Court in *New York Times Co. Ltd. v. U.S.*:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the founders hoped and trusted they would do.[38]

Of course, readers would be correct to point out that this arose in a very different context (publication of sensitive government materials by a newspaper) than the one under consideration here. It also did not arise in Canada, and thus took place under a very different constitutional framework. Notwithstanding all those acknowledged differences, what I take away from this famous piece of judicial writing is that there is an obligation to hold government to account in a democracy. If this is so (and I believe that Justice Black is very much correct in holding that it was at the time of his writing, and continues to be so), it follows that allowing governments to make remediation agreements with other government actors may be injurious to the public interest. By specifically excluding public bodies and municipalities from the availability of a remediation agreement, the legislation makes clear that the ability to label a bad government actor as being "criminal" is a very important step in holding elected officials to account. Although, below, the argument will be made that not allowing trade unions to have access to the possibility of a remediation agreement is probably ill-conceived, the exclusion of public bodies and municipalities is completely justified.

IV. What About Trade Unions?

[38] *New York Times Co Ltd v US*, 403 US 713 (1971) at 717.

A. Introduction

Notwithstanding the previous argument in respect to both public bodies and municipalities, there are several reasons as to why trade unions stand on quite a different footing compared to the other two excluded groups.

First, trade unions are statutorily recognized for a very specific purpose, that is, to help protect the rights of workers vis-à-vis their employers. However, the attempts to use the remediation agreement regime show that, in an attempt to avoid criminal sanctions, the employer is the one who gets to argue that it is protecting the employees by seeking a remediation agreement, as was seen when the Prime Minister urged the consideration of a remediation agreement for SNC-Lavalin to avoid the loss of jobs in Quebec .[39] This is true even when the relationship between management and labour may be quite antagonistic (where, for example, there are constant complaints about working conditions, or protracted job action every time that the collective agreement between management labour is up for renegotiation). While an employer may use the negative impacts of a potential conviction on its labour force as a reason for the government to engage in the negotiation of a remediation agreement, the trade union representing the same employees is not accorded this same ability.

Second, trade unions are not only statutorily recognized, their activities on behalf of workers are also constitutionally recognized as protected pursuant to the *Canadian Charter of Rights and Freedoms*.[40] To give less protection to a trade union (which is not allowed to access the mediation agreement regime) and more protection to an employer corporation (which is at least not statutorily prohibited from negotiating a remediation agreement) would seem to turn this constitutional protection on its head.

Third, there is an issue as to whether or not it is legitimate to remove the possibility of a remediation agreement from a trade union due to the source of its funding. Under the Rand formula in Canadian labour law,

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39 *Supra* note 2.

40 *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, in particular, para. 2(d). In terms of cases that have recently considered the content of this paragraph in the labour context, see e.g.: *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27, [2007] 2 SCR 391; *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Dunmore*, *supra* note 18; *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4, [2015] 1 SCR 245.

even non-members of the union can be required by law to contribute to its economic well-being by paying an amount equal to the dues paid by its members. Therefore, just like the innocent employees of a corporation who will be negatively affected by criminal conviction of their employer, non-members of the union may be unduly affected by a criminal conviction of the union to which they were forced to contribute by operation of law. Put another way, given that people are statutorily forced to contribute money to a trade union even if they are not members of it, it does seem particularly harsh that the trade union can never avoid the label of "criminality."

Fourth, it does seem counter-intuitive that the legislation specifically provides that remediation agreements are to be used where damage can be done to innocent third parties, while at the same time, in a situation where there will clearly be innocent third parties, the use of a remediation agreement is statutorily prohibited. It is doubtful that every member of the rank-and-file in a trade union will be actively involved in wrongdoing, no matter what its goal, so those people are innocent of the wrongdoing, at least to that extent. Relatedly, the damage to the union of being labelled a "criminal" may actually be greater because the achievement of its goals through, for example, strike action, may be undermined because the employer will be able to paint it as untrustworthy given its criminal history.

Below, we consider each of these arguments in turn.

B. The Unequal Relationship of the Protection of Workers in the Context of a Remediation Agreement

As the reference to the SNC-Lavalin affair in the introduction makes illusion, the sitting Prime Minister's desire in trying to cause the Attorney-General to allow the negotiation of a remediation agreement was, at least allegedly, in large part driven by the protection of jobs. In other words, the reason the employer corporation should, in the view of the Prime Minister at least, be allowed to negotiate a remediation agreement is to protect the economic interest of employees. Yet, the blanket exclusion of trade unions from the ability to negotiate a remediation agreement serves the exact opposite purpose. The trade union exists as a means of protecting the collective interests of workers.[41] Those interests may be economic, but they

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41 *The Labour Relations Act*, *supra* note 21, s 1, *sv* "union" means any organization of employees formed for purposes which include the regulation of relations between employers and employees.

also may be much broader than merely the quantity of remuneration received. The collective agreement represents "the law of the shop."[42] Put another way, two of the matters with which any trade union should be genuinely concerned are generally the working conditions and job security for its members.[43] This is not to say that all members of any given trade union should all have the same working conditions or level of job security, but rather, that these issues are often collectively bargained, with the union representing the interests of the workers.

So, when an employer is a wrongdoer, not only is the potential effect of the criminal sanction on the workers a relevant consideration, but it may be the single most important consideration, at least according to the Prime Minister of the government that introduced the concept of a remediation agreement in the first place. Yet, the same government is willing to disallow the protection of a remediation agreement from the direct representative whose job it is to protect the welfare of workers, that is, the trade union of which the workers are members.

To be clear, there is no issue with any assertion that the vast majority of workers may be entirely innocent of the wrongdoing that leads to the potential criminal charges. Nor is there any issue with an assertion that if the criminal sanction for wrongdoing is too heavy, there may be unintended, negative consequences for the workforce of the corporate wrongdoer, both individually and collectively. Rather, the sole point here is that sauce for the goose is sauce for the gander.

Both employer and union are incentivized to protect the workforce of the employer. Each of them does this in a different way. The employer protects the workforce by hiring other competent people, including competent management, to oversee the work done by the rest of the workforce. Many employers want to create an identity of interest with their work forces so that everyone can feel the pride of a job well done. This type of pride furthers an identity of interest that encourages both hard work in the short term, and commitment to the workplace in the longer term.[44] One

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42 On this point, see William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: The Osgoode Society for Canadian Legal History, 2009) [Kaplan, *Canadian Maverick*] at 432.

43 *Ibid* at 176.

44 See Daphne G Taras & Morley Gunderson, "Chapter 1: Canadian Labour and Employment Relations" in Morley Gunderson & Daphne Gottlieb Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson/Addison Wesley, 2009) at 8-12.

can see this in the transition from "workers" to "human resources." One reason for this change is to recognize the value of the workers to the enterprise that the corporation operates.[45]

The trade union, on the other hand, is in place to protect the interests of the worker when that identity of interest between employer, on the one hand, and the employee, on the other, breaks down. Where the employer becomes the antagonist to the employee's interests, the trade union (and the collective agreement that it negotiates) is generally meant to ensure the employee is treated fairly when dealing with the antagonistic employer.

In the context of remediation agreements, however, the employer has the possibility of receiving one; the union does not. The categorical removal of the possibility of a remediation agreement from a trade union is a step that places employers on a better footing than the representative of the overall interests of employees, that is, the trade union to which those employees belong.

C. The Constitutional Protection of Trade Unions and Their Activities

As a general rule, the right of employers to carry on business is not constitutionally protected. Corporations and other non-individual businesses do not even have the same rights as individuals.[46] Meanwhile,

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45 *Ibid*.

46 On this point, see e.g. *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 per Chief Justice Dickson, Justice Lamer (as he then was), and Justice Wilson, as the majority, but speaking for the Court on this issue (holding that s. 7 is unavailable to corporations in the absence of specific penal proceedings). Justices Beetz and McIntyre dissenting on other grounds (in particular, finding that there was a violation of the freedom of expression not justified under s. 1 of the *Charter*), but agreeing with the majority with respect to the non-applicability of s. 7.

The Supreme Court of Canada has also determined that s. 12 of the *Charter* (prohibiting "cruel and unusual punishment") does not apply to corporations. See *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32. In fact, this is one of the few areas where the majority (Justices Brown and Rowe, writing jointly, with Chief Justice Wagner, and Justices Moldaver and Coté, concurring) and the minority (Justice Abella, writing, and Justices Karakatsanis and Martin, concurring) are in agreement, Justice Kasirer wrote a limited judgment, agreeing with both the reasons of Justices Rowe and Brown, on the one hand, and those of Justice Abella, on the other, with respect to this issue. With respect to other issues, there were significant disagreements between the majority and the dissent, notably with respect to the proper role of constitutional documents from other countries in domestic constitutional interpretation.

many of the activities of a recognized trade union are constitutionally protected under the *Charter*.[47]

To be clear, it is not intended to suggest, by the argument made below, that all activities undertaken by a trade union are of necessity constitutionally protected. Clearly, where a trade union engages in criminal conduct no suggestion has been made that any court has ever indicated that the trade union cannot be prosecuted for the criminal conduct. Rather, the argument is that by excluding a trade union from ever being a proper subject of a remediation agreement, one may in fact be undermining the constitutional protection provided to certain types of activities under recent jurisprudence. For example, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, the majority held as follows:

> Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.[48]

This paragraph could easily be adapted to make an argument that the deliberate exclusion of trade unions from the possibility of remediation agreements could constitute a "substantial interference" with the ability of the trade union to carry out its functions. While a full *Charter* analysis will not be conducted here, several points could be made in favour of such an approach. First, all goals of a trade union are typically for an association of

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47 *Charter*, *supra* note 40.

48 *Health Services and Support – Facilities Subsector Bargaining Assn*, *supra* note 18, at para 90, per Chief Justice McLachlin, and Justice LeBel, writing in joint reasons for the majority.

persons, that is, the collective membership of the trade union. Secondly, it is important to remember that an "organization" as defined in the *Criminal Code*[49] can only be convicted where the criminal activities undertaken were undertaken with the intent of benefitting the organization.[50] One could certainly see benefit flowing to a trade union if it is able to achieve the associational goals of its membership. In other words, while not completely overlapping, one could certainly see a connection between the associational goals of a trade union, on the one hand, and overall benefit to the organization even if some of the activity might technically violate the *Criminal Code*.

A simple example may assist here. Section 322 of the *Criminal Code* provides in part as follows:

> **322(1)** Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
>
> **(a)** to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> **(b)** to pledge it or deposit it as security;
>
> **(c)** to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
>
> **(d)** to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
>
> **(2)** A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

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49 *Criminal Code*, *supra* note 4.

50 On this point, see the wording of section 22.2 of the *Criminal Code*, *ibid*. The relevant wording provides in part as follows: "**22.2** In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers … **(c)** knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence."

> **(3)** A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.[51]

One can certainly imagine a situation where a management-level employee of the trade union[52] steals information (or causes another person to steal information) in the run-up to a potential strike about the plans of management in the event of a strike. It is, therefore, at least arguable that subsection 322(1) might apply. Law enforcement officials decide to charge the trade union and the thieving employee with contravention of subsection 322(1).[53]

Theft could never be countenanced. Yet, strike preparations could certainly be considered part of the "associational activity" of a trade union,

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51 *Criminal Code*, *supra* note 4, s. 322.

52 "Senior officer" as the term is used in s. 22.2 (the relevant wording of this section is reproduced at note50, *supra*) of the *Criminal Code*, *supra* note 4, is defined as follows: "**senior officer"** means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer".

53 Section 322 is not chosen at random. Under s. 1 of the Schedule to Part XXII.1, only certain *Criminal Code* offences are eligible for remediation agreement. Section 1 provides as follows: 1 An offence under any of the following provisions of this Act: (a) section 119 or 120 (bribery of officers); (b) section 121 (frauds on the government); (c) section 123 (municipal corruption); (d) section 124 (selling or purchasing office); (e) section 125 (influencing or negotiating appointments or dealing in offices); (f) subsection 139(3) (obstructing justice); (g) section 322 (theft); (h) section 330 (theft by person required to account); (i) section 332 (misappropriation of money held under direction); (j) section 340 (destroying documents of title); (k) section 341 (fraudulent concealment); (l) section 354 (property obtained by crime); (m) section 362 (false pretence or false statement); (n) section 363 (obtaining execution of valuable security by fraud); (o) section 366 (forgery); (p) section 368 (use, trafficking or possession of forged document); (q) section 375 (obtaining by instrument based on forged document); (r) section 378 (offences in relation to registers); (s) section 380 (fraud); (t) section 382 (fraudulent manipulation of stock exchange transactions); (u) section 382.1 (prohibited insider trading); (v) section 383 (gaming in stocks or merchandise); (w) section 389 (fraudulent disposal of goods on which money advanced); (x) section 390 (fraudulent receipts under Bank Act); (x.1) section 391 (trade secret); (y) section 392 (disposal of property to defraud creditors); (z) section 397 (books and documents); (z.1) section 400 (false prospectus); (z.2) section 418 (selling defective stores to Her Majesty); and (z.3) section 426 (secret commissions); (z.4) section 462.31 (laundering proceeds of crime). Accessory, attempt, and counselling liability for the same offences is also included. Certain other crimes outside the *Code* (notably under the *Corruption of Foreign Public Officials Act*, SC 1998, c 34) also potentially have remediation agreements available in appropriate circumstances.

and a criminal charge could be seen as government "thereby discouraging the collective pursuit of common goals." In other words, the government's blanket denial of a remediation agreement based on the form of organization (a trade union) and/or its goals (the protection of the interests of workers) seems contrary to permitting "the collective pursuit of common goals".

To return for a moment to the statutory framework of remediation agreements, a remediation agreement is a contract.[54] Nothing in this paper is meant to suggest that a trade union should have any greater likelihood of achieving a remediation agreement, but under the right circumstances, the negotiation of such an agreement should at least not be statutorily prohibited. Yet, the definition of "organization" for these purposes has exactly that effect.

Meanwhile, this might also be a perfect case for the use of a remediation agreement. If the crime of theft caused loss to a public body employer or other private interests, a remediation agreement might be one way to ensure that the union makes reparations to those interests, without requiring private legal action in order to seek redress. Put another way, allowing for a remediation agreement in appropriate circumstances may allow the government to mediate the rights of the trade union, on the one hand, and those public and private entities who may be negatively affected by the exercise of those rights, on the other. The use of the remediation agreement mechanism may be one way that the government can show that it has taken minimally impairing steps[55] to respect the rights of the trade union while, for example, providing financial reparations for those whose interests might have been damaged beyond a *de minimus* level.[56]

D. The Impact of the Rand Formula

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54 According to J.D. McCamus, a contract is "any enforceable promise" arising out of a "bargain". See John D McCamus, *The Essentials of Canadian Law – The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 1.

55 Of course, "minimal impairment" of a constitutionally-protected right is part the test propounded in the judgment of Chief Justice Dickson in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, for the majority, and its multitudinous progeny.

56 For example, providing financial recompense to affected parties, for both direct and indirect costs, plus an amount to recognize the wrongfulness of the act, could easily be part of the remediation agreement.

I have argued elsewhere the impacts on individuals or organizations other than those charged with an offence is generally not considered the "punishment" of that other.[57] Think of it this way: when Bernard Madoff went to jail for massive criminal fraud, his wife and sons lost their lifestyles, and were the subject of significant social ostracization,[58] to the point that one of his sons committed suicide.[59] Yet, by virtually all accounts, they knew nothing of the wrongdoing that was occurring,[60] despite the fact that the sons worked for the organization. From the point of view of the criminal law, they are not being "punished," even though their lives are made significantly more difficult and less comfortable by the conviction of Mr. Madoff. The reason they are not being punished is they have not had the stigma of the criminal conviction attached to them. Even though they are certainly suffering negative consequences resulting from their association with the criminal (these consequences are sometimes referred to as "hard treatment"[61]), the moral statement of culpability (sometimes referred to as "censure"[62]) is notably absent as against those around the direct wrongdoer.

Of course, the same can be said of union leadership and rank-and-file members of the trade union who have nothing to do with the wrongdoing that leads to criminal charges against the trade union itself. Nothing below should be taken to indicate that the negative effects of criminal sanction that may be unintentionally foisted upon non-wrongdoers should be considered as a reason not to pursue the wrongdoer in criminal proceedings. The argument offered here assumes that there is at least a substantial and plausible argument that the criminal sanction is one

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57 On this point, see Darcy L MacPherson, "'A Centenary of a Mistake'?: An Outsider's Critical Analysis of, and Reply To, The Approach of Professor Hasnas" (2018) 18 Asper Rev Intl Business Trade L 104 ["MacPherson, 'A Centenary of a Mistake'?"] at 132.

58 Kaitlyn Menza, "How Bernie Madoff Took His Family Down", *Town & Country* (19 May 2017) online: <www.townandcountrymag.com/society/money-and-power/a9656715/bernie-madoff-ponzi-scheme-scandal-story-and-aftermath/> [perma.cc/4THJ-L8HB].

59 Diana B Henriques & Al Baker, "A Madoff Son Hangs Himself on Father's Arrest Anniversary", *New York Times* (11 December 2010) online: <www.nytimes.com/2010/12/12/business/12madoff.html> [perma.cc/5K9Z-7TF4].

60 Erik Larson, "The Madoff Players: Where Are They Now?" *Bloomberg* (11 December 2018) online: <www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now> [perma.cc/7XAN-XC2P].

61 MacPherson, "'A Centenary of a Mistake'?", *supra* note 57 at 130.

62 *Ibid* at 132.

potentially appropriate tool to be used to discourage inappropriate conduct by a trade union. In other words, it is accepted that the trade union may commit criminal wrongdoing, and that the criminal sanction may be an appropriate remedy.

Notwithstanding this concession, the question which remains is whether, given the framework which governs a trade union, is the trade union's blanket exclusion from the potential use of a remediation agreement appropriate?

In this regard, there is a specific element of the make-up of a Canadian trade union (and particularly, its funding model) that needs to be considered here. The Rand formula means that all the holders of positions within a unionized work environment who are members of the bargaining unit are required to pay the equivalent of union dues to the trade union, whether they are members of the trade union or not.[63]

The majority of the Supreme Court of Canada has recognized that the payment of dues to a trade union pursuant to the Rand formula can invoke the freedom not to associate[64] which has been recognized to be part of the freedom to associate guaranteed by para. 2(d) of the *Charter*.[65] Nonetheless, the majority in *Lavigne* held that the forced payment of an amount equivalent to trade union dues by non-members of the trade union was a justified infringement on the freedom to associate.[66] Given the negative financial impact on non-members of the trade union who have paid the equivalent of union dues to the trade unions despite not being members of it, it would seem that this is yet another group of truly innocent third parties who could reasonably be protected through the use of a remediation agreement. Put another way, in a more typical situation of corporate wrongdoing, scholars have argued that criminal penalties are inappropriate, mainly because the people who will pay those penalties are not the corporation itself, but rather, shareholders who will have the value of their shares reduced when the corporation pays the fine levied against it.[67] As I have argued elsewhere,[68] a significant weakness that inherently

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63 On this point, see *Lavigne v OPSEU*, [1991] 2 SCR 211, 81 DLR (4th) 545.

64 *Ibid* at 340, per Justice LaForest, writing for the majority.

65 *Charter*, *supra* note 40.

66 *Lavigne*, *supra* note 63 at 323.

67 See John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) Am Crim L Rev 1329 at 1339.

68 MacPherson, "'A Centenary of a Mistake'?", *supra* note 57 at 131.

produces a great deal of trouble with this proposition is that the shareholders of a corporation are speculating the value of the shares will increase. If they are correct in this, few if any of them would ask why they were allowed to benefit. If this is so, why then, should those same people be allowed to question the reason for the decline in the value of their shares? Why, from the point of view of the shareholder, should a criminal fine be treated any differently than any other expense that a corporation is to pay?[69] Regardless of the strength of the argument when applied to corporations, what is important about these arguments is that, in virtually every case, when considering a corporation, the relationship is a voluntary one. Workers are generally able to choose their employer. Shareholders are allowed to choose the companies in which they invest. Financial and other trade creditors are allowed to refuse to do business with any borrower, as they see fit. This is not necessarily true of the person who gives money to a trade union. The Rand formula can and does force people who do not wish to be financially supportive of the trade union to nonetheless provide financial security to that very same trade union.

To be clear again about the scope of this argument, there is no suggestion that non-members of the trade union should not be expected to have their money contributed toward any fine or other financial consequence of the wrongdoing. As soon as the money is properly received by the trade union, it is also fully available to be dispensed by the trade union in accordance with its activities.[70] Rather, the argument is that

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69 There are other arguments that, in my view at least, counter the "innocent shareholder" thesis to oppose corporate criminal liability. These arguments are beyond the scope of the current paper. For some of these arguments, see e.g. MacPherson, "'A Centenary of a Mistake'?", *ibid* at 130-133.

70 Both the majority and the concurring opinions in *Lavigne* make clear that there have historically been restrictions placed on the ability of trade unions to spend money on certain activities. On this point, Justice Wilson writes as follows (at 297): "Mr. Lavigne notes that legislatures have in the past placed restrictions on the way compelled dues could be spent: see *Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c. 31, s. 5, and *The Industrial Relations Act*, S.P.E.I. 1962, c. 18, s. 48. Both these provisions restricted only the right to make contributions for electoral purposes and not for the "non-collective bargaining" purposes cited by the appellant. These provisions have since been repealed: see *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 151, and *Prince Edward Island Labour Act*, S.P.E.I. 1971, c. 35, s. 76(1)(a). To my mind, the fact that some jurisdictions at one time imposed restrictions on the Rand formula does not advance the inquiry. We simply do not know whether the old system worked or why it was abandoned."

unlike most creditors of a corporation,[71] the employees, who pay union dues or the equivalent of union dues, are not doing so in any sense that is truly and meaningfully "voluntary." Rather, employees are required by law to make those payments because this serves a policy rationale. This rationale runs something like this: unions protect the interests of workers, and the employer is likely to give a similar deal to all employees in the same or similar positions, whether they are members of the union or not.[72] As a result, the worker is assumed to benefit from the unionized environment, regardless of whether they are members of the union or not.[73] However, if the worker receives the same benefit from the employer regardless of union membership, there is a temptation to not join the union so as to receive the benefits (better working conditions) without the underlying costs (that is, union dues).[74] The union needs financial security (a relatively consistent level of money coming into its coffers, mostly in the form of dues, or the equivalent)[75] in order to perform its role as the protector of employees.[76] The tension between these last two sentences (the economic reality is that if the result of paying and not is the same, most people will choose to receive benefits but not to pay, despite the need

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71 The notable exception to this general rule of course are "classic" tort victims. On this point, see the judgment of Justice LaForest (in partial dissent, by not on this point), in *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 S.C.R. 299 at 342-343, 97 DLR (4th) 261. "Classic" tort victims are those tort victims who have no connection with the corporation prior to the tort. As Justice LaForest explains: "Nonetheless, for one reason or another, the employer may not be available as a source of compensation. In my view, in what may be termed a 'classic' or non-contractual vicarious liability case, in which there are no 'contractual overtones' concerning the plaintiff, the concern over compensation for loss caused by the fault of another requires that as between the plaintiff and the negligent employee, the employee must be held liable for property damage and personal injury caused to the plaintiff. An example of such a case is a plaintiff who is injured by an employee while the employee, acting in the course of employment, is driving on the road. In this context, the plaintiff obviously never chose to deal with a limited liability company."

72 Kaplan, *Canadian Maverick*, *supra* note 42 at 168.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

for consistent funding to maintain the benefits achieved) is known as the "free rider problem."[77]

The goal is to point out that the Rand formula creates more people who are truly innocent. The shareholders of a company are generally "innocent" in the sense that, as a group, they do not share the *mens rea* of the actual individual perpetrators of the underlying crime. However, as shareholders, they have put their faith voluntarily into the directors of the corporation, as well as the people who report to them.[78] In most business corporations, this is generally done in an effort to reap financial reward from the success of the business of the corporation.[79] Put another way, there is an immediate identity of financial interest between the shareholders, on the one hand, and the activities of the corporation, on the other. This is not to say that the shareholders would necessarily support the undertaking of illegal activity in order to try to create the economic outcome of increased share value. Rather, this is simply an acknowledgement that in the traditional corporate setting, the shareholder chooses to speculate (along with management) that the activities undertaken in the name of the corporation will be profitable and attempts to share that profitability if it occurs.

For those people paying the equivalent of dues pursuant to the Rand formula, that identity of interest may, frankly, be lacking. The person forced to pay dues in this way may in fact be philosophically opposed to the collective and associational nature of the union's activities. Nonetheless, so as to avoid the free rider problem, Canadian law mandates that at least for financial purposes, they are required to contribute to the trade union that represents a bargaining unit that

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77 Interview of Horace Pettigrove (27 October 1989) cited in Kaplan, *Canadian Maverick*, *ibid* at 463.

78 See e.g. s 107 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*], which mandates that the shareholders with the right to vote are permitted to vote in the election of directors. Section 102(1) of the CBCA gives the directors the duty to manage, or oversee the management of, the business and affairs of the corporation. Section 121 of the same statute gives the power to the directors to appoint the officers of the corporation. The by-laws of most *CBCA* corporations will define the rights, obligations, and powers of the Corporation of the offices created by the by-laws. The by-laws must be passed by the board of directors, and subsequently approved by the shareholders acting in general meeting. See *CBCA*, s 103.

79 See J Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships and Corporations*, 3rd ed (Toronto: Irwin Law, 2009) at 124-125.

includes their position. While moral innocence does not easily permit of gradations in this respect, it is quite clear that those non-members of a trade union who are nonetheless compelled to contribute financially to it are even more morally innocent than those shareholders who contribute to a corporation and expect to share in the rewards thereof. The reason for this is simple: shareholding is generally a voluntary activity.[80] According to Canadian law, contribution to a union may not be. If part of the goal of a remediation agreement is avowedly "to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing,",[81] it would seem to me that this would apply to a union even more than it would apply to the shareholders of a corporation. Similarly, the employees of a corporation generally choose their employer. The law does not allow them to choose to not contribute financially to the union that represents other employees, even if they do not choose to be a member of the union themselves. At the very least, those employees who contribute to the union are in no worse position than the employees and shareholders who are generally considered to be "innocent" of the wrongdoing. Yet, the employees of a corporate offender are a reason to give a remediation agreement, while neither the rank-and-file employees who are members of the union, nor the non-members who were required by law to contribute to it as part of their employment are legally allowed to qualify for the same treatment. This seems to run counter to one of the very purposes that remediation agreements are designed to serve.

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80 Of course, there are scenarios where voluntariness can be more questionable than the standard purchase of a share or particular corporation by a particular individual. For example, the acquisition of a share upon the death of its original holder and the receipt of that year by either operation of law under a will, or intestacy would be one example. One could also make the case that the acquisition of shares of a company through a mutual fund with a person who buys the mutual fund and was unaware of the underlying holdings of the mutual fund, or where the mutual fund changed its holdings after the person acquired an interest in the mutual fund may be different as well. Neither of these scenarios may be as "voluntary" as the scenario contemplated here, where a person specifically decides to acquire shares of a particular corporation in an attempt to benefit financially from the operations of that particular corporation.

81 See *Criminal Code*, *supra* note 4, para 715.31(f).

E. The Publicity Effect of Labelling a Union as a Criminal, and Giving to a Corporation – Its Opponents in Negotiation – a Remediation Agreement

It is readily observable that, in a situation of labour strife, there is clearly a public element to the private dispute. In a strike situation, one of the goals of the strike is to remove labour from the employer in an effort to return the employer to negotiations with the union to resolve the dispute, by giving the employer an economic incentive to negotiate in a more concessionary fashion. Further, the law clearly allows the union and its membership to picket.[82] Picketing makes the dispute a public one. For the union, the hope is, at least in part, that when the public becomes aware of the employer's unwillingness to accede to the reasonable demands of the union, the public will be less likely to purchase the goods and services offered by the employer, thereby increasing economic and political pressure on the employer.[83]

Assuming that there is in fact a public component to a strike, how does the lack of availability of a remediation agreement affect this public aspect of a strike? The potential for such an affect is real and important. Let us imagine that there is a situation where the corporate employer has been pursued in the past for criminal contempt of court for ignoring a court order.[84] However, the corporate employer was given a remediation agreement with respect to that transgression. Then, later the trade union is pursued for criminal contempt of court for ignoring a court order, arising out of its associational activities. Subsequent to both of these events, there is a strike situation between the employer and the trade union representing its unionized employees. When there is picketing to inform the public as to the plight of the workers, the corporate employer then points out "the

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82 See e.g. "Winnipeg's Canada Post employees back on the picket line" (15 November 2018), *CBC*, online: <www.cbc.ca/news/canada/manitoba/canada-post-rotating-strikes-winnipeg-1.4906465> [perma.cc/BYD6-E28W]; Talia Ricci & Katie Dangerfield, "Faculty on strike at the University of Manitoba" (1 November 2016), *Global News*, online: <globalnews.ca/news/3037596/faculty-will-strike-at-university-of-manitoba-tuesday-morning/> [perma.cc/98HW-K4FA].

83 See "Demonstrators picket Tim Hortons after cuts to employee benefits" (10 January 2018), *CBC*, online: <www.cbc.ca/news/business/tim-hortons-protest-rally-picket-ontario-employee-benefits-1.4480559> [perma.cc/ZC8J-UEQG].

84 I choose this particular offence simply because it is clear that a trade union may be liable for this particular offence (under both the common law and the statute), and it is easy to imagine a situation where similar conduct by a corporate employer could result in similar potential liability.

criminal past" of the trade union in its dealings with the corporate employer, pointing specifically to the conviction of the trade union for failure to obey a court order. The public statements always end with the same question to the public: "Do you want to put your faith in a criminal organization?" Of course, the trade union will want to point out that the corporate employer has engaged in similar behaviour. However, the question of criminality cannot legitimately be raised. The trade union has been adjudged to be a criminal; the corporate employer has avoided a similar fate, given the diversionary tools available to it that are specifically made unavailable to a trade union, namely, the remediation agreement.

Given the public nature of the pressure that is attempted to be exerted by strike action by a trade union, asking the general public to fully understand the differences and similarities between the actions of the trade union in its past, when compared to the actions of the corporate employer in its past, is, quite unrealistic. The general public understands what criminality is. Many members of the public have a visceral reaction to the label of "criminal." The entire purpose of the remediation agreement provisions of the *Criminal Code*[85] is to avoid labelling an organization as a criminal where such a label would be permissible under the law as it now stands, but where it would nonetheless be inappropriately harsh to do so. Through the inability of trade unions to access the remediation agreement regime, there is certainly the suggestion that it is never inappropriately harsh to label the actions of a trade union as being "criminal" where it fits the strict letter of the law to do so.

Moreover, a strike is an area where organized labour is generally considered to be an antagonist to an employer, group of employers (if the employers are related) or to an industry as a whole.[86] Given the antagonism that exists in a strike situation, it seems as though the government's decision

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85 *Criminal Code*, *supra* note 4.

86 While it would be rare for a strike to be organized against an entire industry, there can be little doubt that the effect of a strike and its resolution by one employer will affect how the remainder of the industry will deal with its labour strife. Technically, the Rand formula was only meant to resolve a singular strike at Ford. On this point, see Kaplan, *Canadian Maverick*, *supra* note 42 at 217. However, it is equally clear that the Rand formula has become fundamentally part of Canadian law which is applied across industries. It is equally clear that the resolution of the dispute with Ford was going to inform how other employers in the automotive industry would deal with their labour strife going forward. On this point, see Kaplan, *Canadian Maverick* at 217.

to deny access to the remediation agreement regime to one side of that antagonism (the trade union) while granting it to the other (the corporate employer) could be seen as the government favouring the employer in the resolution of the strike situation, to the concomitant disadvantage of the trade union.

In other words, labour relations legislation[87] is designed to ensure the resolution of strikes,[88] and to put limits on the actions of the parties thereto in an effort to succeed through strike action (or their response to that action),[89] it would seem very unusual for a level government to explicitly favour one side in this dispute, particularly where there may be significant antagonism between management and labour, and management may effectively be allowed to use the protection of labour as a reason why it should be allowed to access the remediation agreement regime. This seems all the more unusual given that this is to use the criminal law as a means to provide that advantage.

V. CONCLUSION

In the end, this paper accepts the idea that remediation agreements are an appropriate part of our criminal law. They are properly used where the stigma of the criminal sanction would simply be too heavy and create too much collateral damage for those who did not intend to carry out the criminal wrongdoing undertaken on behalf of an organization. However, this paper seriously questions the clear legislative decision to exclude trade unions from the ambit of the remediation agreement regime. Trade unions serve a socially valuable role in protecting the rights and working conditions of employees. Some of the activities of trade unions are constitutionally protected, so as to ensure they are able to carry out this socially important role. It therefore seems quite incongruous to suggest that there would never be a circumstance in which it would be appropriate that a trade union be

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87 *The Labour Relations Act*, *supra* note 21.

88 See e.g. *ibid*, at ss 83.1-83.3. Even in those provinces where there are similar statutory provisions, there is undoubtedly an interest for both the general public and the government of the day to ensure that strikes and other labour disruptions remain within manageable limits, given the social and economic costs and losses for both sides. This may explain why, more than 75 years ago, a Justice of the Supreme Court of Canada was asked to find a solution to a strike with difficult economic and social consequences. See Kaplan, *Canadian Maverick*, *supra* note 42, c 5.

89 *The Labour Relations Act*, *supra* note 21, Part V.

given the opportunity to enter into a remediation agreement. Yet, this is clearly the legislative choice that Parliament has made. This paper has attempted to demonstrate that even accepting Parliament's purposes for creating the remediation agreement regime in the first place, this legislative exclusion does not appear to serve the purposes of the regime itself and appears to run directly counter to it.

Of course, it may be possible for a trade union to mount a constitutional challenge to this legislative exclusion. However, laying out the grounds of such a challenge will have to wait for another day. For now, this paper has simply attempted to lay out an incongruity within a legislative scheme. That incongruity leads to certain results that can be considered untenable, including what appears to be a direct interference into the resolution of labour disputes. How this incongruity will be resolved by Parliament in the future is anyone's guess. If Parliament decides to leave the current legislative exclusion of trade unions in place in the remediation agreement regime, at the very least, I hope that Parliamentarians are asked to explain the approach that justifies such an exclusion. Perhaps there is one that has not been canvassed here. It is only by pointing out the incongruity that we can ask for a justification. The motive of this paper was to point out the incongruity so that the groundwork can be laid to seek a justification. Until that justification is provided (assuming that there is one), there are only unanswered questions. One can only hope that, in the near future, answers to these questions will be forthcoming.

Secrecy and Impunity: The Role of Law Societies in Canadian Wrongful Convictions

MELISSA MONTANA

ABSTRACT

This article argues that law societies play a role in causing wrongful convictions in Canada and suggests possibilities for reform to ensure that law societies prevent wrongful convictions rather than perpetuate them. A lawyer's lack of cultural competence can lead to an increased risk of wrongful conviction for Indigenous peoples. Yet, law societies are mostly silent on cultural competence in their rules of professional conduct. Moreover, the overly discretionary disciplinary processes of Canadian law societies have created a system of impunity for lawyers who engage in professional misconduct. The inadequacies of these disciplinary processes will be illustrated through a close examination of a Crown disclosure scandal in Alberta and Clayton Boucher's wrongful conviction. Ultimately, if law societies fail to guard against this problem, a question forms: are law societies self-regulating in the public interest or in the interests of their members?

Keywords: Wrongful Convictions; Law Societies; Cultural Competence; Professional Misconduct; False Guilty Pleas; False Confessions; Indigenous Peoples

I. INTRODUCTION

> Every day innocent people – a disproportionate number of them First Nations, Inuit and Métis people – plead guilty to crimes they did not commit.[1]

[1] Amanda Carling, "Pleading Guilty When Innocent: A Truth for Too Many Indigenous People", *The Globe and Mail* (23 May 2018), online:

On May 10, 2018, the Manitoba Court of Appeal overturned Richard Joseph Catcheway's wrongful conviction.[2] Mr. Catcheway is a member of the Skownan First Nation, and he served four months in prison after entering a guilty plea to unlawfully being in a dwelling house in Winnipeg. However, Mr. Catcheway was already in custody 200 kilometres away when the crime occurred, making it impossible for him to have committed the crime in Winnipeg. Yet, Mr. Catcheway's defence counsel and the Crown prosecutor in the case allowed the guilty plea. While it is unclear why Mr. Catcheway pled guilty to a crime he did not commit, there are several reasons why individuals – particularly Indigenous persons – would plead guilty when they are innocent.

Intergenerational traumas, racism, distrust in the criminal justice system, systemic discrimination in bail hearings, and cross-cultural miscommunication between Indigenous clients and non-Indigenous lawyers all impact upon Indigenous peoples' capacity to navigate the criminal justice system in Canada. This can ultimately lead to wrongful convictions through false confessions or false guilty pleas. Worsening the problem are lawyers who are not culturally competent, rendering them unable to recognize these barriers to justice for Indigenous peoples and making them ill-equipped to provide legal representation of Indigenous clients. What is unclear is whether Mr. Catcheway's lawyer was ever reprimanded by the Manitoba Law Society for this apparent professional misconduct.

By reviewing how a lawyer's lack of cultural competence can lead to an increased risk of wrongful conviction for Indigenous peoples in Canada and examining the inadequacies of law societies' disciplinary practices, this paper will consider the role of law societies in wrongful convictions and the way law societies can be reformed to play a larger role in preventing wrongful convictions in Canada. Part II of this article will examine cultural competency and its significance in effective legal representation, as well as the Federation of Law Societies of Canada's Model Code of Professional Conduct. Part III will survey literature addressing how Indigenous peoples are particularly vulnerable to false guilty pleas and false confessions.

<www.theglobeandmail.com/opinion/article-pleading-guilty-when-innocent-a-truth-for-too-many-indigenous-people/> [perma.cc/265M-DLTF].

2 *Ibid.*

This literature will be examined in light of two cases involving Indigenous men: Richard Joseph Catcheway and Phillip James Tallio. These case examples will be used to illustrate how a lack of cultural competency may lead to ineffective legal counsel that results in wrongful convictions. Part IV will focus on the disciplinary processes of law societies in Ontario, Manitoba, and Alberta. This paper maintain that the disciplinary processes are inadequate due to a lack of transparency and accountability within law societies, suggesting a culture of secrecy. In part, these inadequacies will be illustrated through a close examination of the wrongful convictions resulting from a disclosure scandal in Alberta and Clayton Boucher's wrongful conviction and subsequent complaints to the Alberta Law Society. Part V will discuss how law societies can be reformed to play a larger role in preventing wrongful convictions in Canada.

II. CULTURAL COMPETENCE AND WRONGFUL CONVICTIONS OF INDIGENOUS PEOPLES

This section will illustrate how a lack of cultural competency on behalf of defence counsel and prosecutors increases the risk of wrongful conviction for Indigenous peoples in Canada. Law societies in Canada can work to rectify this and play a larger role in preventing wrongful convictions by taking cultural competence more seriously as an important aspect of professional conduct. While there is no comprehensive list of wrongful convictions in Canada, Kent Roach maintains that it is "relatively certain" that on a list of the wrongly convicted in Canada, Indigenous peoples would be overrepresented relative to their population percentage.[3] Accordingly, this section will focus on Indigenous peoples in Canada, as they are likely the individuals most at risk of being wrongly convicted. It is important to note, however, that cultural competency is likely to also aid in preventing wrongful convictions of other non-Indigenous, racialized individuals in Canada.

A. Competence in the Model Rules of Professional Conduct

The Federation of Law Societies of Canada provides a Model Code of Professional Conduct for law societies to use in creating their own rules of

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3 Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17:2 Flinders LJ 203 at 224.

professional conduct. Rule 3.1-1 defines what it means to be a competent lawyer as "a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement."[4] The Model Code goes on to list several competencies, none of which mention cultural competence.

Sarah Marsden and Sarah Buhler argue that the competencies listed in the Model Code are essentialist.[5] This essentialism is problematic because it reduces lawyering as something that is purely technical in nature, and as such, the competencies are presented as neutral.[6] Marsden and Buhler hold that a neutral presentation of competencies is dangerous because it reflects legal practice as a culture having no specific values,[7] despite law being historically used – and, in some cases, used today – as a tool of oppression by the dominant group in society. The Truth and Reconciliation Commission ("TRC") called specifically on the Federation of Law Societies in Calls to Action #27 and #28 to educate lawyers and law students on "residential schools, international law, treaties, Indigenous law and Aboriginal-Crown relations."[8] Yet, the Model Rules of Professional Conduct, as amended in October 2019 – four years after the TRC published its Calls to Action – do not address cultural competence. In order to respond meaningfully to these calls, Marsden and Buhler hold that re-thinking legal competencies to include cultural competency is crucial.[9]

B. What is Cultural Competence?

Cultural competence refers to a "set of skills, behaviours, attitudes and knowledge that enable a professional to provide services that are appropriate to a diverse range of clients."[10] According to Pooja Parmar, cultural competence for lawyers must go beyond merely serving a diverse

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4 The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2017, Rule 3-1-1.

5 Sarah Marsden and Sarah Buhler, "Lawyer Competencies for Access to Justice: Two Empirical Studies" (2017) 34:2 Windsor Y B Access Just 186 at 191.

6 *Ibid.*

7 *Ibid.*

8 Marsden & Buhler, *supra* note 5 at 188.

9 *Ibid.*

10 Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97 Can Bar Rev 526 at 534.

range of clients and instead must include training in both anti-racism and colonialism.[11] In addition, Parmar explains that cultural competence requires lawyers to understand how the legal culture is not neutral and, consequently, to think critically about the legal culture and the power dynamics produced and upheld by it.[12] With respect to reconciliation with Indigenous peoples, Parmar holds that a commitment to ensuring lawyers are culturally competent "demands acknowledgement of the foundational violence of colonialism that has shaped Canada, Canadian laws, and Canadians."[13]

Therefore, cultural competence in Canada must include learning about Indigenous peoples' experiences with the justice system and how systemic racism and colonial legacies are embedded at each stage of the justice system when encountered by Indigenous peoples.[14]

III. FALSE CONFESSIONS AND FALSE GUILTY PLEAS OF INDIGENOUS PEOPLES AND CULTURAL COMPETENCE

This section will survey the literature addressing how Indigenous peoples are particularly vulnerable to false guilty pleas and false confessions, in part stemming from communication problems between Indigenous clients and non-Indigenous lawyers. The literature will be examined in light of the cases of Richard Joseph Catcheway and Phillip James Tallio. This examination will demonstrate how law societies can work to help prevent wrongful convictions of Indigenous peoples by increasing their efforts to ensure the cultural competence of their members.

A. Why are Indigenous Peoples Particularly Vulnerable to False Guilty Pleas and False Confessions?

A false guilty plea occurs where an accused pleads guilty – often for a lighter sentence than what would be pursued at trial – when they did not commit the crime or lacked the requisite mental intent. Similarly, a false confession occurs when an accused confesses to committing a crime that

11 *Ibid* at 540, 545.
12 *Ibid* at 539.
13 *Ibid* at 535.
14 *Ibid* at 556.

they did not commit, and most often results in guilty pleas.[15] Malini Vijaykumar explains that plea bargains are "strong temptations" when an accused is unsure about the strength of their case, especially if they are being detained pre-trial.[16]

These temptations, coupled with the systemic discrimination experienced by Indigenous peoples in the bail system, offers a strong reason as to why Indigenous peoples are particularly vulnerable to false guilty pleas. Amanda Carling maintains that systemic discrimination in the bail system is widespread.[17] For example, the Aboriginal Justice Inquiry of Manitoba found that Indigenous accused spend more time in pre-trial detention than non-Indigenous people, and they are also more likely to be held without bail.[18] Moreover, a 2014 report by the Canadian Civil Liberties Association ("CCLA") found that Indigenous peoples are systematically disadvantaged in the bail system due to the disproportionate impact of "substance abuse issues, poverty, lower educational attainment, social isolation, and other forms of marginalization," largely stemming from colonial histories and intergenerational traumas.[19] The same report found that a major contributor to the incarceration of Indigenous peoples was the "over-imposition of conditions of release and subsequent breaches."[20] The CCLA found that systemic barriers were even harsher for Indigenous peoples living on remote reserves, such as long distances to courts, unemployment, and lack of property ownership.[21]

In addition, the bail system is permeated with stereotypes of Indigenous peoples as "dangerous" which influences assessments of reliability that can result in unjustified pre-trial detention.[22] When faced with a choice between pre-trial detention with poor bail prospects and release upon a guilty plea, the CCLA reports that many Indigenous clients will plead guilty in order to

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15 Malini Vijaykumar, "A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada" (2018) 51:1 UBCL Rev 161.

16 *Ibid*.

17 Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64:3/4 Crim LQ 415.

18 *Ibid* at 435.

19 "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention" (2014) at 75, online (pdf): Canadian Civil Liberties Association <ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> [perma.cc/K86-PMVR].

20 *Ibid* at 75–76.

21 *Ibid* at 76.

22 Carling, *supra* note 17 at 427.

return home.[23] Therefore, systemic discrimination in the bail system makes it more strategic for Indigenous peoples to plead guilty to avoid pre-trial detention than to wait for their day in court.

Systemic discrimination in the bail system is not the only factor at play when it comes to false guilty pleas. Jeremy Greenberg explains other reasons why Indigenous peoples plead guilty more than non-Indigenous people including: "lack of understanding, pressures from counsel, a cultural desire to cause the least amount of trouble… distrust of what they perceive to be a racist justice system"[24] as well as social vulnerabilities, such as intergenerational trauma, police bias against Indigenous peoples, and experiences with the child welfare system.[25] An Indigenous accused's capacity to enter a guilty plea may also be hampered by language comprehension and low literacy.[26] Additionally, Vijaykumar explains that Indigenous peoples may be more vulnerable to false guilty pleas due to Indigenous cultural norms which emphasize taking responsibility.[27] However, the notion of "responsibility" for an Indigenous accused often differs meaningfully from legal guilt.[28]

With respect to false confessions, Carling explains that racism, intellectual disabilities, mental health disorders, and dysthymic disorder each play a role in making Indigenous accused more prone to false confessions,[29] which often form the basis of a false guilty plea. First, Carling maintains that stereotypes associating Indigenous peoples with crime may result in police officers using Reid tactics.[30] The Reid interrogation technique is "premised on an investigator's ability to tell – using verbal and nonverbal cues" when a suspect is lying.[31] Reid tactics are particularly problematic when the accused is Indigenous because "indicators of deception" are not cross-culturally reliable.[32]

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23 *Ibid.*

24 Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" (2020) 67 CLQ 407 at 12.

25 *Ibid* at 7.

26 Carling, *supra* note 17 at 428.

27 Vijaykumar, *supra* note 15 at 11.

28 *Ibid.*

29 Carling, *supra* note 17 at 443.

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

Second, colonial legacies and intergenerational traumas have resulted in high rates of Fetal Alcohol Spectrum Disorder ("FASD") in Indigenous communities, which also plays a role in false confessions.[33] Individuals with FASD are able to perform basic functions but struggle with memory loss and controlling impulsive behaviour, while also being suggestible and, therefore, easily influenced by leading questions.[34] This is particularly problematic in the context of a police interrogation, as individuals with FASD are likely to be heavily influenced in their confessions by tactics used by police officers.[35]

Third, Indigenous peoples suffer higher rates of dysthymic disorder, a mental health condition involving a "constant long period of low-level depression or sadness" that is largely related to historical oppression and colonialism, including the impact of residential schools and resulting intergenerational traumas.[36] These factors combine and produce an unwillingness to confront or resist authority, making Indigenous peoples more vulnerable to false confessions during police interrogations.[37]

B. Communicating with Indigenous Clients

Underlying the various elements that make Indigenous peoples particularly vulnerable to miscarriages of justice through false guilty pleas and false confessions are the communication struggles between Indigenous peoples and non-Indigenous lawyers, which are also exemplified in the cases of Mr. Catcheway and Mr. Tallio.

Aboriginal Legal Services' ("ALS") guide, *Communicating Effectively with Indigenous Clients*, illustrates how miscommunications between Indigenous accused and non-Indigenous lawyers can occur.[38] The guide also explains how such miscommunications stem from the differences between Standard

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33 *Ibid* at 445.

34 Kent Roach & Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing" (2009) 42:1 UBC L Rev 1 at 1; "Criminal Justice: Adult" online: Fetal Alcohol Spectrum Disorder & Justice [https://fasdjustice.ca/en-ca/criminal-justice/adult.html].

35 Carling, *supra* note 17 at 445–46.

36 *Ibid* at 448–49.

37 *Ibid* at 449.

38 Lorna Fadden, "Communicating Effectively with Indigenous Clients" (last visited 31 March 2022), online (pdf): *Aboriginal Legal Services* <www.aboriginallegal.ca/assets/als-communicating-w-indigenous-clients.pdf> [perma.cc/LK9X-DW2F].

English ("SE") and Aboriginal English ("AE") – representing numerous dialects spoken by Indigenous communities.[39]

Some of the consulted Indigenous peoples felt that their stories went unheard due to their distrust of the legal system and/or belief that they would not be deemed credible because they were Indigenous. Others felt that they were unable to tell their stories because their case was seemingly only based on information from the Crown and police.[40] The guide also explains how cross-cultural miscommunications occur "when people speak the same language but with different accents and different discourse styles."[41] For example, double negatives are common in AE and should be interpreted as a negated sentence in SE, as opposed to SE interpreting double negatives as a positive.[42] More notably, features of AE include not making eye contact and taking a long time to answer, as it is considered polite in many Indigenous communities to lease a pause to ensure the person speaking is finished before one begins to speak.[43] Conversely, someone who takes many pauses and does not keep eye contact in SE is often assumed to be untruthful and deceptive.[44] Therefore, differences in discourse styles may cause a SE speaker to misinterpret what is being said by an AE speaker, which can lead to erroneous assumptions being made.[45]

C. Richard Joseph Catcheway

As previously mentioned, Richard Joseph Catcheway – a member of the Skownan First Nation – pled guilty to being unlawfully in a dwelling house in Winnipeg after receiving a sentence of six months in pre-sentence custody and 18 months of supervised probation.[46] Following his guilty plea, the Brandon Correctional Centre informed counsel that Catcheway could not have committed the crime because he was in the Centre's custody when the crime was committed.[47]

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39 *Ibid*.
40 *Ibid* at 2.
41 *Ibid* at 25.
42 *Ibid* at 21.
43 *Ibid* at 24–25.
44 *Ibid* at 26.
45 *Ibid* at 23, 25.
46 Carling, *supra* note 1.
47 Cameron MacLean, "'Miscarriage of Justice' After Man Serves 6 Months for Crime he Couldn't Have Committed", *CBC News* (28 May 2018), online:

On May 10, 2018, the Manitoba Court of Appeal overturned Catcheway's wrongful conviction.[48] Although it is unclear why Catcheway pled guilty, his comments to the writer of the pre-sentence report – which are quoted in the joint factum filed at the Manitoba Court of Appeal – reveal that he pled guilty to avoid going to trial because there was a video statement saying he was present at the time of the offence.[49] During the interview, Catcheway alternated between saying he did not remember and he was not there. While it is unclear why Catcheway's lawyer allowed the plea to be entered without further investigation into Catcheway's whereabouts, Catcheway is an individual with FASD, and he was denied bail in this case – both of which are factors that make Indigenous peoples particularly vulnerable to false guilty pleas and false confessions.[50]

D. Phillip James Tallio

Over 36 years ago, Phillip James Tallio was convicted of murdering his infant cousin but has continued to maintain his innocence since his arrest and conviction.[51] Tallio's youth – like that of many Indigenous youth – was troubled. Tallio suffered physical abuse from his mother who was an alcoholic, as well as sexual abuse from his uncle.[52] In 1979, Tallio became formally registered as a ward of the state after his parents died, and he was transferred between numerous foster homes in a primarily non-Indigenous community.[53] Prior to his arrest for his cousin's murder, Tallio had other run-ins with the law and attempted suicide three times.[54] Tallio's experiences demonstrate the effects of intergenerational traumas on Indigenous communities, particularly Indigenous youth.

<www.cbc.ca/news/canada/manitoba/richard-catcheway-wrongful-conviction-1.4681737> [perma.cc/J3RG-A8JN].

48 Carling, *supra* note 1.

49 Canada, Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions – 2018, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa, PPSC: last modified 25 April 2019).

50 Carling, *supra* note 1; MacLean, *supra* note 45.

51 Greenberg, *supra* note 24 at 1.

52 *Ibid* at 3.

53 *Ibid*.

54 *Ibid*.

Jeremy Greenberg explains that when he was arrested, Tallio was in police custody for ten hours.[55] Tape recordings and interview transcripts confirm that during the first nine and a half hours of interrogations, Tallio maintained his innocence.[56] However, once a new constable came into the room at the nine-and-a-half-hour mark unaccompanied, he claimed that Tallio had confessed but the "tape recorder had mysteriously broken." While the alleged confession was ruled inadmissible at *voir dire*, Tallio pled guilty.[57] The guilty plea was entered into based on a letter from a psychiatrist who claimed that Tallio gave inculpatory statements after an unrecorded interview.[58] Although Tallio maintained that he did not meet with the psychiatrist, Tallio's defence counsel did not challenge the letter due to a concern that the jury would likely find Tallio guilty if the psychiatrist was called as a fact witness, and the lawyer entered the guilty plea on Tallio's behalf instead.[59]

Tallio appealed his conviction in 2017. The British Columbia Court of Appeal ("BCCA") unanimously rejected Tallio's appeal for a new trial in August 2021.[60] The BCCA found that Tallio failed to establish that he received inadequate legal counsel, that new DNA evidence exonerates him, and that the police investigation was inadequate.[61] The BCCA also held that Tallio was prone to long pauses after questions that undermined his credibility.[62] Tallio's defence lawyer, Rachel Barsky, told Aboriginal Peoples Television Network ("APTN") News that Tallio's legal team will be appealing the BCCA's decision to the Supreme Court of Canada ("SCC").[63]

E. Where does Cultural Competence Fit In?

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55 *Ibid* at 9.

56 *Ibid*.

57 *Ibid* at 11, 13.

58 *Ibid* at 13.

59 *Ibid*.

60 Jason Proctor, "Appeal Court Rejects B.C. Child Killer's Attempt to Overturn 1983 Conviction", *CBC News* (19 August 2021), online: <www.cbc.ca/news/canada/british-columbia/phillip-tallio-appeal-conviction-murder-1.6146446> [perma.cc/L2VK-4XW9].

61 *R v Tallio,* 2021 BCCA 314.

62 *Ibid*.

63 Kathleen Martens, "'Evasive and Inconsistent': B.C. Court Turns down Nuxalk Man's Appeal", *APTN News* (20 August 2021), online: <www.aptnnews.ca/national-news/evasive-and-inconsistent-b-c-court-turns-down-nuxalk-mans-appeal/> [perma.cc/XMU7-EH4F].

Vijaykumar explains that failure by defence counsel to follow best practices is often a factor in miscarriages of justice affecting Indigenous peoples.[64] This failure includes the following actions: not thinking critically about a client's decision to plead guilty and whether it is voluntary, not having open communication with your client, and failing to investigate or present evidence.[65]

Cultural competence is significant because being a culturally competent lawyer works to combat biases that may affect a non-Indigenous lawyer's representation of their Indigenous client. Similarly, cultural competence allows a non-Indigenous lawyer to understand both the incentives to plead guilty experienced by Indigenous clients, as well as their susceptibility to false confessions. Lawyers who work cross-culturally often have their cultural competency tested in cases with "undisputed facts" where such facts could take an alternate meaning when considering a client's background and social context.[66] Consequently, a culturally competent lawyer is more likely to represent their Indigenous client in a way that prevents a false guilty plea or false confession.

The cases of Catcheway and Tallio each provide examples of how cultural competence might have worked to prevent a wrongful conviction (though Tallio's case has not yet been granted leave by the SCC). Catcheway was denied bail in a bail system that routinely discriminates against Indigenous peoples. Without an understanding of the impacts of not receiving bail on Indigenous accused, it is impossible to assess the voluntariness of a client's willingness to plead guilty. As an individual with FASD, the voluntariness of Catcheway's guilty plea should have been questioned due to the increased suggestibility of individuals with FASD.

Although we can never know why Catcheway's defence counsel did not probe his guilty plea further, or whether Catcheway's lawyer's ineffectiveness stemmed from a lack of cultural competence, Catcheway's case illustrates how cultural competence can be an important tool in ensuring the effective representation of Indigenous peoples in the criminal justice system. In Tallio's case, while the false confession was deemed inadmissible, Tallio's subsequent guilty plea suggests both the possibility of

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64 Vijaykumar, *supra* note 15 at 198.

65 *Ibid* at 197.

66 Travis Adams, "Cultural Competency: A Necessary Skill for the 21st Century Attorney" (2012) 4:1 Law Raza 1.

tunnel vision on the part of his defence lawyer and the Crown prosecutor and a failure to understand why Tallio, as an Indigenous man, was particularly vulnerable to a false confession and ultimately a false guilty plea.

Cultural competence also requires that lawyers be familiar with the differences between AE and SE so that there is a decreased chance of misinterpretations and mistaken assumptions. It is possible that such miscommunications were present between Tallio and his non-Indigenous lawyer, which could have impacted the false guilty plea.

In order to fulfil their obligation to regulate lawyers in the public interest, law societies should include cultural competence in their rules of professional conduct to ensure that a lack of cultural competency does not lead to wrongful convictions. However, adding cultural competence to the rules of professional conduct is not enough. Law societies must also work to ensure that their members are interacting with the legal system in a way that acknowledges the systemic discrimination and biases against Indigenous peoples in the legal system that make them particularly vulnerable to wrongful convictions through false guilty pleas and false confessions.

IV. LAW SOCIETIES AND DISCIPLINARY PRACTICES

A. Complaint Processes Across Canada

Across Canada, most law society investigations into the conduct of lawyers result from complaints launched by current or former clients and other legal professionals.[67] Investigations may also be the product of random audits, the media, or reports from government agencies, such as law enforcement.[68] The Federation of Law Societies of Canada published Discipline Standards for all law societies in Canada.[69] More specifically, discipline standards for transparency include hearings that are open to the public, providing reasons for any decision to close a hearing, and publishing notices of charges and/or citations. I will now discuss the complaint processes for 4 provinces: Ontario, Manitoba, Alberta, and British

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67 Gavin MacKenzie, Lawyers & Ethics: Professional Responsibility and Discipline (Toronto: Carswell, 2010) at 26:4.

68 *Ibid.*

69 "National Discipline Standards" (7 June 2021), online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2021/08/Disc-Standards-June-2021-V4.pdf> [perma.cc/HY25-S7P2].

Columbia. Manitoba, Alberta, and British Columbia were chosen because of their relationship to the cases mentioned in this paper. Ontario was chosen because, with 57,000 lawyer licensees, it is the largest law society in Canada.

1. Ontario

The Law Society of Ontario ("LSO") is tasked with receiving and assessing complaints against members of the Ontario Bar. Complaints will only be investigated by the LSO if they occurred within three years from the date of the issue or the date the complainant learned of the issue, with very few exceptions.[70] The first point of contact for a complainant is the Complaints and Compliance Department which decides whether to forward the case to investigation or to close it. If the complaint is within the LSO's jurisdiction and raises a professional conduct issue, the complaint is directed to the Intake and Resolution Department.

Once the complaint has reached the Intake and Resolution Department, it will be reviewed to identify whether there was professional misconduct, conduct unbecoming of a lawyer, a lack of capacity to meet lawyers' obligations in the profession. The complainant must provide evidence to the LSO to support the allegations. If the evidence provided does not raise a reasonable belief of professional misconduct or conduct unbecoming of a lawyer, the LSO may close the case. The LSO may also close the case if a further investigation will not resolve the issues in the complaint. If the evidence is compelling, the LSO may opt to conduct a further investigation into the lawyer's conduct per subsections 49.3(2) or (4) of the *Law Society Act*.

Subsection 49.3(1) of the *Law Society Act* gives the LSO the power to investigate a licensee's conduct if the LSO received "information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming of a licensee."[71] It is unclear whether this only relates to complaints made to the LSO or if it also includes information that comes to the LSO through news media. Complainants have a limited ability to have their cases reviewed, as the LSO will not review a complaint closed by the Complaints and Compliance Department. A complainant, however,

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70 "The Complaints Process" (last visited 31 March 2022), online: *Law Society of Ontario* <lso.ca/protecting-the-public/complaints/complaints-process> [perma.cc/6PMH-DZC5].

71 *Law Society Act*, RSO 1990, c L-8, s 49.3(1).

may request an independent review by the Complaints Resolution Commissioner if the complaint is closed by the Intake and Resolution Department. In its 2020 Annual Report, the LSO disclosed that 3987 complaints were filed.[72] Of these complaints, 165 notices were filed in the Hearing Division, and there were 123 hearings where a final order was rendered.

2. Manitoba

The Manitoba Law Society ("MLS") has a similar complaint process to the LSO. First, a complaint will go through an Initial Assessment, where the Law Society may first attempt informal resolution of the complaint between the lawyer and the complainant.[73] At this stage, the Law Society may decide that it is inappropriate to investigate. There is little information on the MLS' website regarding investigation, but following an investigation, over 80% of complaints are resolved through dismissal, sending a letter to the lawyer with recommendations, or sending a letter to the lawyer to remind them of their ethical obligations.[74]

After investigation, if there are serious concerns, the Complaints Investigation Committee may charge the lawyer with professional misconduct or conduct unbecoming of a lawyer. Complainants may appeal decisions by requesting a review by the Complaints Review Commissioner within 60 days, who may review the file and uphold the decision or send the matter back to the Law Society.[75] In the MLS' 2020 Annual Report, the Law Society noted that 44 complaints were referred to discipline, but the number of total complaints that were made at each stage was not provided.[76]

3. Alberta

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72 "2020 Annual Report: Professional Regulation Statistics" (2020), online (pdf): *The Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/annualreport/documents/statstics-professionalregoverview-2020.pdf> [perma.cc/NW8T-MA8E].

73 "Complaint Process and Possible Outcomes" (last modified 31 March 2022), online: *The Law Society of Manitoba* <lawsociety.mb.ca/for-the-public/complaints/complaint-process-and-possible-outcomes/>.

74 *Ibid.*

75 *Ibid.*

76 "Annual Report 2020" (2020), online: *The Law Society of Manitoba* <lawsociety.mb.ca/wp-content/uploads/2020/07/2020-Law-Society-of-Manitoba-Annual-Report-Final.pdf>.

In Alberta, there are various streams that a law society complaint may enter. A complaint can either go to the Resolution and Early Intervention Process, summary dismissal, or the Conduct Process. At Early Intervention, a complaint either goes to resolution or dismissal but can also go to the Conduct Process.[77] Once a complaint enters the Conduct process, a staff lawyer (Conduct Counsel) is assigned to review the case and thoroughly analyze the information relating to the complaint.[78]

In determining whether to dismiss a complaint or refer the matter to the Practice Review Committee and/or Conduct Committee, the following threshold test must be met: "(1) is there a reasonable prospect that a Hearing Committee would find the lawyer committed the alleged conduct, and (2) if so, is there a reasonable prospect that a Hearing Committee would find the conduct deserving of sanction."[79] Failure to meet this test results in dismissal. If the test is met, the Practice Review Committee will generally assess the lawyer's practice, while the Conduct Committee – which is made up of benchers – will decide the next step in the process, including a hearing, dismissal, further investigation, or an alternate form of intervention.[80]

Accordingly, there are several people with discretion to determine whether a case will go to further investigation before a complainant arrives at any kind of hearing. In its 2020 Annual Report, the Law Society of Alberta ("LSA") noted that of the general inquiries and concerns about Alberta lawyers received in 2020, 716 were referred to the Early Intervention Process, and 238 matters were referred to the Conduct Process. [81]

4. British Columbia

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77 "Resolution and Early Intervention Process" (last visited 31 March 2022), online: *Law Society of Alberta* <www.lawsociety.ab.ca/public/complaints/complaint-process/resolution-and-early-intervention-process/> [perma.cc/6VGL-EYM3].

78 "Conduct Process" (last visited 31 March 2022), online: *Law Society of Alberta* <www.lawsociety.ab.ca/public/complaints/complaint-process/conduct-process/> [perma.cc/D43D-PUSH].

79 *Ibid*.

80 *Ibid*.

81 "2020 Annual Report" (last visited 4 April 2022), online: *Law Society of Alberta* <https://www.lawsociety.ab.ca/about-us/annual-accountability-and-financial-reports/2020-annual-report/>.

In British Columbia, when a complaint is first received, intake staff determine whether there is a basis for investigating the complaint.[82] At this stage, complaints may be closed by intake staff if the complaint is unsubstantiated, outside the Law Society's jurisdiction, frivolous or vexatious, or not a disciplinary violation if proven. If the complaint is sent to the investigation stage, information and documents will be gathered, and interviews may be conducted. The complaint may be dismissed after the investigation is concluded. If there are ethical concerns or rule breaches, the lawyer may be referred to the Discipline Committee for further action. The Disciplinary Committee may recommend any of the following consequences: taking no further action, sending a conduct letter, ordering a conduct meeting, ordering a conduct review, or issuing a citation.[83]

B. Provincial Disciplinary Statistics

All four provinces release disciplinary statistics in their Annual Reports, but while Ontario and British Columbia release the total number of complaints made to their respective law societies, Manitoba and Alberta do not. In addition, there is no publicly available documentation for any of the four law societies stating the reasons why specific complaints were investigated but did not result in any further action. Instead, the only documents made publicly available by all law societies are hearing decisions and any notices of citation or discipline.

C. A Note on Prosecutorial Complaints

In *Krieger v Law Society of Alberta*, the SCC held that as members of a law society, prosecutors are subject to the code of conduct of the law society to which they are a member.[84] As such, any conduct that does not fall within prosecutorial discretion can be subject to the respective law society's code of conduct. Prosecutorial disclosure does not fall within prosecutorial discretion and, therefore, can be reviewed by the Law Society through the requisite complaint processes. As such, the SCC found a difference between

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82 "The Complaints and Discipline Process" (last visited 31 March 2022), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/complaints/about-the-complaints-process/> [perma.cc/49PD-7VKL].

83 "The Complaints and Discipline Process" (last visited 31 March 2022), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/complaints/about-the-complaints-process/> [perma.cc/49PD-7VKL].

84 *Krieger v Law Society of Alberta*, 2002 SCC 65.

discipline within the Attorney General's Office and discipline by law societies.

Nonetheless, an investigation by the *Toronto Star* found that the Ministry of the Attorney General's office in Ontario failed to monitor the nearly 1000 prosecutorial complaints lodged against prosecutors across the province. Moreover, the Ministry did not have a centralized system for tracking complaints or which prosecutors have been disciplined for misconduct.[85] While the LSO can technically investigate and discipline prosecutors since they are members of the Ontario Bar, prosecutorial complaints are usually investigated internally by the Ministry of the Attorney General's Office and are subsequently kept secret. In addition, it is usually direct superiors who deal with complaints and decide whether disciplinary actions will be taken.

D. Lack of Transparency and Accountability

This paper maintain that the disciplinary processes described are inadequate because the overly discretionary nature of deciding which complaints are pursued results in a lack of transparency in how complaints are handled and why complaints are dismissed. The presence of discretion in the disciplinary process is not problematic on its own. However, too much discretion coupled with a decision-making system that is not transparent in how certain conclusions are reached can result in an inadequate disciplinary system overall.

The law societies discussed in this paper each publish statistics on the number of complaints received and how many complaints ended in a hearing in any given year. However, the lack of transparency in the disciplinary processes results from there being no publicly available documentation for any of the four law societies discussed stating the reasons why certain complaints were investigated but did not result in any further action. Such a process may offer some impunity for lawyers who may have played a role in wrongful convictions, as the lack of transparency in the system could create a culture of secrecy, and possibly even corruption, within law societies when it comes to disciplining lawyers. The inadequacies of the disciplinary processes will in part be illustrated through a closer

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[85] Jennifer Pagliaro & Jayme Poisson, "Ontario Fails to Track Complaints Against Crown Attorneys", *The Toronto Star* (16 December 2014), online: <www.thestar.com/> [perma.cc/4KHL-AUPK].

examination of the wrongful convictions resulting from a disclosure scandal in Alberta and Clayton Boucher's wrongful conviction and subsequent complaint to the LSA.

1. Alberta Disclosure Wrongful Convictions

Before looking at the Alberta disclosure cases, this paper will first explain the disclosure obligations of prosecutors in Canada. *R v Stinchcombe* set guidelines for prosecutorial disclosure in Canada. In *Stinchcombe*, the SCC found that "the Crown must disclose to the defence all relevant information under its control, whether inculpatory or exculpatory, regardless of whether the information pertains to evidence that the Crown intends to adduce at trial."[86] *Stinchcombe* also highlighted that this obligation is a continuing one – disclosure must be given before and during trial, and even after conviction.[87] This also means that disclosure must be given prior to and during plea negotiations with defence counsel.[88] In *R v Chaplin*, the SCC found that disclosure must include elements that are both favourable and unfavourable to the Crown.[89] However, per *Stinchcombe*, prosecutors still have discretion as to what information is "relevant."

A six-month investigation by CBC's *The Fifth Estate* found that senior officials at Alberta Justice were aware of a report undermining the findings of medical examiner Dr. Evan Matshes, which called into question several murder charges in which Dr. Matshes was involved.[90] Alberta Justice launched an inquiry into Dr. Matshes' autopsies and found unreasonable findings in 13 of 14 cases reviewed – five of which were criminal cases. However, interviews with two defence lawyers and their clients suggest that this report was never disclosed to them after guilty pleas were entered, despite the prosecutorial disclosure obligations outlined in *Stinchcombe*. The cases of Butch Chiniquay and Shelby Herchak are two instances in which this occurred.

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86 Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2015) at 654.

87 *Ibid*.

88 *Ibid* at 662.

89 *Ibid* at 655.

90 Harvey Cashore, Rachel Ward & Carolyn Dunn, "Alberta Judge Denies Evidence was Buried in Autopsy Scandal", *CBC News* (26 February 2020), online: <www.cbc.ca/news/canada/calgary/judge-alberta-autopsy-scandal-1.5469933> [perma.cc/V9X-4PQD].

In January 2012, Chiniquay – an Indigenous man – pled guilty to manslaughter to avoid going to trial for second-degree murder of his girlfriend and was given a five-year prison sentence.[91] The initial autopsy report in 2011 had ruled the death a homicide. However, while Chiniquay was serving his prison sentence, a medical report in November 2012 was completed – as part of the investigation into Dr. Matshes – which concluded that there was not adequate evidence of a homicide. While internal correspondence shows that there was an acknowledgement by Alberta Justice to disclose what they knew, Chiniquay's lawyer maintains that he was never told there was a peer review done to indicate there was no homicide. In November 2013, the expert panel report was set aside because Dr. Matshes was never consulted. However, a second review has yet to be completed nearly six years later. [92]

Similarly, Shelby Herchak was charged with second-degree murder in the death of her 26-day old son in 2010, and she entered a plea bargain of manslaughter in October 2013 to avoid the possibility of a life sentence.[93] However, in 2012, the Chief Medical Examiner's Office changed the autopsy report's cause of death from "homicide" to "undetermined." While correspondence demonstrates that the change in report was provided to prosecutors, the second-degree murder charge remained in place, and Herchak only learned of the change recently from journalists. Herchak's lawyer did not respond to the CBC investigation, but it remains unknown why the review panel's findings were not discussed prior to the plea bargain being entered. The bargain was struck on the basis of the Crown's continued pursuit of a second-degree murder charge despite the report's findings.[94]

2. Clayton Boucher

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91 Harvey Cashore, Rachel Ward & Mark Kelly, "'I did not kill her': Justice Officials Withheld Report Signalling No Homicide While Alberta Man Sat in Prison", *CBC News* (13 January 2020), online: <www.cbc.ca/news/canada/fifth-estate-the-autopsy-1.5421945> [perma.cc/Q9WC-26KQ].

92 *Ibid.*

93 Harvey Cashore & Rachel Ward, "Alberta Prosecutors Had Mounting Evidence Disputing Murder Charge Against Calgary 'Baby Killer'", *CBC News* (6 March 2020), online: <www.cbc.ca/news/canada/alberta-prosecutors-shelby-herchak-autopsy-fifth-estate-1.5483752> [perma.cc/H5TH-EAZF].

94 *Ibid.*

Clayton Boucher is an Indigenous man from Alberta. Boucher was arrested for an armed robbery that occurred on October 30, 2015 – an arrest that was likely the result of false eyewitness identification.[95] Boucher was released under strict bail conditions after the robbery and explained to Kenneth Jackson for APTN News that he was always being checked on by the RCMP. [96]

On January 22, 2017, Boucher was arrested by RCMP officers for breaching his bail conditions, due to having changed his address without notifying his probation officer. The RCMP obtained a warrant to search the apartment where Boucher was residing after alleging that he was selling drugs. The officer found 130 grams of powder – some of which was in an Arm & Hammer baking soda box – and other items like a small scale and sandwich bags. [97]

The RCMP charged Boucher with trafficking and possession of meth and cocaine, and he was held in custody pending test results on the powder due to his prior bail conditions. Health Canada tests of two samples of the powder tested negative for any drugs on February 20, 2017, though the RCMP allegedly did not receive the results until March 20, 2017. The Crown Prosecutor in the case – Erwin Schulz – claimed that he continued to ask the RCMP for test results after March 20, but they were never provided. Despite the RCMP's claims that they told Schulz that both tests were negative on May 3, 2017, Leighton Grey – Boucher's defence attorney – claimed that Schulz informed him that traces of cocaine were found on May 4, 2017. [98]

On May 31, 2017, Boucher pled guilty to a drug offence that he did not commit about a month after his common law wife Phyllis Favel died. After Boucher was released, he learned that the test results came back negative, and his conviction was overturned in September 2017. Boucher would go on to file separate complaints against Schulz and Grey to the LSA. However, both complaints were ultimately dismissed, with Schulz and Grey continuing to practice law. [99]

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95 Kenneth Jackson, "Tunnel Vision: The Sad, Wrongful Conviction of Clayton Boucher", *APTN News* (last visited 31 March 2022), online: <www.aptnnews.ca/tunnel-vision-the-sad-wrongful-conviction-of-clayton-boucher/> [perma.cc/8KW7-HDM5].

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

As part of an APTN News investigation into Boucher's Law Society complaints, Kenneth Jackson examined a number of law society documents related to Boucher's complaints.[100] Boucher's first complaint against Schulz and Grey were determined by the LSA's intake department to not meet the threshold test to allow the complaints to proceed to the Conduct Committee – who ultimately decides whether there will be an investigation, hearing, or other form of intervention. This occurred without any public publication of Boucher's complaints or the Intake Department's reasoning for dismissal.

The LSA would later appoint Allan Fineblit as independent counsel to investigate Boucher's respective complaints against Grey and Schulz. After investigation, Fineblit declined to forward the complaints against both lawyers to the Conduct Committee for failure to meet the LSA's threshold test. Declining to forward the complaints effectively dismissed Boucher's complaint, as the Conduct Committee is the body at the LSA that determines whether there is a hearing and/or sanctions. While Boucher appealed both findings, the appeal panel made up of three law society benchers dismissed the complaints against Grey and Schulz.[101]

Fineblit's two separate letters to Boucher declining to forward the complaints against Grey and Schulz demonstrate the lack of transparency and accountability that imbue law society disciplinary processes.[102] Both letters were attached via Google Drive to Kenneth Jackson's article.[103] Fineblit's letter to Boucher regarding his dismissal of the complaint against Grey explains that one of Boucher's allegations against Grey was that he allowed Boucher to plead guilty prior to confirming whether the powder seized was drugs.[104] While Boucher explained to Jackson that he simply wanted to plead guilty to get out of prison in the aftermath of his common-law wife's death, Fineblit maintained in the letter that Grey followed

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100 Kenneth Jackson, "Law Society Documents Reveal How Crown Avoided Discipline in Wrongful Conviction of Metis Man", *APTN News* (2 July 2020), online: <www.aptnnews.ca/national-news/law-society-documents-reveal-how-crown-avoided-discipline-in-wrongful-conviction-of-metis-man/> [perma.cc/79VZ-E7SJ].

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 "Letter from Allan Fineblit to Clayton Boucher Regarding Complaint Against Leighton B. U. Grey, Q.C." (18 January 2018), online: <drive.google.com/file/d/1McORXGn-THdHfLLqGDlZsjta_RFbfiWu/view>.

Boucher's informed instructions. Specifically, Fineblit stated that extenuating circumstances "obviously led you [Boucher] to admit facts that were untrue just to get out of custody. This is not however the responsibility of Mr. Grey."[105] Therefore, despite possible negligence, Fineblit did not find that Grey engaged in any conduct that breached law society rules or amounted to professional misconduct.

In Fineblit's letter to Boucher declining to forward the complaint against Schulz, Fineblit found no evidence to support discrimination against Boucher as an Indigenous man or based on his criminal record.[106] With respect to the seized substance and subsequent test results, Fineblit held that "there is however no good explanation for why he would have assumed the samples were 'spitballs'" and that Schulz "had no analysis to suggest they were controlled drugs" and consequently made a mistaken conclusion.[107] Most significantly, in finding no professional misconduct, Fineblit wrote:

> Does Mr. Schulz's conduct in jumping to a mistaken conclusion amount to professional misconduct? It was certainly a mistake that resulted in a wrongful conviction. It was a mistake unsupported by the text of the document he relied upon. In the end however I conclude it was a mistake and nothing more.[108]

With respect to both complaints, Boucher's appeals to the Law Society were dismissed by an appeal panel made up of benchers.[109] In the complaint against Grey, the panel found that it was not unreasonable for a defence lawyer to rely on the Crown's word regarding drug tests without further investigation. However, in the complaint against Schulz, the appeal panel found that Fineblit's findings were unreasonable and allowed the appeal. The panel held that Fineblit was wrong in accepting Schulz's claim that the reason the analyst certificates were withheld was because they were in the middle of a plea negotiation, citing that Crown disclosure obligations persist even during such negotiations. The process after an appeal involves the matter being referred to the Conduct Committee panel. Nonetheless, the Conduct Committee still dismissed Boucher's complaint against Schulz

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105 *Ibid.*

106 "Letter From Allan Fineblit to Clayton Boucher Regarding Complaint Against Erwin R. Schulz by Clayton Boucher" (31 January 2018) <drive.google.com/file/d/1ZL9jcnDOcoRRtPkimiYPzg77YmzJ4JDc/view>.

107 *Ibid.*

108 *Ibid.*

109 "*Clayton Boucher v Leighton B.U. Grey, QC*" (17 May 2018), online: <drive.google.com/file/d/1ge_Pqg6naB1BJUiMtpy7HgGQvdaYAJ_y/view>.

after Schulz met with a bencher appointed by the Conduct Committee to resolve the issue.[110]

3. What Do These Cases Say About Law Society Disciplinary Processes?

Although both cases relate to the LSA, the similarity in the disciplinary processes of law societies across Canada suggests that the concerns with these cases are likely applicable to other law societies. Both the Alberta Disclosure Wrongful Convictions and Clayton Boucher's wrongful conviction illustrate a disciplinary system for lawyers in Canada that lacks transparency and accountability through disciplinary processes. These processes rely too heavily on decision-making that is overly discretionary where no fulsome explanation of decision-makers' reasoning is required and where a decision-maker's reasoning does not need to be made publicly available unless a complaint goes to a hearing.

Boucher's struggle to compel the LSA to discipline Schulz and Grey for their roles in Boucher's wrongful conviction is illustrative of the Law Society's highly discretional approach to dismissing complaints. For example, the Intake and Resolution Department initially dismissed both complaints without providing adequate reasoning for doing so and without publishing its decision, as there is no requirement to make such decisions publicly available.

The LSA's website explains that complaints are frequently dismissed at this stage because they do not meet the threshold test requiring both that the conduct occurred and that the lawyer would be disciplined for that conduct. However, it is unclear how a determination of whether a lawyer would be disciplined for their conduct in a wrongful conviction can be made without a further investigation into the complaint – an investigation, which, paradoxically can only occur if the threshold test is met. Moreover, the Law Society documents disclosed in Jackson's article demonstrate that Fineblit was accorded wide discretion in determining whether misconduct occurred. For example, Fineblit decided that the contradictory stories surrounding the negative drug test results amounted to a mistake on Schulz's part, rather than professional misconduct.[111]

The LSA does not explicitly define professional misconduct in its Code of Conduct. Professional misconduct is defined by the LSO, however, as

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110 Jackson, *supra* note 95.

111 Letter, *supra* note 106.

"conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession."[112] We will never know for certain whether Schulz knew about the negative drug test results. Nonetheless, assuming that there were spitballs attached to the negative drug test results seems to discredit the legal profession, as it demonstrates a violation of the presumption of innocence, while also suggesting that Crown prosecutors are more concerned with obtaining a conviction than reaching a fact-based outcome. Yet, Finneblit did not rely on any definition of professional misconduct in his report.

Ultimately, Boucher's experience complaining to the LSA illustrates the Law Society's willingness to take lawyers' explanations at face value instead of more critically engaging with a lawyers' actions and how those actions affect the reputation of the legal profession as a whole. The wide discretion given to investigators, coupled with very few regulatory rules to follow, suggests that the decision-making surrounding whether to dismiss a complaint lacks transparency. This may create opportunities for impunity for lawyers despite having played a role in a wrongful conviction.

There are also several issues with disciplinary processes for prosecutors across Canada which may suggest a culture of secrecy and lack of accountability among prosecutors. For example, the former head of Alberta's prosecution service, Gregory Lepp, denied the allegation that autopsy reports which could have exonerated convicted individuals were not disclosed to their respective lawyers.[113] It is difficult to know what actually transpired given the pending external review,[114] and there was no evidence of any complaints to the LSA.

The *Law Society Act* in Ontario and the *Legal Profession Act* in Alberta give both law societies the power to investigate conduct that comes to the attention of the law society by complaint or other means.[115] The CBC's investigation was national news, but there is no evidence that the LSA used its powers to investigate the prosecutors involved. This, coupled with the lack of transparency in disciplinary proceedings against prosecutors and an unwillingness to track complaints internally, suggests a lack of checks and balances on prosecutorial discipline. Further, limited public records about

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112 Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2014, Rule 1.1-1.

113 Cashore, Ward & Dunn, *supra* note 90.

114 *Ibid.*

115 *Law Society Act*, *supra* note 63, s 49.3(1); *Legal Profession Act*, RSA 2000 c L-8, s 53(1).

complaints might work to protect prosecutors rather than discipline them, suggesting a culture of secrecy embedded within the mechanisms for disciplining prosecutors internal to the Attorney General's Office.

A culture of secrecy also seems to persist in disciplining both prosecutors and defence counsel through law societies. For instance, there was no public record of Boucher's complaints prior to Kenneth Jackson's article, and the initial dismissal of Boucher's complaints by the Intake and Resolution Department did not provide an explanation of why the complaint was dismissed.[116] Both the lack of transparency in disciplinary processes and the lack of precise rules for determining whether a complaint should be dismissed mean that the public, and often complainants themselves, are not privy to the precise reasons why a lawyer was not disciplined for their alleged conduct. Although law societies are tasked with regulating the legal profession in the public interest, this does not seem to extend to disciplinary proceedings against their members. Without adequate disciplinary mechanisms, it appears there is very little incentive for defence counsel and prosecutors to ensure that their actions do not result in a wrongful conviction.

V. Where Do Law Societies Go from Here?

In order to play a greater role in preventing wrongful convictions, there are a number of reforms law societies across Canada can implement. Law societies should take cultural competence more seriously since it helps lawyers understand the systemic racism and colonial legacies in the justice system that make Indigenous peoples particularly vulnerable to false confessions and false guilty pleas. Law societies can do this by including cultural competence as a distinct lawyer competency in their rules of professional conduct. Doing so would allow for complaints of incompetency against lawyers who do not demonstrate cultural competence in their practice.

In doing so, however, Nicholas Healy argues law societies must ensure that in fulfilling their cultural competence obligations, lawyers are not only provided with training.[117] Instead, law societies must also work towards

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116 Jackson, *supra* note 95.

117 Nicholas Healy, "Ethics, Legal Professional and Reconciliation: Enacting Reconciliation through Civility" (2018) 26 Dalhousie J Legal Stud 113 at 113.

ensuring that any training given requires attendees to actively implicate themselves in what is being taught, such as pushing lawyers to understand their individual role in perpetuating discriminatory systems. Healy also maintains that in a system driven by complaints, law societies should clearly communicate to their members that lawyers can and will be disciplined for any kind of cultural ineptitude. As such, disciplinary hearings that have any element of cultural ineptitude should make explicit references to it.

Second, while defence counsel are ethically bound in the Model Rules of Professional Conduct to not plead their clients guilty if they are innocent, there is nothing in the Model Rules that puts an onus on defence counsel to investigate the true voluntariness of their clients' guilty pleas.[118] While this is a legal requirement in the *Criminal Code*, a lawyer who has not been sufficiently trained in cultural competence may be more likely to engage in miscommunications with their client due to cultural differences. Accordingly, a client's behaviours and motivations may be misinterpreted as voluntarily pleading guilty when that is not the case.

Therefore, the Federation of Law Societies of Canada should consider including additional ethical rules on guilty pleas to ensure that lawyers are thinking critically about cultural circumstances that may lead their client to enter into a false guilty plea to ensure that guilty pleas are truly voluntary. Nonetheless, guilty pleas are part of larger issues in Canada, including, among other things, backlogged courts and underpaid and overworked defence lawyers. Consequently, changing ethical rules alone will not dispense with the false guilty plea problem.

In addition, law societies must reform their disciplinary practices in order to play a greater role in preventing wrongful convictions in Canada. First, there must be more transparency in disciplinary proceedings, starting at the intake stage. When complaints are dismissed at the intake stage, a more in-depth explanation of the law society's reasoning should be given to complainants. Moreover, as complaints proceed through the disciplinary process, documents discussing why a complaint was dismissed at the investigatory stage should be made publicly available by law societies. Greater publicity of disciplinary processes will allow for greater accountability within the law society, which can combat the potential for a culture of secrecy that allows for impunity.

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118 Model Rules, *supra* note 4, Rule 5.1-8.

While the Ministry of the Attorney General's Office has its own internal disciplinary mechanisms for prosecutors, *Krieger* allows law societies to discipline prosecutors for professional misconduct that falls outside prosecutorial discretion. Thus, law societies should take more initiative to discipline prosecutors when such misconduct occurs. Law societies also cannot simply rely on formal complaints to address professional misconduct.

Instead, law societies must take greater onus in investigating alleged professional misconduct that is made known through other sources, such as the news media. For instance, even though Amanda Carling published an article in the Globe & Mail about Richard Catcheway's wrongful conviction, there was no evidence to suggest that Catcheway's former defence counsel was investigated or disciplined by the Law Society of Manitoba. His former defence counsel continues to practice law today, despite pleading his client guilty for a crime that he could not possibly have committed because he was imprisoned 200 kilometers away. In addition to sanctions, law societies might consider a model for dealing with professional misconduct that is more remedial in nature, including meeting with complainants and issuing formal apologies to individuals who were wrongly convicted as a result of their conduct. While law societies cannot single-handedly end wrongful convictions in Canada, there are various ways in which they can work to prevent wrongful convictions and ensure that they are not perpetuating the problem.

VI. Conclusion

Law societies are supposed to self-regulate in the public interest. However, law societies currently play a role in wrongful convictions in Canada. This role is played both by not prioritizing cultural competence and by inadequately deterring lawyers from engaging in professional misconduct that results in wrongful convictions through a lack of transparency and culture of secrecy in disciplinary processes. If law societies do not take measures to ensure that they are part of the solution to wrongful convictions instead of part of the problem, an important question arises: are law societies self-regulating in the public interest or self-regulating in the interests of their members?

The Application of Gladue Principles During NCRMD and Fitness Disposition Hearings

MICHAEL MICHEL*

ABSTRACT

Since 1999, *Gladue* principles have been applied in a variety of contexts within the Canadian criminal justice system. Some of these contexts, like bail hearings, have been thoroughly discussed by courts and academics. Others have not. To supplement the ongoing discussion of how *Gladue* can be used in new and unique ways, this paper analyzes the application of *Gladue* principles to NCRMD and fitness disposition hearings under s. 672.54 of the *Criminal Code*.

To date, only one appellate court has held that *Gladue* principles apply to NCRMD and fitness disposition hearings. However, according to the Ontario Court of Appeal, that application is limited. While relevant to the rehabilitation and reintegration of an Indigenous accused, *Gladue* principles are not relevant when assessing their dangerousness or mental condition. This paper argues that the current approach by the Ontario Court of Appeal is inappropriate, inconsistently applied, and should not be adopted by Courts and review boards across the country since it ignores the benefits a full *Gladue* analysis can have during s. 672.54 disposition hearings.

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Keywords: *Gladue*; Indigenous; NCRMD; Fitness; Disposition; Dangerousness; *Sim*; 672.54; Review Board; Restorative; Mental; Expert; Actuarial.

I. INTRODUCTION

Indigenous peoples are over-represented at nearly every stage of the Canadian criminal justice system.[1] In 2018-2019, Indigenous adults comprised "approximately 4.5% of the Canadian adult population,... [but] accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody."[2] Indigenous youth, who represent "8.8% of the youth population in Canada,... [accounted for] 43% of youth admissions to correctional services" in 2018-2019.[3] As the Supreme Court of Canada stated in *R v Gladue*, "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system."[4] Unfortunately, that crisis has only worsened since 1999. While adult and youth incarceration rates have been declining,[5] "[t]he incarceration numbers for Indigenous people are worsening year by year."[6] To date, legislative and judicial interventions have been unable to stop this crisis.

While the over-representation of Indigenous peoples in custody is well-documented, less attention has been given to the rate at which Indigenous peoples are found not criminally responsible on account of mental disorder ("NCRMD") or unfit to stand trial. The most recent study by Statistics Canada on the NCRMD verdict was published in 2014 and made no reference to the ancestry or ethnicity of people found NCRMD.[7] In 2015,

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1 *R v Gladue*, [1999] 1 SCR 688 at para 61, 171 DLR (4th) 385 [*Gladue*].

2 Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2018/2019" (21 December 2020) at 5, online (pdf): *Statistics Canada Juristat* <www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.pdf> [perma.cc/369M-F6UX].

3 *Ibid* at 7.

4 *Gladue*, *supra* note 1 at para 64.

5 Malakieh, *supra* note 2 at 3–6.

6 Scott Clark, "Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses" (2019) at 1, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf> [perma.cc/ALR7-ANEU].

7 See Zonran Miladinovic & Jennifer Lukassen, "Verdicts of not criminally responsible on account of mental disorder in adult criminal courts, 2005/2006-2011/2012" (18

the Department of Justice found that "only 4% of accused within the Review Board system were reported to be Aboriginal, which is relatively consistent with the proportion of Aboriginal people in the Canadian population."[8] The review board system includes offenders that are either NCRMD or unfit to stand trial, however this study is unreliable since "Manitoba and Saskatchewan, which both have a high proportion of Aboriginal people within their populations, are missing from the study."[9]

Given the prevalence of mental health concerns among Indigenous populations, it is reasonable to suggest that Indigenous peoples may also be over-represented in the review board system. Resulting from historical and ongoing effects of colonization and assimilationist policies, "Indigenous Peoples have poorer mental health outcomes, including anxiety, depression, and suicide, compared to non-Indigenous peoples in Canada."[10] These poorer outcomes can cause an Indigenous person to become involved with the review board system after being found NCRMD or unfit to stand trial. It is therefore important to ensure all available measures are taken to rectify or prevent the over-representation of Indigenous peoples in this part of the criminal justice system. One way to achieve this is by applying *Gladue* principles to NCRMD and fitness dispositions.

The goal of this paper is to review the current law relating to the application of *Gladue* principles to *Criminal Code* review board disposition hearings. There is currently little judicial and academic consideration of this issue.[11] The most recent and comprehensive article on this topic, which this paper expands on, is Kyle McCleery's "'Resort to the Easy Answer': *Gladue* and the Treatment of Indigenous NCRMD Accused by the British Columbia Review Board," published in 2021. McCleery provides an extensive overview of the history of *Gladue* principles, their application

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September 2014), online: *Statistics Canada Juristat* <www150.statcan.gc.ca/n1/pub/85-002-x/2014001/article/14085-eng.htm> [perma.cc/2PUT-YHT7].

8 "The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study" (2015), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p3.html#ftn15> [perma.cc/ZR7U-WMGX].

9 *Ibid.*

10 Simon Graham et al, "Mental Health Interventions for First Nations, Inuit, and Métis Peoples in Canada: A Systematic Review" (2021) 12:2 Intl Indigenous Policy J 1 at 2.

11 Kyle McCleery, "'Resort to the Easy Answer': *Gladue* and the Treatment of Indigenous NCRMD Accused by the British Columbia Review Board," (2021) 54:1 UBC L Rev 151 at 152.

outside of sentencing, and how they have been applied by the British Columbia Review Board. He makes three conclusions: (a) the British Columbia Review Board has not adequately applied *Gladue* principles during disposition hearings, (b) "the legislative framework that governs the Review Board's decision-making process allows little opportunity for the application of *Gladue*," and (c) "legislative reform is required."[12]

This paper expands the discussion started by McCleery in three ways. First, it provides a broader analysis of the role of *Gladue* in review board disposition hearings across the country, rather than describing how *Gladue* is applied by the review board of one province. Second, it considers the application of *Gladue* to NCRMD and fitness dispositions, rather than just the former. Third, it argues that legislative reform is not absolutely necessary to resolve the inadequate application of *Gladue* during NCRMD and fitness disposition hearings. There are numerous ways *Gladue* can apply to all factors during a disposition hearing, and courts can extend the application of *Gladue* to these areas without overstepping the judicial role.

Following this introduction, the paper is separated into four more parts. In Part II, the paper provides an overview of s. 718.2(e) of the *Criminal Code* and the Supreme Court of Canada's decisions in *Gladue* and *R v Ipeelee*. This section outlines the unique principles that are applicable to Indigenous peoples in the criminal justice system, as well as the potential to expand the use of *Gladue* principles outside of the sentencing context. In Part III, NCRMD and fitness disposition hearings will be discussed, providing an overview of the types of dispositions available and the conditions that must be met before an individual is released into the public. This includes an analysis of when an individual will be considered a significant threat to public safety, and the weight to be given to the other needs of an accused and their eventual reintegration into society. In Part IV, this paper analyzes the current jurisprudence discussing *Gladue* principles in review board disposition hearings. This includes the decision of the Ontario Court of Appeal in *R v Sim*, as well as review board decisions such as *Kokokopenance, Re*. As these cases demonstrate, *Gladue* principles must be applied to NCRMD and fitness disposition hearings. However, given the emphasis on "dangerousness" in the *Criminal Code*, the application of these principles is limited to issues involving rehabilitation and reintegration. In Part V, this

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12 *Ibid* at 153.

paper concludes by arguing that the applicability of *Gladue* should not be limited during NCRMD and fitness disposition hearings. This position is justified by showing how *Gladue* principles can be relevant when assessing the mental condition of an accused and whether they pose a significant threat to the public. Specifically, this paper analyzes (a) how *Gladue* principles can apply to certain factors a review board considers when assessing dangerousness; (b) how a broad application of *Gladue* principles can assist an Indigenous accused on their path to healing; (c) how the broad application of *Gladue* principles accords with Parliament's new emphasis on restorative justice in the *Criminal Code*, Call to Action 19 of the Truth and Reconciliation Commission Inquiry ("TRC"), and Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"); and (d) how *Gladue* can help supplement expert recommendations and actuarial test results.

II. S. 718.2(E), *GLADUE*, AND *IPEELEE*

In 1996, Parliament sought to address Indigenous over-representation in the criminal justice system by enacting s. 718.2(e) of the *Criminal Code*. S. 718.2(e) instructs sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community." It also instructs sentencing judges to pay "particular attention to the circumstances of Aboriginal offenders" when considering alternatives to imprisonment.[13]

The Supreme Court of Canada first interpreted s. 718.2(e) in *R v Gladue*. The appellant, Jamie Tanis Gladue, was appealing "a three-year prison sentence for manslaughter of her common law husband," on the basis "that the trial judge failed to give appropriate consideration to her circumstances as an Indigenous person pursuant to s. 718.2(e) of the *Criminal Code*."[14] The judge had concluded that "there were no 'special circumstances' arising from… Ms. Gladue's Indigeneity"[15] because she lived "off-reserve rather than 'within the aboriginal community.'"[16]

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13 *Criminal Code*, RSC 1985, c C-46, s 718.2(e) [*Criminal Code*].

14 Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: University of Saskatchewan Indigenous Law Centre, 2021) at 71.

15 *Ibid*, citing *Gladue*, *supra* note 1 at para 18.

16 *Gladue*, *supra* note 1 at para 18.

The Supreme Court of Canada allowed Ms. Gladue's appeal and held that s. 718.2(e) "must be considered in every case involving an Indigenous offender."[17] The Court recognized that intergenerational trauma, as well as background and systemic factors "such as poverty, substance abuse, and 'community fragmentation,'" should be considered as part of the s. 718.2(e) analysis.[18] To ensure these factors are considered, the Court provided a framework for judges to follow when sentencing an Indigenous offender. Judges must consider:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[19]

Following *Gladue*, some judges continued to incorrectly apply s. 718.2(e). Specifically, judges were only applying s. 718.2(e) in two situations: when (a) a causal link could be established between an offender's crime, their Indigenous heritage, and systemic factors and (b) the crime was not serious.[20] The frequency of these two legal errors led the Supreme Court to reconsider the principles established in *Gladue* in *Ipeelee*.

In *Ipeelee*, the Supreme Court of Canada reaffirmed that s. 718.2(e) applies to all Indigenous peoples. The Court also implicitly extended the application of *Gladue* to every case involving an Indigenous person.[21] As stated by McCleery, the Court held that:

> [T]he *Gladue* analysis is required in all cases involving the sentencing of an Indigenous person, and that failure to apply [s.] 718.2(e) in any case involving an Indigenous offender, regardless of the severity of the offence or the existence of an obvious connection between the offender's Indigenous identity and the offence, would "result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality."[22]

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17 McCleery, *supra* note 11 at 156, citing *Gladue*, *supra* note 1 at para 88 [emphasis in original].

18 David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 27.

19 *Gladue*, *supra* note 1 at para 66.

20 *R v Ipeelee*, 2012 SCC 13 at paras 81, 84 [*Ipeelee*].

21 *Ibid* at para 87.

22 McCleery, *supra* note 11 at 158, citing *Ipeelee*, *supra* note 20 at paras 84–87; Johnathon Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:1 SCLR 687 at 376.

This statement about the value of applying Gladue principles has led to their implementation in a variety of contexts outside of sentencing. This includes "bail, parole, extradition ... dangerous and long-term offender proceedings," as well as NCRMD and fitness disposition hearings. While Gladue principles have been applied in these contexts, its application has been limited during NCRMD and fitness disposition hearings.

III. THE STRUCTURE OF NCRMD AND FITNESS DISPOSITION HEARINGS

Part XX.I of the *Criminal Code* governs NCRMD and fitness dispositions. An NCRMD or fitness disposition refers to a decision made by a court or provincial review board about whether an NCRMD or unfit accused can be released into the public, with or without conditions, or whether continued treatment and monitoring of that individual is required. When a court decides that an accused is either NCRMD[23] or unfit to stand trial,[24] the court "may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing."[25] At this hearing, the court may decide to release or detain the accused "if it is satisfied that it can readily do so and that a disposition should be made without delay."[26] If a court does not make a disposition with respect to an NCRMD or unfit accused, a provincial review board must, barring exceptional circumstances,[27] hold a hearing and make a disposition within 45 "days after the [NCRMD or unfit] verdict was rendered."[28] If a court makes a

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23 See *Criminal Code*, *supra* note 13, s 16. An accused will be found not criminally responsible on account of mental disorder if, at the time they committed an offence, they were suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong.

24 Section 2 of the *Criminal Code*, *supra* note 13 defines "unfit to stand trial" as an accused's inability, on account of mental disorder, to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel.

25 *Criminal Code*, *supra* note 13, s 672.45(1).

26 *Ibid*, s 672.45(2).

27 *Ibid*, s 672.47(2). If there are exceptional circumstances, the hearing and disposition may be rendered by a review board within 90 days after the initial verdict, rather than 45.

28 *Ibid*, s 672.47(1).

disposition, other than an absolute discharge, a provincial review board must hold its own hearing and make a disposition within 90 days following the court's disposition.[29] Every NCRMD or fitness disposition made by a provincial review board must be reassessed by that review board within 12 months of the original disposition, "and every… [12] months thereafter for as long as the disposition remains in force."[30] With respect to an accused found unfit to stand trial, there is an additional obligation placed on the court that has jurisdiction over the accused: that court must hold an inquiry within two years of the unfit to stand trial verdict, "and every two years thereafter until the accused is [either] acquitted," or until the court can "decide whether sufficient evidence can be adduced at that time to put the accused on trial."[31] A review board also has the authority to determine whether "an accused who has been found unfit to stand trial" is fit to stand trial at the time of a disposition hearing.[32] If the review board finds the accused fit, they must "order that the accused be sent back to court, and the court shall try the [fitness] issue and render a verdict."[33]

When a court or provincial review board makes an NCRMD or fitness disposition, the safety of the public "is the paramount consideration."[34] Other relevant considerations include "the mental condition of the accused, the reintegration of the accused into society[,] and the other needs of the accused."[35] Nevertheless, the type of disposition granted largely depends on whether the accused is a significant threat to public safety. An accused will be a significant threat to public safety if they pose "a risk of serious physical or psychological harm to members of the public… resulting from conduct that is criminal in nature but not necessarily violent."[36] The risk of physical or psychological harm must go "beyond the merely trivial or annoying."[37] As stated in by the Supreme Court of Canada in *Winko v British*

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29 *Ibid*, s 672.47(3).

30 *Ibid*, s 672.81(1). Dispositions are not reviewed every 12 months if the accused receives an absolute discharge.

31 *Ibid*, s 672.33(1).

32 *Ibid*, s 672.48(1).

33 *Ibid*, s 672.48(2).

34 *Ibid*, s 672.54.

35 *Ibid*.

36 *Ibid*, s 672.5401.

37 *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 62, 175 DLR (4th) 193 [*Winko*].

Columbia (Forensic Psychiatric Institute), "[a] miniscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold."[38] A court or provincial review board must ask whether an NCRMD or unfit accused is a significant threat to public safety at every disposition hearing.

There are three types of dispositions available under s. 672.54 for someone found NCRMD: an absolute discharge, a conditional discharge, or detention in a hospital.[39] For an unfit accused, s. 672.54 only allows for a conditional discharge or detention in a hospital; an absolute discharge is unavailable since the guilt or innocence of that accused has not been tried.[40] However, if an accused is found permanently unfit and is not a significant threat to public safety, a review board may recommend to a court that an inquiry should be held to "determine whether a stay of proceedings should be ordered" for that accused.[41] It is unconstitutional to indefinitely detain a permanently unfit accused that poses no significant threat to the public.[42] Conversely, an accused found unfit, whether temporarily or permanently, that does pose a significant threat to public safety can be indefinitely detained in a hospital by a court or provincial review board.[43] The same is true for individuals found NCRMD. As stated by McCleery, "[i]f required to safeguard the public, significant restrictions may be placed on the liberty of an NCRMD accused, up to and including indefinite detention in a hospital."[44] Indefinite detention is an extreme option that should only be used when absolutely necessary to safeguard public safety.

The more likely outcome is one of the three dispositions available under s. 672.54. If an individual found NCRMD is not a significant risk to public safety, under s. 672.54(a), "the court or [r]eview [b]oard must direct that the accused be discharged absolutely."[45] The court or review board must be certain the NCRMD accused is a significant threat to the safety of the public; if they cannot come to a decision, or there is uncertainty about whether the accused poses a significant risk, the accused must be discharged

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38 *Ibid* at para 57.

39 *Criminal Code*, *supra* note 13, ss 672.54(a)–(c).

40 *R v Demers*, 2004 SCC 46 at para 34 [*Demers*].

41 *Criminal Code*, *supra* note 13, s 672.851(1); *Demers*, *supra* note 45 at para 66.

42 *Demers*, *supra* note 40 at para 66.

43 *Criminal Code*, *supra* note 13, s 672.39(1).

44 McCleery, *supra* note 11 at 171.

45 *Winko*, *supra* note 37 at para 48.

absolutely.[46] Alternatively, there are two options if a court or review board concludes that an NCRMD or unfit accused is "a significant threat to the safety of the public:"

> It may order that the... accused be discharged subject to the conditions the court or Review Board considers necessary, or it may direct that the... accused be detained in custody in a hospital, again subject to appropriate conditions.[47]

When a court or review board is determining the appropriate type of disposition, they must choose "the least onerous and least restrictive"[48] option "that is necessary and appropriate in the circumstances."[49] This is also true of any conditions that attach to a conditional discharge or detention order.[50] The appropriate conditions that will be the least onerous and least restrictive will depend on an individualized assessment of the particular needs of the NCRMD or unfit accused. This will entail a consideration of public safety, as well as the other considerations outlined in s. 672.54: "the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused,"[51] including treatment.[52] Thus, while public safety is the predominant concern during disposition hearings, an accused's personal characteristics and treatment

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46 *Ibid* at paras 49, 62.

47 *Ibid* at para 62.

48 *Ibid* at para 47.

49 *Criminal Code*, *supra* note 13, s 672.54. I recognize that this may not be an accurate statement of the law. It is, however, a fair interpretation. In 2014, Parliament changed the wording of s. 672.54 of the *Criminal Code*. Prior to 2014, s. 672.54 stated that a Review Board was to make "one of the following dispositions that is the least onerous and least restrictive." Bill C-54, known as *The Not Criminally Responsible Reform Act*, amended s. 672.54. That section no longer contains the terms "least onerous and least restrictive," but instead states "one of the following dispositions that is necessary and appropriate in the circumstances." The Supreme Court of Canada has not considered whether the least onerous and least restrictive standard still applies to s. 672.54. However, I could find no principled reason why this standard would not apply. Application of the least onerous and least restrictive standard would not preclude a review board from ordering a disposition that is necessary and appropriate in the circumstances. Thus, this paper continues under the presumption that the least onerous and least restrictive standard still applies to dispositions made under s. 672.54, as outlined in pre-2014 jurisprudence.

50 *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, 2004 SCC 20 at para 67 [*Penetanguishene*].

51 *Criminal Code*, *supra* note 13, s 672.54.

52 *Penetanguishene*, *supra* note 50 at para 67.

needs are still highly relevant to the type of disposition granted and any conditions attached to it. As the Ontario Court of Appeal stated:

> The Board is required to gather and review all available evidence pertaining to the four factors set out in s. 672.54. ...Failure to consider all of the factors when determining the least onerous and least restrictive disposition is an error of law.[53]

In the context of an Indigenous accused that is NCRMD or unfit, consideration of all available evidence requires a full application of *Gladue*. Conditions that might seem the least onerous or least restrictive to a non-Indigenous accused may be inappropriate and impose undue hardship on an Indigenous accused, depending on their unique circumstances. This could prolong their involvement with the review board system or even prevent their recovery and reintegration into society. It is therefore necessary to consider and apply *Gladue* principles to NCRMD and fitness disposition hearings. To date, *Gladue* principles are only partially applied.

IV. THE CURRENT ROLE OF *GLADUE* IN NCRMD AND FITNESS DISPOSITION HEARINGS

The Ontario Court of Appeal is the only appellate court in Canada that has discussed how *Gladue* principles apply during NCRMD and fitness disposition hearings. In *R v Sim*, the Court held that *Gladue* principles apply to disposition hearings under s. 672.54.[54] That application, however, is limited. A review board only has a positive obligation to "ensure that it has adequate information in relation to the [A]boriginal background of an NCR accused" when the accused's eventual reintegration into society and other needs are "live issues."[55] In other words, when a review board is assessing the mental condition of the accused or the potential threat they pose to public safety, *Gladue* principles do not apply. A *Gladue* report is not required in every case, however a review board has a "legal duty to obtain such information where it would be pertinent and relevant to the disposition it

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53 *Tompkins (Re)*, 2018 ONCA 654 at para 24, citing *Winko*, *supra* note 37at para 55; *R v Aghdasi*, 2011 ONCA 57 at para 19; *Penetanguishene Mental Health Centre v Magee*, [2006] OJ No 1926, 80 OR (3d) (Ont CA) at paras 59, 65. *Tompkins (Re)* was cited with approval in *R v Denny*, 2019 NSCA 93 at para 20 [*Denny* (NSCA)].

54 *R v Sim*, [2005] OJ No 4432, at para 19, 78 OR (3d) 183 [*Sim*].

55 *Ibid* at para 29.

is asked to make."[56] Justice Sharpe, writing for the Court, stated that *Gladue* had a limited role during disposition hearings because:

> [A]boriginal status would ordinarily have little direct bearing upon the dangerousness or the mental condition of the accused. An individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her [A]boriginal status.[57]

The Ontario Court of Appeal has reaffirmed that *Gladue* principles apply during NCRMD and fitness disposition hearings as recently as November 19, 2021. In *R v CK*, Justice Paciocco stated:

> In *Gladue*, the Supreme Court of Canada recognized that the systemic and direct discrimination against Indigenous persons is an omnipresent evil, and that the effect of discrimination on the offender is highly relevant information required to arrive at a fit sentence. In those circumstances, the case law evolved to make it crystal clear that Indigeneity is so important a consideration in arriving at a fit disposition that judges must be obliged to augment the adversarial system by ensuring that they have the information they need to discharge their existing responsibility to impose a just disposition. Parallel reasoning suggests that anytime courts are discharging their obligation to identify a fit disposition for Indigenous offenders, the same duty should apply. This line of reasoning explains the extension of the original *Gladue* principles to bail hearings, [and] disposition hearings for mentally disordered offenders.[58]

Albeit highly persuasive, the Ontario Court of Appeal's reasons in *Sim* and *CK* have not been consistently followed by courts or review boards across the country. In British Columbia, the provincial review board has applied *Gladue* during some disposition hearings, but not others. In *Alexis, Re*, for example, "the British Columbia Review Board explicitly embraced *Gladue* and applied the *Winko* duty with an eye to *Gladue* in order to ensure that the aboriginality of an NCR accused was properly considered."[59] However, as McCleery states in his analysis of British Columbia disposition hearings, in 2015-2016 the British Columbia Review Board rarely considered *Gladue* principles during disposition hearings: "[i]n the majority of the decisions… there is no acknowledgement of the requirements of

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56 *Ibid*.

57 *Ibid* at para 18.

58 *R v CK*, 2021 ONCA 826 at paras 78–79 [emphasis added].

59 *Sim*, *supra* note 54 at para 28, citing *Alexis, Re*, [2003] BCRBD No 1, 2003 CarswellBC 3702 (BC).

Gladue and no meaningful consideration of the accused's Indigenous identity."[60]

In Nova Scotia, it is difficult to conclude whether *Gladue* has been consistently applied during disposition hearings since only the dispositions themselves are published, not the Nova Scotia Review Board's reasons.[61] However, by analyzing one Indigenous person's involvement with the provincial review board and various courts in the province, it becomes evident that a failure to consider *Gladue* principles during disposition hearings does not amount to a legal error in Nova Scotia.

Andre Noel Denny is an Indigenous male who "has been the subject of successive disposition hearings pursuant to s. 672.54 [...] since 2012."[62] Mr. Denny "is a member of the Membertou First Nation Reserve near Sydney, Nova Scotia," but occasionally resided "at the Eskasoni First Nation Reserve" on Cape Breton Island.[63] He has received at least seven dispositions since 2014, and is currently detained at the East Coast Forensic Hospital.[64]

Mr. Denny became involved with the review board system after being found NCRMD on January 9, 2012, "on a charge of assault causing bodily harm." He was granted a conditional discharge. Five days later, he left the East Coast Forensic Hospital "without permission," "consumed some alcohol and crack cocaine," and got into an argument outside of a bar. This resulted in Mr. Denny killing a stranger by punching him two times, kicking him in the head, and "repeatedly hit[ting] his face into the pavement." Mr. Denny was in a state of psychosis at the time and was under the influence of alcohol and cocaine.[65] He was convicted of manslaughter.

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60 McCleery, *supra* note 11 at 182.

61 Every published disposition of the Nova Scotia Review Board is available at "Criminal Code Review Board – Disposition" online: *Government of Nova Scotia* <novascotia.ca/just/ccrb/ccrb_disposition.asp> [perma.cc/633U-RVKM]. After searching CanLII, Westlaw, and Lexis Advance Quicklaw, I was unable to locate decisions by the Nova Scotia Review Board.

62 *R v Denny*, 2016 NSSC 76 at para 13 [*Denny* (NSSC)]; Denny (NSCA), *supra* note 53 at para 2.

63 *Denny* (NSSC), *supra* note 62 at para 13.

64 *Andre Denny Disposition Order* (7 December 2020), online (pdf): NSRB <novascotia.ca/just/ccrb/disposition/DENNY,%20Andre%20-%20Disposition%20-%20December%202020.pdf> [perma.cc/8L75-GFWA].

65 *Denny* (NSSC), *supra* note 62 at para 13.

A *Gladue* report was produced at Mr. Denny's sentencing hearing. It stated, among other things, that (a) Mr. Denny was exposed to "episodes of domestic violence and substance abuse" at the age of four; (b) showed interest in "[A]boriginal ways and culture, including, 'the traditional medicines'" that he was taught about as an adolescent; (c) has been living with "schizophrenia since he was approximately in his mid teens;" and (d) continues to abuse substances – a behaviour which he began in early adolescence.[66]

Despite this history and Mr. Denny's personal circumstances, this was the only time his Indigeneity was explicitly referenced in published materials. None of the seven dispositions published by the Nova Scotia Review Board mention that Mr. Denny is Indigenous, nor do any contain conditions that might benefit an Indigenous person found NCRMD, such as culturally appropriate treatment. This is in spite of the fact that prior to committing manslaughter, Mr. Denny had tried to enter "the Mi'kmaw Native Friendship Centre" in Halifax but was unable to do so because it was closed.[67]

Even the Nova Scotia Court of Appeal, when reviewing a Crown appeal from a 2018 Review Board disposition, failed to acknowledge that Mr. Denny was Indigenous. The Crown had appealed a decision to increase Mr. Denny's privileges within the East Coast Forensic Hospital. The Nova Scotia Court of Appeal dismissed the appeal and stated that, "[a]bsent any error in law, I am unable to conclude the decision was unreasonable."[68] The review board in 2018 had considered medical evidence "which spoke to Mr. Denny's ongoing progress with treatment compliance and abstinence,... his efforts toward reintegration," his level of insight into his medical history, and his personal opinions about being permitted greater circulation in the community.[69] However, Mr. Denny's Indigeneity was seemingly not considered during the disposition hearing, including his prior interest in traditional medicines. Nevertheless, the Nova Scotia Court of Appeal found there was no error of law and dismissed the appeal.

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66 *Ibid* at paras 74, 77, 86.

67 *Ibid* at para 13.

68 *Denny* (NSCA), *supra* note 53at para 29.

69 *Ibid* at para 23.

The disregard for *Gladue* principles in British Columbia and Nova Scotia disposition hearings directly contradicts the approach outlined in *Sim*. As Justice Sharpe stated for the Court:

> Without actual evidence directing the mind of the decision-maker to the [A]boriginal circumstances of the accused, there is a serious risk that the decision-maker will simply assume that the needs of the [A]boriginal accused are the same as those of the non-[A]boriginal accused. This, it seems to me, is the very sort of systemic discrimination that *Gladue* seeks to eliminate.[70]

Unfortunately, the Ontario Review Board also fails to consistently apply *Gladue* principles following the decision in *Sim*. On the one hand, there are numerous examples of *Gladue* principles being considered, *Gladue* reports being ordered, or more fulsome *Gladue* reports being requested by the Ontario Review Board. In *L(E), Re*, for example, an Indigenous male was "found not criminally responsible on one count of second degree murder."[71] This individual was diagnosed with "Schizophrenia; Substance Abuse (Cannabis and Alcohol); Antisocial Personality Disorder; [and] Alcohol Related Neurodevelopmental Disorder" and had a mild intellectual disability.[72] No *Gladue* report was prepared,[73] but the Ontario Review Board did emphasize the individual's background when deciding whether he could be transferred to a less secure facility.

Specifically, the Review Board noted the following: the accused (a) "was raised in Grassy Narrows First Nation," (b) "suffered *in utero* exposure to alcohol," (c) had his mother pass "away when he was five years old due to... alcohol," (d) was "physically and emotionally abused" by his grandparents, (e) "was involved with the Anishinaabe Abinogii Family Services" between the ages of six to eleven, (f) became involved with "gang-related activities on [his First Nation] Reserve," and (g) was "heavily abusing substances, including alcohol, by age 14."[74] The Review Board also recognized the importance of maintaining L(E)'s weekly meetings with an Aboriginal Healer, who was able to "provide some one-on-one substance abuse counselling."[75] These personal circumstances are exactly what would be outlined in a *Gladue* report, and by factoring them into their reasons, the

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70 *Sim*, *supra* note 54 at para 24.

71 *L(E), Re*, 2017 CarswellOnt 14082 at para 1.

72 *Ibid* at para 27.

73 *Ibid* at para 80.

74 *Ibid* at paras 12, 13, 16.

75 *Ibid* at para 100.

Ontario Review Board met its legal duty to consider all available evidence that is pertinent and relevant to the disposition it had to make.[76]

In *Oakes, Re* and *Kokokopenance, Re*, the Ontario Review Board also fulfilled its legal duty by requesting an initial *Gladue* report in the former case and a more extensive *Gladue* report in the latter. In *Oakes*, the Review Board was considering a variation to Mr. Oakes' disposition order that would allow for greater community access. Mr. Oakes "was found unfit to stand trial on account of mental disorder on charges of mischief" under $5000, breaking and entering, and four counts of breaching a release order.[77] He is Indigenous and a member of the Akwesasne Mohawk Nation.[78] There was no *Gladue* report. A doctor who testified "acknowledged that Mr. Oakes' connection with his Mohawk heritage is important and that arrangements should and could be made for him to participate more."[79] However, without the benefit of a *Gladue* report, it was difficult for the Review Board to determine exactly how more community access could increase Mr. Oakes' connection to his Indigenous heritage. The Review Board decided to "order a *Gladue* Report, as this could be helpful, if not fundamental, to the direction that Mr. Oakes' life takes with regard to his Indigenous heritage."[80]

Similarly, in *Kokokopenance*, the Review Board requested "a more fulsome *Gladue* Report" as part of their duty to seek out pertinent and relevant information.[81] After considering the evidence available at the time of the disposition hearing, the Review Board concluded that:

> [F]urther information both with respect to Mr. Kokokopenance's [A]boriginal background and the resources which may be available to assist him in his home community as well as the Southern Ontario Community pending his transfer to the Northwest would be of great assistance to the treatment team both in treating him and in finding a residence which could meet his needs.[82]

Although these decisions show *Gladue* being applied to the "reintegration" and "other needs of the accused" factors in s. 672.54, there have been instances where the Ontario Review Board either failed to

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76 *Sim*, *supra* note 54 at para 29.
77 *Oakes, Re*, 2020 CarswellOnt 16371 (ON) at para 1.
78 *Ibid* at para 14.
79 *Ibid* at para 27.
80 *Ibid* at para 44.
81 *Kokokopenance, Re, 2018 CarswellOnt 1731* at para 38.
82 *Ibid* at para 38.

consider *Gladue* principles or outright declined to consider them, contrary to *Sim*. In *Ootoova, Re*, for example, the Ontario Review Board refused to do a *Gladue* analysis because, in those circumstances, their decision would be the same with or without the analysis.[83] This is an error of law. To reiterate, the Ontario Court of Appeal held in *Sim* that a review board has a legal duty to obtain information that would be pertinent and relevant to its decision. By refusing to conduct a *Gladue* analysis, the Ontario Review Board neglected this duty.

At one point in their reasons, the Review Board stated that a *Gladue* analysis would provide "an additional lens and… might support transfer."[84] The fact that such an analysis "might" support the very disposition the Review Board granted means it was relevant. Evidence that is relevant "must simply tend to 'increase or diminish the probability of the existence of a fact in issue.'"[85] As Justice Paciocco (as he then was), Palma Paciocco, and Lee Stuesser explain in *The Law of Evidence*,

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence.[86]

In *Ootoova*, the issue before the Review Board was whether it was in the best interests of Mr. Ootoova, and the public, to transfer him from the Secure Forensic Unit of Providence Care Hospital in Kingston, Ontario, to the Royal Ottawa Mental Health Centre. Mr. Ootoova opposed the transfer.[87] Mr. Ootoova is an Inuit man who was "found unfit to stand trial on a charge of murder" in 2019.[88] The alleged murder occurred in Ottawa, where Mr. Ootoova had been living since 2011. The deceased was his mother. The Review Board reasoned that, in relation to Mr. Ootoova's Inuit ancestry, their decision to transfer Mr. Ootoova to Ottawa was the most culturally appropriate disposition. This was because "[t]here are more cultural services in Ottawa and more citizens of Inuit heritage living there."[89]

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83 *Ootoova, Re*, 2021 CarswellOnt 3867 (ON) at para 60 [*Ootoova*].

84 *Ibid*.

85 *R v Arp*, [1998] 3 SCR 339 at 38, 166 DLR (4th) 296.

86 David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law Inc, 2020) at 35.

87 *Ootoova*, *supra* note 83 at para 57.

88 *Ibid* at para 1.

89 *Ibid* at para 58.

At first glance, it might appear as if the Review Board's decision to refuse a *Gladue* analysis was appropriate because his needs as an Inuit person would be best met in Ottawa. This is incorrect. The Ontario Review Board simply assumed that Mr. Ootoova's individual needs would be better met in Ottawa without actually analyzing whether there were personal circumstances related to his Indigeneity that might oppose the transfer. Mr. Ootoova himself preferred to stay in Kingston, and this "blanket-assumption" reasoning used by the Ontario Review Board is the exact type of injustice the Ontario Court of Appeal cautioned against in *Sim*:

> Failure to advert to the unique circumstances of [A]boriginal offenders when making decisions relating to their reintegration into the community falls squarely within the category of systemic problems identified in *Gladue* as contributing to the failure of the criminal justice system to respond to the particular circumstances and needs of [A]boriginal peoples.[90]

Therefore, it was an error for the Ontario Review Board to simply assume that a transfer was in Mr. Ootoova's best interests without considering his unique circumstances, as outlined during a *Gladue* analysis. Even if a *Gladue* analysis would have supported a transfer to Ottawa, the Review Board was still under a legal duty to consider *Gladue* factors since they were relevant to the decision.

This section has shown that *Gladue* principles are inconsistently applied during NCRMD and fitness disposition hearings. In British Columbia and Nova Scotia, *Gladue* is rarely considered, and review boards are not bound by *stare decisis* to consider *Gladue* when making dispositions. Alternatively, the Ontario Review Board must consider *Gladue* principles when pertinent and relevant to their decision. The application of those principles is limited, and even though consideration of *Gladue* is a requirement in Ontario, it is still misapplied or neglected entirely. The easiest way to address this problem is to outline why a full *Gladue* analysis might be beneficial during NCRMD and fitness disposition hearings that involve an Indigenous accused.

V. Expanding the Use of *Gladue* in NCRMD and Fitness Disposition Hearings

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90 *Sim*, *supra* note 54 at para 23.

As stated above, the Ontario Court of Appeal in *Sim* limited the application of *Gladue* principles during NCRMD and fitness disposition hearings. The Court held that *Gladue* need only be considered when an individual's reintegration into society and other needs are at issue. According to the Court, *Gladue* has no role when evaluating the mental condition of an accused or the risk they pose to the public. The Court stated that "[a]n individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her [A]boriginal status."[91] This final section outlines different ways *Gladue* can be relevant to risk assessments and the mental condition of an accused.

A. The Relationship Between *Gladue* and "Significant Threat to Public Safety"

1. Bail Hearings and s. 515(10)(b) of the Criminal Code

An NCRMD or unfit accused will be a significant threat to the public if they pose "a [foreseeable] risk of serious physical or psychological harm to members of the public… resulting from conduct that is criminal in nature but not necessarily violent."[92] As stated above, the risk cannot be "merely trivial or annoying."[93] Instead, "the threat must be 'significant' and must relate to the commission of a 'serious criminal offence.'"[94] This concept of risk assessment is not unique to NCRMD and fitness disposition hearings – it can be seen, with slight modifications, in parole hearings, dangerous offender designations, sentencing principles, and bail hearings. Since *Gladue* principles apply to each of these components of the criminal justice system, it is necessary to analyze what value *Gladue* has when assessing dangerousness in these different contexts. Since this topic can be an entire research article on its own, this subsection focuses solely on how *Gladue* is applied during bail and whether similar reasoning is transferable to NCRMD and fitness disposition hearings.

S. 515(10) of the *Criminal Code* outlines the primary, secondary, and tertiary grounds that justify pre-trial detention of an accused. The concept of dangerousness is contained in s. 515(10)(b), often referred to as the

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91 *Ibid* at para 18.

92 *Criminal Code*, *supra* note 13, s 672.5401; *Winko*, *supra* note 37 at para 62.

93 *Winko*, *supra* note 37 at para 62.

94 Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Toronto: Thomson Reuters Canada, 2019) at 9-12.

"secondary grounds." This section allows an accused to be detained in custody if:

> [T]he detention is necessary for the protection or safety of the public… having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.[95]

Although "[t]he Supreme Court of Canada has yet to provide any guidance on how the *Gladue* principles ought to impact bail decisions,"[96] the Ontario Court of Appeal provided an explanation of the relevance of *Gladue* during bail in *R v Robinson*. The Court stated that the application of *Gladue* principles during bail hearings:

> [W]ould involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular [A]boriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary, and tertiary grounds for release.[97]

By limiting *Gladue*'s relevance to the types of conditions necessary to alleviate public safety risks under s. 515(10)(b), it is not immediately evident how the application of *Gladue* during bail might be relevant to assessing dangerousness during NCRMD and fitness dispositions. During bail hearings, the application of *Gladue* to public safety concerns is twofold: (a) what unique background and systemic factors brought that Indigenous person before the court and (b) due to these factors, what, if any, conditions are available that can alleviate public safety concerns. In other words, *Gladue* is applied during bail hearings both before and after conditions are considered. As outlined by Benjamin A. Ralston, this approach was used in *R v Magill*, *R v DD(P)*, and *R v Duncan*.[98] Alternatively, during an NCRMD disposition hearing, an individual's dangerousness is assessed before conditions are considered. This is because conditions will only be part of an NCRMD disposition under s. 672.54 when the individual poses a significant threat to the public. It is at this stage that the reasoning used during bail hearings might be transferable to disposition hearings – specifically, what background and systemic factors may have brought that Indigenous person before the court.

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95 *Criminal Code*, *supra* note 13, s 515(10)(b).

96 Ralston, *supra* note 14 at 300.

97 *R v Robinson*, 2009 ONCA 205 at para 9.

98 Ralston, *supra* note 14at pp 306–08.

A *Criminal Code* review "[b]oard is a court of competent jurisdiction."[99] An accused found NCRMD will only be in front of that review board if they are a significant threat to the public.[100] Background and systemic factors that contribute to the dangerousness of an Indigenous person found NCRMD can therefore be relevant, since it is the dangerousness itself that causes their continued appearance in front of the review board. For an unfit Indigenous accused, dangerousness is still a consideration when determining appropriate conditions.[101] However, since an absolute discharge is unavailable to unfit individuals, it is their lack of fitness to stand trial that causes continued hearings before a review board, not their dangerousness. The background and systemic factors that contribute to an Indigenous accused's unfitness would be relevant in this situation.

During bail hearings, the background and systemic factors considered under the secondary grounds are not always causally linked to an accused's risk of reoffending. Requiring such a causal link would be an error of law, as outlined in *Ipeelee*.[102] However, there are still situations in bail where a causal link is established between risk of reoffending and background and systemic factors. In *R v Duncan*, for example, a *Gladue* analysis showed that the Indigenous accused had "a history of personal and intergenerational addictions and poverty linked to broader systemic and background factors."[103] The accused had a long criminal record that included numerous convictions for breaking and entering.[104] The causal link between poverty and break and enters is self-explanatory. The Court in *Duncan* ultimately imposed strict release conditions on the accused, including participation in a residential treatment program, that were considered "a culturally responsive and appropriate application of the *Gladue* factors."[105] Since a causal link can be established between an accused's background and systemic factors and their risk of reoffending, as shown *Duncan*, it is reasonable to conclude that a similar causal link can be identified by a *Gladue* analysis during a review board's assessment of dangerousness. The

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99 *R v Conway*, 2010 SCC 22 at para 84.

100 This is true except in the case of an individual found NCRMD that was granted an absolute discharge at their initial disposition hearing.

101 *Demers*, *supra* note 40 at para 10.

102 *Ipeelee*, *supra* note 20 at para 84.

103 Ralston, *supra* note 14 at 307, citing *R v Duncan*, 2020 BCSC 590 [*Duncan*].

104 Ralston, *supra* note 14 at 307, citing *Duncan*, *supra* note 103 at para 32.

105 *Duncan*, *supra* note 103 at para 38, cited in Ralston, *supra* note 14 at 308.

question then becomes, however, whether this type of analysis has any value. There are at least four reasons why it might.

2. The Analytical Value of Applying Gladue Principles to Assessments of Dangerousness

First, the Ontario Court of Appeal was correct in *Sim* when they stated that "[a]n individual will not be more or less dangerous… because of his or her [A]boriginal status."[106] To conclude otherwise would be to invoke the same prejudicial thinking *Gladue* sought to erase. However, an individual may be less dangerous due to the location they live in because of their Indigenous status. In *Winko*, the Supreme Court of Canada outlined relevant factors a review board should consider when determining "whether the accused meets [the] threshold test of dangerousness."[107] These factors are non-exhaustive and include: "the nature of the harm that may be expected; the degree of risk that the particular behaviour will occur; the period of time over which the behaviour may be expected to manifest itself and the number of people who may be at risk."[108] Therefore, an Indigenous accused who ordinarily resides in a First Nation community may be considered less dangerous if the population is small and access to that community is difficult.

Additionally, the concept of risk in this *Winko* factor is not conclusively defined. This potential ambiguity leads to two observations. First, the number of people who may be at "risk" incorporates, at least implicitly, a geographic and proximity analysis into assessments of dangerousness. There will be more people at risk if an accused is absolutely discharged into downtown Toronto, for example, than there would be if they were absolutely discharged into a remote fly-in community such as Moose Factory, Ontario. While it must be acknowledged that the mobility rights of an accused absolutely discharged are not affected due to a lack of conditions, in the context of Indigenous offenders, the remoteness and personal ties an individual accused has to their community will be relevant when analyzing how many people they will be exposed to upon release. Some may have remained exclusively within their First Nations community

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106 *Sim*, *supra* note 54 at para 18.

107 Barrett & Shandler, *supra* note 94 at 9-13.

108 *Winko*, *supra* note 37 at para 141 [emphasis added], cited in Barrett & Shandler, *supra* note 94 at 9-13.

prior to a disposition hearing, while others may have few ways of leaving due to transportation limitations. Both possibilities could be discovered in a *Gladue* analysis. Second, it can be argued that the risk an individual poses varies based on who they are in proximity to. For example, an accused that exhibits violent behaviour during a period of psychosis may be more of a risk if surrounded by children than they would be if surrounded by police officers. Albeit a far-fetched example, there is some merit to this type of reasoning. Although a non-dangerous NCRMD accused would not be subject to conditions, the types of voluntary services, supports, and supervision available in their community could be relevant considerations. Access to an Elder and traditional medicines, for example, might assist with risk management if this type of relationship is of personal, cultural, and/or spiritual significance to the particular Indigenous accused. Similarly, if an Indigenous NCRMD accused has a close relationship with a trustworthy individual, this could mitigate the risk the accused poses to the public. Similar to the supervisory role of a surety in the bail context, if there is a responsible person who is regularly near the accused, such as a relative or roommate, the likelihood of the accused committing a serious criminal offence may be reduced. Of course, this individual would not be obligated to perform a supervisory role like a surety would be, but their potential to manage any risk the accused poses to the public is still relevant. Therefore, community characteristics, the relationship of the accused to their community, and the relationship of the accused to members of that community are all relevant factors when assessing the dangerousness of the accused. For an Indigenous accused, the only way to ensure these factors are considered in a culturally appropriate manner is through a *Gladue* analysis.

Second, the application of *Gladue* principles requires more than just a cursory analysis of why an Indigenous accused is before the courts and what types of sanctions or conditions are appropriate given the accused's Indigenous background. As stated by Professor Andrew Martin, it can also include "a recognition of the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions."[109] Applying this broader definition of *Gladue* principles during an assessment of

[109] Andrew Flavelle Martin, "Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law" (2020) 66:2 McGill LJ 337 at 346.

dangerousness may allow a review board to give effect to Parliament's "emphasis upon the goals of restorative justice" and reconciliation with Indigenous peoples.[110]

Restorative justice is a difficult concept to define. Central to the concept, however, is healing damaged relationships between an accused, victim, and community. The Supreme Court of Canada, for example, stated that:

> Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community.[111]

As this definition shows, restorative justice "involves the principles of repairing harm, healing, restoring relationships, accountability, community involvement, and community ownership."[112] There is at least one way Professor Martin's definition of *Gladue* principles can contribute to a restorative justice approach during a review board's assessment of dangerousness.

Restoring and healing relationships requires judicial recognition of the fact that an Indigenous accused may only pose a significant threat to the public because of the harms inflicted on them by colonization and assimilationist polices. By examining "the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions,"[113] a review board can consider the underlying causes of an Indigenous individual's dangerousness. A review board can then, depending on the individual circumstances, determine whether dangerousness was caused completely, or in part, by the actions of the Canadian government. Instead of simply labelling an Indigenous NCRMD or unfit accused as a significant threat to the public, a review board can also recognize this is not entirely the

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110 *R v Proulx*, 2000 SCC 5 at para 19 [*Proulx*].

111 *Ibid* at para 18.

112 J Wilton Littlechild, "Commission on First Nations and Métis Peoples and Justice Reform: 2003 Interim Report and 2004 Final Report" in WD McCaslin, ed, *Justice as Healing: Indigenous Ways* (Minnesota: Living Justice Press, 2005) at 328.

113 Martin, *supra* note 109 at 346.

accused's fault. This apportionment of accountability can (a) assist that Indigenous accused with their healing by providing them with a greater understanding of the causes for their actions; (b) restore the relationship between the accused, their community, and possibly the Canadian government by recognizing the past harms that contributed to their conduct; and (c) allow the accused to take accountability for their actions in a manner that is proportionate to their level of blameworthiness, if any. Thus, to give effect to Parliament's emphasis on restorative justice, a broad application of *Gladue* principles is required when assessing whether an Indigenous accused is a significant threat to the public.

Third, applying *Gladue* principles in this manner is consistent with the purpose of the review board system, Canada's international obligations under UNDRIP, and the duty to respond to systemic problems outlined by the TRC. As stated in *R v Demers*, "[t]he pith and substance of Part XX.1 [of the *Criminal Code*] is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately."[114] To treat a mentally ill Indigenous accused fairly and appropriately, a review board must recognize that, as per Article 24(2) of UNDRIP, "Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health."[115] For an Indigenous NCRMD or unfit accused, the highest attainable standard of mental heath may only be reached if the unique systemic and backgrounds factors that contribute to the accused's dangerousness are canvassed and understood by that individual. This can be achieved through a broad application of *Gladue* principles, as outlined above.

Similarly, the highest attainable standard of mental health would be a standard that accurately reflects the dangerousness of an Indigenous individual. Further detention in a hospital based solely on an inaccurate analysis of dangerousness may exacerbate mental health issues, particularly if the needs of that individual are better met in the community. Again, as outlined above, dangerousness may only be accurately assessed if a review board considers the number of people an accused poses a significant risk to. For an Indigenous NCRMD accused, this consideration requires the application of *Gladue* principles.

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114 *Demers*, *supra* note 40 at para 18, citing *Winko*, *supra* note 37 at para 20.

115 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess (2007) (UNDRIP), Article 24(2).

Finally, at Call to Action 19, the TRC "called upon the federal government to 'close the gap in health outcomes between Aboriginal and non-Aboriginal communities,' including mental health."[116] One argument advanced above outlined the potential healing benefit associated with identifying the root causes of dangerousness. By virtue of being a benefit, the potential healing provided by a robust *Gladue* analysis may help close the gap in health outcomes identified by the TRC. It is also possible to argue that, due to this potential benefit, a review board must apply *Gladue* principles during dangerousness assessments to satisfy Call to Action 19. Although this Call to Action specifically calls on the federal government, the Supreme Court of Canada has recognized that Parliament placed a greater emphasis on achieving the goals of restorative justice through the enactment of s. 718.2(e) of the *Criminal Code*.[117] In other words, the concept of healing, which is a goal of restorative justice, was given greater weight due to the legislative actions of the federal government. *Gladue* principles arose from an interpretation of s. 718.2(e) and can provide a potential healing benefit if applied to dangerousness assessments during NCRMD and fitness disposition hearings. Since this healing benefit can potentially close the gap in health outcomes between Aboriginal and non-Aboriginal communities, as outlined above, a review board must apply *Gladue* principles to dangerousness assessments if seeking to act in accordance with Call to Action 19. A review board in this situation would be giving effect to government conduct that established principles, through statutory interpretation, capable of providing a healing benefit. That healing benefit can address the gap in health outcomes between Aboriginal and non-Aboriginal communities and can only arise in this specific situation if a review board applies *Gladue* principles during dangerousness assessments. Therefore, *Gladue* principles must be applied to dangerousness assessments during NCRMD and fitness disposition hearings.

Although this argument is difficult to make and certainly subject to challenge, it further emphasizes the main point of this section – that there is a potential benefit to applying *Gladue* principles when determining whether an individual poses a significant threat to the public. This section focused on how *Gladue* could be incorporated into a legal analysis of dangerousness, and how that information may be "pertinent and relevant

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116 Graham et al, *supra* note 10 at 3.

117 *Proulx*, *supra* note 110 at para 19.

to the disposition" a review board "is asked to make."[118] The next section focuses on how *Gladue* can be used to analyze a medical assessment of dangerousness.

B. *Gladue* and Forensic Psychiatry: Indigeneity Considerations During Medical Evaluations of Dangerousness

During a disposition hearing under s. 672.54, there is no presumption of dangerousness and no burden on an NCRMD or unfit accused to prove they are not a significant threat to the public.[119] That "legal and evidentiary burden" rests solely on the court or review board making the disposition.[120] To meet this burden, a review board exercises inquisitorial powers.[121] The review board will consider a number of factors when exercising these powers. In addition to the four non-exhaustive factors from *Winko* outlined in Part V(a)(ii), other relevant evidence may include "the recommendations of experts who have examined the NCR accused,"[122] and "the accused's actuarial test results."[123] Relevant actuarial tests include the Hare Psychopathy Checklist-Revised ("PCL-R"), the Violence Risk Appraisal Guide ("VRAG"), and the Sex Offender Risk Appraisal Guide ("SORAG").[124] A *Gladue* analysis may help uncover different ways this evidence can cause a review board to incorrectly conclude that an Indigenous offender is a significant threat to the public.

1. Expert Recommendations

The Supreme Court of Canada has recognized that "the assessment of whether… [an accused's] mental condition renders him a significant threat to the safety of the public calls for significant expertise."[125] In fact:

> To make these difficult assessments of mental disorders and attendant safety risks, the [Review] Board is provided with expert membership and broad inquisitorial powers. While the chairperson is to be a federally appointed judge, or someone qualified for such an appointment, at least one of the minimum of five members

118 *Sim*, *supra* note 54 at para 29.
119 *Winko*, *supra* note 37 at para 46.
120 *Ibid* at para 54.
121 *R v Owen*, 2003 SCC 33 at para 29 [*Owen*].
122 Barrett & Shandler, *supra* note 94 at 9-16, citing *Winko*, *supra* note 37 at para 61.
123 Barrett & Shandler, *supra* note 94 at 9-18.
124 *Ibid*.
125 *Owen*, *supra* note 132 at para 30.

> must be a qualified psychiatrist. If only one member is so qualified, at least one other member must "have training and experience in the field of mental health," and be entitled to practise [*sic*] medicine or psychology.[126]

Since "[t]he recommendations of experts who have examined the accused are generally accorded significant weight when assessing the accused's dangerousness,"[127] expert recommendations can detrimentally affect an Indigenous accused if their examination of dangerousness is not conducted in a culturally appropriate way. An accused's mental disorder, available treatment options, and the effectiveness of those treatment options are all factors a review board may consider when assessing dangerousness.[128] They also, by necessity, require input from an expert to be properly evaluated. Therefore, the diagnostic tools used by experts to diagnose mental disorders should be analyzed through a *Gladue* lens to ensure they do not discriminate against an Indigenous accused.

The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* ("*DSM-V*") is the diagnostic tool used by psychiatrists to diagnose mental disorders. As stated by Dr. Roberto Lewis-Fernandez and colleagues, "[c]ulture affects the clinical encounter for every patient, not only underserved minority groups, and cultural formulation therefore is an essential component of any comprehensive assessment."[129] The *DSM-V* recognizes the impact of culture on the diagnostic process through implementation of the Cultural Formulation Interview ("CFI"). The CFI "consists of a core 16-item questionnaire supplemented by 12 modules for further assessment as well as an informant version to obtain material from care-givers."[130] Generally speaking, the CFI allows a health practitioner to obtain "clinical information in four domains: (1) cultural identity of the individual, (2) cultural explanations of illness, (3) cultural interpretation of psychosocial stressors, supports, and levels of functioning, and (4) cultural elements of the patient-clinician relationship."[131] This information helps inform a clinician's diagnosis of a mental disorder, if any.

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126 *Ibid* at para 29.

127 Barrett & Shandler, *supra* note 94 at 9-16, n 48.

128 *Ibid* at 9-16 to 9-18.

129 Roberto Lewis-Fernandez et al, "Culture and Psychiatric Evaluation: Operationalizing Cultural Formulation for *DSM-5*" (2014) 77:2 Psychiatry 130 at 131.

130 *Ibid* at 131.

131 *Ibid* at 133. These domains originated from the "Outline for Cultural Formulation" (OCF), which was the predecessor to the CFI.

This individualized assessment of the relationship between culture and mental disorder diagnoses is similar to information that could be revealed by a *Gladue* analysis. Albeit similar, there is one important difference: within the context of diagnosing a mental disorder, the cultural factors deemed relevant, and the methods used to evaluate those factors, were created from a medical perspective, not legal. Alternatively, a *Gladue* analysis is strictly legal. Since the mental condition of an accused is relevant when assessing dangerousness, the diagnosis of a mental disorder can have legal implications. The *DSM-V* may specify certain treatments for a particular mental disorder, for example, and thereby affect the "treatment-compliance" consideration in a dangerousness assessment.

One way that *Gladue* could supplement this assessment is by providing a different perspective to view cultural factors that are assessed during a mental disorder diagnosis. This additional perspective is especially important since the *DSM-V* recognizes "difficulties in judging illness severity or impairment" as one of "five main situations when assessment of cultural factors may be especially relevant for patient care."[132] Specifically, *Gladue* can be used to compare and contrast evidence obtained through the CFI to the evidence outlined in a *Gladue* Report. If there are discrepancies between the two, a review board can then assess whether any information missing affected the diagnosis of an Indigenous accused. If it did, the review board can then consider whether this improper or tainted diagnosis has any bearing on the risk the accused poses to the public. This way, a review board can be satisfied that the dangerousness of an accused is completely analyzed, both from a medical and legal perspective.

2. Actuarial Test Results

Unlike the *DSM-V*, actuarial tests such as the PCL-R, VRAG, and SORAG do not contain cultural considerations. The PCL-R, for example, "is a 20-item symptom rating scale of psychopathic personality disorder intended for use in forensic settings."[133] It focuses solely on symptoms – such as "pathological lying," "poor behavioural controls," and "impulsivity"[134] – and provides a rating based on the frequency of those

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132 *Ibid* at 145.

133 David J Cooke et al, "Searching for the Pan-Cultural Core of Psychopathic Personality Disorder" (2005) 39 Personality and Individual Differences 283 at 284.

134 *Ibid* at 289.

symptoms throughout an individual's life.[135] When researchers conducted a cross-cultural analysis of PCL-R test results across North America and Europe, they concluded that "[o]verall, the findings indicated the presence of a significant culture bias in PCL-R ratings."[136] This culture bias resulted in certain symptoms being "more useful [at assessing psychopathic personality disorder] in North America as compared with Europe."[137]

Similarly, the VRAG attributes a score to certain events in a person's life, such as prolonged separation from biological parents and a "history of alcohol or drug problems."[138] These scores are then used to assess an individual's "risk of criminal violence after release [in]to the community."[139] The SORAG operates in a similar way and assesses an individual's risk of committing sexual offences. However, neither of these actuarial tests consider the cultural context surrounding past life events. For example, the VRAG does not consider the effects of community and familial fragmentation caused by the Residential School System, the Sixties Scoop, or provincial child welfare systems when assessing an Indigenous person's separation from their biological parents. Since these test results may be considered by a review board during an assessment of dangerousness, there is a possibility that, due to the lack of cultural considerations, the threat posed by an Indigenous accused will be overestimated. Different courts across Canada have already recognized this risk associated with actuarial test results.

In *Ewert v Canada*, for example, the Supreme Court of Canada commented on the use and validity of actuarial tests when assessing the risk posed by Indigenous offenders in the correctional system. In that case, "the [Correctional Service of Canada's ("CSC")] reliance on certain psychological and actuarial risk assessment tools" was challenged by Mr. Ewert, a Métis offender, "on the ground that the validity of the tools when applied to Indigenous offenders has not been established through empirical

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135 *Ibid* at 284.

136 *Ibid* at 283.

137 *Ibid* at 292.

138 Melanie Dougherty, "VRAG-R Scoring Sheet" (n.d.) at pp 1-2, online (pdf): *VRAG-R Official Website* <www.vrag-r.org/wp-content/uploads/2016/12/VRAG-R-scoring-sheet-1.pdf> [perma.cc/4DA2-BMPZ].

139 Marnie E Rice, Grant T Harris & Carol Lang, "Validation of and Revision to the VRAG and SORAG: The Violence Risk Appraisal Guide – Revised (VRAG-R)" (2013) 25:3 Psychological Assessment 951 at 951.

research."[140] Three of the actuarial risk assessment tools Mr. Ewert challenged were the PCL-R, the VRAG, and the SORAG.[141] Benjamin A. Ralston provides a clear summary of the Court's decision:

> The Court held that the risk that these actuarial tools may overestimate the risk posed by Indigenous people[s] could unjustifiably contribute to disparities in correctional outcomes in a variety of areas where Indigenous peoples are already disadvantaged, potentially leading to harsher prison conditions, higher security classifications, unnecessary denial of parole, reduced access to rehabilitative opportunities, and reduced access to Indigenous-specific programming. As a result, any overestimation of the risk posed by Indigenous people would not only undermine the promotion of substantive equality if correctional outcomes for Indigenous inmates, it would also frustrate the CSC's statutory purposes of providing humane custody, and assisting in rehabilitation of offenders and their reintegration in the community as well.[142]

Although the decision in *Ewert* was reached in the context of correctional services, the Court still recognized that the actuarial tests relied on in NCRMD and fitness disposition hearings may overestimate the risk posed by Indigenous peoples. This overestimation of risk can, like it does in the correctional setting, frustrate Parliament's emphasis on rehabilitation and reintegration in s. 672.54 of the *Criminal Code*. Application of *Gladue* principles may help counteract this overestimation of risk. For example, in *R v George*, the "British Columbia Court of Appeal stated that, "seemingly neutral considerations in the assessment of an individual's risk and dangerousness could disproportionately impact some Indigenous individuals due to systemic and background factors."[143] These systemic and background factors could include the fact that Indigenous peoples are disproportionately overrepresented in the child welfare system and therefore more likely to be separated from their biological parents.[144] It could also include the fact that trauma caused by the Residential School System "continue[s] to have long-term and intergenerational effects on health… including higher rates of depression, mental distress, [and]

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140 *Ewert v Canada*, 2018 SCC 30 at para 4 [*Ewert*].

141 *Ibid* at para 11.

142 Ralston, *supra* note 14 at 146 [emphasis in original], citing *Ewert*, *supra* note 140 at para 65.

143 Ralston, *supra* note 14 at 330, citing *R v George*, [1998] BCJ No 1505, 1998 CanLII 5691 (CA) at para 18.

144 Nico Trocmé, Della Knoke & Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78:4 Soc Service Rev 577 at 577-578.

substance misuse."[145] The actuarial tests listed above do not recognize that these systemic and background factors can contribute to higher test scores and thus an overestimation of risk. This creates a possibility of "systemic discrimination" that courts and review boards "need to be alive to."[146] A *Gladue* analysis can outline how systemic and background factors affected a particular Indigenous accused, and therefore challenge the validity of actuarial test results relied on to assess dangerousness during disposition hearings.[147]

There are undoubtedly other ways *Gladue* can apply to assessments of dangerousness. The reasoning above may also be transferable to a review board's consideration of the mental condition of the accused under s. 672.54. However, the purpose of this section was not to canvass every possible application of *Gladue* principles. Rather, the purpose of this section was to show that *Gladue* principles can be relevant to assessments of dangerousness in a manner not considered by the Ontario Court of Appeal in *Sim*. It is an important analysis a review board should consider when dealing with an Indigenous accused.

V. CONCLUSION

As the Honourable Mary Ellen Turpel-Lafond (as she then was) once said:

> The reasoning in the *Gladue* decision is not of the sort that is narrowly confined to one specific component of the administration of justice, or criminal procedure. It is broad and of vast significance. Presumably, it will be introduced in a variety of contexts in the future with interesting results.[148]

This paper has outlined one of those new contexts – NCRMD and fitness disposition hearings under s. 672.54 of the *Criminal Code*. As the

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145 Graham et al, *supra* note 10 at 2.

146 Ralston, *supra* note 14at 330.

147 For a recent discussion about using actuarial tests to assess the risk posed by an Indigenous accused, see *R v Natomagan*, 2022 ABCA 48: "[a]fter examining the evidence on actuarial assessment methodology in some depth, we conclude it is prone to overestimating the risk posed by Indigenous offenders by failing to consider or to account for past discrimination, thereby potentially contributing to custodial over-representation" at para 13.

148 (Hon) ME Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (2000) 43 CLQ 34 at 40.

Ontario Court of Appeal held in *Sim*, *Gladue* applies to disposition hearings under s. 672.54 when the accused's eventual reintegration into society and other needs are live issues. Although a *Gladue* report might not be required in every case, a review board has an obligation to obtain such information when it would be pertinent and relevant to the disposition it must make. This could include information such as the spiritual significance a community healing circle might have for an individual, or the way an Elder might assist a particular accused with their treatment.

As shown by decisions such as *Ootoova* and *Denny*, courts and review boards still fail to correctly apply *Gladue* principles during disposition hearings. This needs to change. *Gladue* marked a revolutionary shift in the way the criminal justice system treats Indigenous peoples, and, as the Supreme Court of Canada stressed in *Ipeelee*, *Gladue* principles apply to every case involving an Indigenous person. Although situations may arise where a *Gladue* analysis is truly unnecessary, there are still numerous ways *Gladue* can apply during a disposition hearing. Whether it provides greater insight into the number of people at risk from an accused or ensures that all relevant cultural factors are considered when assessing dangerousness, a *Gladue* analysis can be a valuable resource at all stages of a disposition hearing. It is time the review board system recognizes this.

Part A
Setting the Stage: Recognizing the Importance of the Open Court Principle and Access to Justice in Manitoba During the COVID-19 Pandemic

SHAWN SINGH & BRANDON TRASK*

ABSTRACT

The authors have embarked on an extensive analysis of the open court principle, access to justice concerns, and how these have been impacted by the Manitoba courts' pandemic response measures. Due to the length of this analysis, it is divided into two parts, to be published as separate articles in the same Issue: Part A ("Setting the Stage") and Part B ("Drawing the Curtains in the House of Justice"). Importantly, these papers are to be read in conjunction. Part A provides a vital and extensive background, outlining the modern history of the open court principle and the importance of ensuring access to justice.

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I. INTRODUCTION

The "open court principle" is a fundamental tenet of constitutional significance recognized in every nation that adheres to the rule of law, including Canada.[1] Although the historical roots of this principle run deep in common law,[2] its tenets have recently been assumed into a broader movement that focuses on improving access to quality justice services. Reformers call for an institutional shift towards easing access to the legal system for individuals by removing barriers to participation, such as reducing upfront associated costs or aligning processes and outcomes with user needs.[3] To these ends, stakeholders like the Canadian Bar Association (CBA) published several reports that argue for a fully accessible justice system, which can be achieved by addressing several contemporary access-to-justice issues in Canada. These reports offer several recommendations that can restructure service delivery in ways that save money through collaboration between institutions and local communities, which can be reinvested to further broaden access to justice.[4] Their conceptual framework

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1 AG *(Nova Scotia) v MacIntyre* [1982] 1 SCR 175, 132 DLR (3d) 385; *Canadian Broadcasting Corporation v New Brunswick (Attorney General)* [1996] 3 SCR 480 at para 23, 139 DLR (4th) 385; see J J Spigelman, "Seen to be Done: The Principle of Open Justice – Part I" (2000) 74:5 Austl LJ 290 at 293; Claire Baylis, "Justice Done and Justice Seen to be Done – The Public Administration of Justice" (1991) 21:2 Victoria U Wellington L Rev 177.

2 *Scott v Scott* [1913] UKHL 2, [1913] AC 417; *R v Sussex Justices; Ex parte McCarthy* [1923] EWHC KB 1, [1924] 1 KB 256 at 259.

3 Martin Partington, "The Relationship between Law Reform and Access to Justice: A Case Study – The Renting Homes Project" (2005) 23 Windsor YB Access Just 375.

4 Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act - Equal Justice: Balancing the Scales" (Ottawa: Canadian Bar Association, August 2013) [Canadian Bar Association, Reaching Equal Justice][CBA Report] at 60, online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf> [perma.cc/5SDD-QTWF] [CBA, "Reaching Equal Justice"]; The Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October

highlights the pitfalls that prevent many from meeting their legal needs through the justice system, such as the inaccessibility of services from local providers, and also articulates several pathways of systemic reform that can create a more participatory justice system that is inclusive and people-focused.[5] In essence, the CBA's proposed access-to-justice initiatives potentially broaden entry points to the variety of available justice services and reduce the upfront costs associated with achieving desired justice outcomes, while also maintaining accountability structures for system executives.

The conclusions of the CBA's reports have been used by decision-makers in the justice system to create outcome targets for pandemic response measures, both in the courts and under the law generally. For example, concerns regarding access to justice are playing a key role in the federal government's Action Committee on Court Operations in Response to COVID-19's proposed justice system reforms, which are operate in provincial jurisdictions through judicial Practice Directions and Notices that are published by the courts, as well as necessary changes to statutory frameworks that are ratified by local legislators.[6]

Discussions about access to justice have become central to the digitalization of legal practice in response to the pandemic, but their place among the priorities involved in such reform measures remain vague in the outcomes that are being worked towards in the rapid institutionalization of technology in the justice system.

2013), online (pdf): <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [https://perma.cc/84N5-BKTC]; Canadian Bar Association, "No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19" (Ottawa: Canadian Bar Association, February 2021), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> [perma.cc/EYN5-QFPA]; Canadian Bar Association, "A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services" (Ottawa: Canadian Bar Association, August 2016), online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/A-National-Framework-for-Meeting-Legal-Needs_Proposed-National-Benchmarks.pdf?lang=en-CA> [perma.cc/2X2H-9DWG].

5 CBA, Reaching Equal Justice," *supra* note 4 at 34-50, 60.

6 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Terms of Reference for the Action Committee - Mandate" (26 August 2021), online: *Action Committee on COVID-19* <www.fja.gc.ca/COVID-19/reference-eng.html> [perma.cc/KE9F-NPL2].

Considering the principled approach that reformers have taken in the tenets of access to justice, this paper examines the reformation agenda's conceptual framework to identify the latent interests that are operating as the justice system embraces the digital future. Authors like the Right Honourable Beverley McLachlin will help us connect the concepts of access to justice with the realities of digitalization to illustrate the inherent conflict between broader public access to judicial proceedings and the privacy interests of relevant parties. To adequately examine this conflict, we contrast Chief Justice McLachlin's views with Judith Resnick's framing of the open court principle, which shifts focus to the access to justice movement's foundational concept of "publicity" to argue that modern access to justice discourse is expanding access to services while simultaneously diminishing measures that hold decision-makers accountable in the process. With these competing frameworks in mind, we examine the proposals being offered by the Federal Action Committee on Court Operations in Response to COVID-19, as well as their operation in Manitoba's courts, to identify whether reforms to the justice system include changes that reduce judicial accountability as part of the broader access to justice agenda.

Measures that hold decision-makers accountable in the justice system are arguably most important for individuals who are accused of the most serious crimes. Considering this, in Part B, we examine the consequences of pandemic reforms in the context of murder charges to demonstrate their effect on judicial accountability and publicity more generally. As an offence that falls within sections 417 and 469 of the *Criminal Code*, those who are charged with murder must have the choice to be heard by a court composed of a judge and a jury of community peers.[7] Jury trials are an important accountability measure because many accused individuals facing serious charges such as murder are racially or economically (or otherwise) marginalized. Biases regarding the perceived "unsavoury" nature of marginalized accused can potentially lead decision-makers that are separated from the relevant community to enter findings of guilt in these contexts, which carry serious consequences. A trial by a jury can provide a deeper understanding of local dynamics, including an ability to see beyond what may appear as unsavoury characteristics that can militate against the innocence of the accused. In essence, jury trials offer a hallmark example of how Resnick's principle of "publicity" safeguards the marginalized from

7 *Canadian Criminal Code*, RSC 1985, c C-46, ss 417, 469.

potentially biased decision-making in court, which must be maintained while system reforms are established to broaden access to justice during the pandemic.

With these features of the justice system in mind, we will examine the effects of pandemic reform measures for marginalized individuals using the principle of publicity, with particular focus on the consequences for executive accountability. First, we will review perspectives regarding access to justice that are offered by Chief Justice McLachlin, as she then was, and Judith Resnick to frame our analysis of justice system reforms that are being put forward during the COVID-19 pandemic. These contrasting narratives will be applied to the measures being proposed for implementation in local courts by the Action Committee on Court Operations in Response to the Pandemic, which is led by the Commissioner for Federal Judicial Affairs. To illustrate their implementation at the regional level, in Part B ("Drawing the Curtains in the House of Justice"), we will then consider Practice Directions and Notices that were issued by Manitoba's courts in response to the pandemic, with particular focus to in-custody hearings that must proceed by way of trial by jury.

In Part B, we will examine the effects of these Practice Directions and Notices on marginalized populations. Following our review of the immediate impacts of pandemic response measures for individuals charged with murder, we will examine several CBA reports regarding the consequences of justice system digitalization on remote, northern, and Indigenous communities to highlight the compounding effect these measures have in terms of their direct participation, as well as their ability to provide community perspectives in jury trials, like the hearings that must be afforded to those charged with s. 469 offences. Bringing these perspectives together, we proceed to analyze the consequences of the justice system reform agenda in the context of judicial accountability. Building from this examination, we will close our analysis in Part B with recommendations that can help resolve these shortfalls while also maintaining the justice system's traditional commitment to publicity, improving access for marginalized populations, and holding decision-makers accountable for the outcomes of the process.

To begin Part A, we turn now to discuss Chief Justice McLachlin's historical review of the open court principle and its role in the modern delivery of justice.

II. BALANCING THE OPEN COURT PRINCIPLE WITH COURT MODERNIZATION

In 2003, Chief Justice McLachlin wrote about the open court principle and its role towards maintaining public confidence in the administration of justice shortly after internet connectivity gained prevalence as a productivity tool.[8] In response to growing concerns about the threats that digitalization presented to the independence of the court, she sought to address the challenges that mass digital dissemination of court proceedings held in relation to the open court principle, as well as several other important considerations like an accused person's right to a fair trial by an impartial decision-maker. Writing at a time of national distress in the wake of terrorist attacks in the United States, she probed the historical construction of the open court principle to consider the unintentional, and, in her view, untenable, costs of its maintenance in the modern age of technology. In doing so, she attempted to provide guidance to judges regarding measures that could be taken to preserve the open court principle while also balancing other contextual interests, like the right to privacy.

She explained that, in the context of the open court principle, "openness" represents a *bona fide* expectation that members of the press and the public will have access to the courts to observe hearings, express concerns and, ultimately, hold decision-makers accountable. Court processes, documentation and records are available to the public by default, meaning that the reasons for a judgment of interest can be accessed for scrutiny by opposing parties, the media, the bar, legal scholars, or any other citizen who wishes to consider what took place during the judgment. Openness of the court means that members of the public and the media can engage in free discourse about judicial proceedings and publish accounts of court processes, unless such access is restricted by the presiding judge for meritorious reasons.

Chief Justice McLachlin summarized the tenets of the open court principle into three headings. Open court supports the transparency and accountability of the justice system by permitting access to, and

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8 Beverley McLachlin, "Courts, Transparency and Public Confidence - To the Better Administration of Justice" (2003) 8:1 Deakin L Rev 1.

dissemination of, accurate information about court proceedings.[9] By extension, regular reporting of court processes enhances the accountability of judges and other court staff by ensuring that concerns can be raised by accurately informed members of the public. Finally, and perhaps most importantly, open courts ensure that the community can *see* that justice is being adequately done and, when mistakes are identified in a particular judgment, members of the public can hold decision-makers accountable. In short, Chief Justice McLachlin characterized the values of open justice as the preservation of free speech, debate, dialogue, judicial accountability, and therapeutic justice. These values work together to assure public confidence in the justice system's delivery of fair, impartial and independent administration that works to preserve the rule of law. In reaching this conclusion, Chief Justice McLachlin notes that removing avenues of observation would reduce public confidence in the justice system to a credulity as opposed to exercises of reason. The rule of law requires an independent judiciary to safeguard the courts' authority; failure to hold decision-makers accountable undermines this objective from the start.

Although the values of open court are fundamental to upholding the rule of law and perceptions of fairness within the justice system, Chief Justice McLachlin explains that sustaining these expectations carries costs in an accused person's expectations of trial fairness, judicial impartiality, and protection of their security interests, such as information related to their identity. In her view, a modern interpretation of the open court principle recognizes that its values must be limited to meaningfully balance the competing interests of the accused and of the judiciary. While the tenets of the open court principle are valuable, Chief Justice McLachlin believes that contemporary digital realities extend the scope of absolute court openness, or "publicity," beyond the range that was described by its original scholars, like Jeremy Bentham.[10] Considering the novelties of access that can be achieved using digital technology, Chief Justice McLachlin recommends that justice system executives acknowledge that the principles of open court may conflict with other important values, which require the resolution of such conflicts on a contextual, case-by-case basis. To these

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9 *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12 [*Dagenais*]; Timothy Bottomer, "Dagenais 2.0: Technology and its Impact on the Dagenais Test" (2012) 45 UBC L Rev 1.

10 See Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice*, vol I (Edinburgh: Edinburgh Review, 1827) 541-542.

ends, she remarked that balancing competing values requires codification of the involved ideals in law, as well as more finite consideration of how these competing values play out in the particular contexts of various cases. In closing, she explained that adequately balancing these competing legal principles requires careful consideration of the precise benefits that would accrue, as well as the harms that could arise, to adequately prioritize some principles over others and achieve the greatest degree of harmony or equilibrium in the context of the case. The open court principle is not an end unto itself, but rather a means to promote the rule of law and the administration of justice. While openness preserves the integrity of the administration of justice, its paramount objectives also lie in its limits and exceptions.

In our view, Chief Justice McLachlin's evaluation of the open court principle appears to provide the necessary analysis for future judicial considerations related to the open court principle. Her analysis of the open court principle offers a compelling commentary regarding its merits, as well as the other important elements that judges must consider when seeking to balance its role among other competing interests when rendering judgment. Although her arguments are compelling, Chief Justice McLachlin's perspective is based in her experience as an executive member—with significant administrative responsibilities—of Canada's justice system. To adequately consider the place of the open court principle in Canadian justice, we now turn to consider the academic criticisms of this modern balancing act offered by Judith Resnick, who has argued that judicial processes are being progressively closed to shield executives from public scrutiny when making decisions in more unsavoury circumstances.

III. BALANCING ACCESS TO JUSTICE WITH COURT MODERNIZATION

As widespread digitalization continued after the 2001 terrorist attacks in the USA, scholars like Judith Resnik took a broader approach to considering the jurisprudential outcomes of contextually balancing court openness with other adjudicative interests.[11] Contrary to Chief Justice McLachlin's claims, Resnik maintained focus on the original construction

[11] Judith Resnik, "Bringing Back Bentham: Open Courts, Terror Trials and Public Sphere(s)" (2011) 4 L & Ethics Hum Rts 1 at 4 [Resnik]; see Trevor C W Farrow & Garry D Watson, "Courts and Procedures: The Changing Roles of the Participants" (2010) 49:2 SCLR 205 [Farrow & Watson].

of the open court principle, as articulated by Jeremy Bentham, in the context of terror trials to highlight a subtle reconfiguration of justice system processes which progressively reduce oversight and accountability measures for decision-makers. Resnik's analysis identifies a trend in Western justice system reforms towards a preference for private adjudication over the use of formal court functions, which can avoid normative expectations of public openness and dissemination through the media. Although Resnik shared concerns regarding the erosion of open court expectations, her primary objective was to question whether the shift towards more private adjudication is problematic for democratic debate and dispute, as well as the disciplinary functions that such discourses have towards judicial accountability. In other words, she considered the implications of recent reform measures in relation to Bentham's principle of "publicity," as opposed to modern constructions of the open court, like those offered by Chief Justice McLachlin.

Resnik's analysis included consideration of the open court principle and its historical roots in the USA, including the influence of theorists like Jeremy Bentham, as well as its codification into the constitutions of the first thirteen states.[12] As in Canadian courts, participants can expect that American trial judges will take every reasonable measure to accommodate public attendance, particularly for criminal trials. Resnik explained that public observation ensures that political and legal leaders can be held accountable for decisions that forward broader state agendas while minimizing the interests that best serve local communities. In her view, the expectations created by open courts face considerable challenges in the technological era. For instance, Resnik offers an example of measures taken during a trial challenge to California's prohibition regarding same-sex marriage.[13] When scheduling the hearing for this case, the presiding judge authorized the digital attendance of spectators from other federal districts but retained prohibitions for the general public. A majority of the US Supreme Court reversed the ruling overall because the judge failed to provide sufficient public notice regarding the opportunity to observe and comment using digital means. In their view, changing court policy to permit

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12 Resnik, *supra* note 11at 6-18; Del Const 1792, art I, § 9, reprinted in Benjamin Perley Poore, *The Federal And State Constitutions: Colonial Charters, And Other Organic Laws Of The United States* (Washington, DC: Government Printing Office, 1877) *278*; *Presley v Georgia*, 558 US 209 (2010).

13 *Hollingsworth v Perry*, 558 US 183 (2010); see Cal Const art I, §7.5.)

the hearing's broadcast via webcast video-stream required adequate posting and dissemination, which could prejudice the outcomes of the decision for all parties involved in the trial. On this basis, the majority reversed the lower court's decision, even though the judge sought to expand access to the hearing for members of the media and other actors in the justice system.[14] To Resnik, the majority's ruling highlighted the contrast between the interests of justice system executives and Bentham's original principle of publicity. Rather than maintain and expand traditional expectations of court openness by allowing the webcast to proceed, the majority concluded that fairness and privacy considerations should prevail when in conflict with judicial decisions to allow more people to witness justice being delivered in practice, particularly when the hearing's subject matter is notably contentious.

The original concept of "publicity" was first introduced by Jeremy Bentham, a scholar who believed that the structure of the justice system, like other institutions in society, should be designed to encourage a dependence of elite rulers on the confidence of public subjects. He recognized early on that the structure of the justice system could influence the means that individuals had at their disposal to make use of their system to meet their needs. With this in mind, he offered a suite of recommendations to improve access to justice, which maintaining focus on reducing the associated costs of participation through government subsidy; ensuring public participation as a method of judicial oversight; and using an integrated state-community approach to delivering justice that could leverage the combined benefits of formal justice processes with less formal conciliatory functions like alternative dispute resolution.[15] To Bentham, ensuring the "publicity" of court processes would allow members of the public to offer simplistic interpretation of the law and its jurisprudence, which would ultimately safeguard the security interests of participants against judicial mis-decisions and omissions. Additionally, such discourse can protect the public from latent justice system operations that serve to further state interests over those valued by local communities.

Resnick explained that preserving Bentham's concept of publicity serves three necessary functions of the justice system: the search for truth, public education regarding the system and its operations, and public oversight of

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14 *Hollingsworth v Perry*, *supra* note 13 at 711.

15 Resnik, *supra* note 11 at 6-18; see Farrow & Watson, *supra* note 11.

the decisions being made by judges and other internal decision-makers.[16] Bentham argued court openness supports the search for truth, in that wide dissemination of case information would ensure that falsehoods would be identified and called out by the published media and other public observers. In addition to allowing the masses to identify shortfalls in adjudicative outcomes, Bentham argued that sharing case details through the press would educate members of the public about the rule of law and their obligatory relationship with the state. At its furthest extension, publicity of court proceedings also serves to impose a level of authoritative oversight of the structural and operational decisions of system executives like judges, administrators, and Ministers. Well before the advent of digital communication technology, Bentham contemplated the ability of governmental Ministers to instantaneously communicate with members of the administrative and judicial branches of government to share, compile and collate records and statistical information, which also held potential to align the interests of fragmented institutional systems beyond their constitutional limits. In Bentham's view, strong avenues of publicity would allow local communities to hold system executives accountable for decisions that complicitly work against their interests in favour of a state agenda, whether those decisions were mistakes, collusion, corruption or worse.[17]

To illustrate Bentham's description of oversight by way of publicity, Resnik commented on Bentham's 1787 concept of the panopticon as a governmental framework for penal institutions. Bentham described a prison that was designed to subject inmates to continual observation and immediate behavioural correction, which served to internalize pro-social behaviour into the minds of inmates. The panopticon was later incorporated into Michel Foucault's theory of governmentality- a portmanteau of "government" and "rationality" - which applied its principles into a post-modern theory of governance that sought to create complicit state subjects by internalizing pro-social values into their minds by

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16 Resnik, *supra* note 11 "at 12-16; see Farrow & Watson, *supra* note 11; Philip Schofield, *Utility And Democracy: The Political Thought of Jeremy Bentham* (New York: Oxford University Press, 2006) at 261-263 (quoting Jeremy Bentham, *Political Tactics*, ed by Michael James & Catherine Pease Watkin (Oxford: Oxford University Press), 1999) at 44-45) [Schofield].

17 Schofield, *surpa* note 16 at 258 (quoting Bentham, *Political Tactics*); Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study Of The Constitutional Code* (Oxford: Oxford University Press, 1989).

generating knowledge, disseminating it into society, then holding individuals responsible for their compliance, or lack thereof. [18] While Foucault's theories fall outside the scope of this paper, he extended the utility of the panopticon to other societal institutions, such as the school, the factory, and other organizations where hierarchical power structures were applied to organize human behaviour. Bentham utilized the panopticon to exemplify the influence that fear of state power could wield over individuals to encourage pro-state behaviour, whether such influence was intended to cultivate the behaviour of citizens, the incarcerated, or state agents themselves. Considering the potentially dual purpose of institutional structures towards manufacturing behavioural compliance, Bentham argued that public systems should be constructed to place lawmakers before the public eye in several senses, such as building debate chambers to accommodate direct observation, ensuring that members of the press media and public can observe public proceedings, and authorizing mass disseminations of public records to ensure that government narratives are not the only accounts of institutional processes that concern the public.

Bentham placed the burden of ensuring that such avenues of accountability are available on government; legal decisions and their reasons should be disseminated through permanent and reliable means, and opportunities for members of the public to offer commentary should be facilitated by the state to safeguard the rule of law and the foundations of democratic government more generally. The primary method of achieving dissemination was through the press media, who could provide information to the public in a manner that remains independent from the perspective of government. Daily discourse regarding the executive functions of government could ensure that attention would be paid to unfolding events and recourse would be taken, by virtue of public dissent, if response measures began to depart from the range of acceptability in a free and democratic society. In Parliamentary jurisdictions like Canada and other Western countries, the right to a free press was paralleled by the right to a trial by a jury of peers. Although Bentham's arguments are important, Resnik noted that the utility of measures that facilitate fulsome publicity with adequate public participation, like universal postal delivery, relied on

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[18] Christopher Pollard, "Explainer: The ideas of Foucault" (26 August 2019), online: *The Conversation* <theconversation.com/explainer-the-ideas-of-foucault-99758> [perma.cc/M4XP-38TQ].

the literacy of the population, which required separate institutional support from government.

In similar sense to the arguments forwarded by Chief Justice McLachlin, Resnik highlighted that Bentham's criticisms were sensitive to the conflicting nature between the open court principle and other important values, like the right to privacy.[19] Conscious of these considerations, Bentham advocated for closures to the public in certain contexts and prescribed several circumstances where closure of trials was appropriate. In his view, participants in the justice system should be protected from public voyeurism, should only be required to disclose facts that are necessary without disclosing others that could be harmful.[20] In other words, Bentham shared Chief Justice McLachlin's claim that some circumstances would require the open court principle to give way to support the broader objectives of the administration of justice. Bentham also acknowledged that publicity did not typically benefit the individual involved in the case of concern. Rather, public opinion referred to the need of government to gain public confidence through institutional balancing of interests while attempting to maintain equilibrium. Departing from McLachlin's perspective, Resnick explained that Bentham's theory remained focused on ensuring that decision-makers in the justice system are held accountable for their decisions, as opposed to simply permitting public commentary and participation within reasonable limits.

Resnick also acknowledged the common criticisms of Bentham's approach, which argued that his reliance on public engagement as the primary method of oversight was insufficient because public opinion via the majority could be manufactured through the tandem influences of the market and the state, as opposed to his neutral conceptualization of public perception. For example, relations between government executives and leaders in the media can become entangled over time through transactions like soliciting advertisements and providing mandatory reports to the public. As relationships grow between these executives, critics argued that media decision-makers may be inclined to avoid the publication of distasteful details or, alternatively, reports may focus on particular interests

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19 Schofield, *supra* note 16 at 251, 268 (quoting Bentham, *Political Tactics*); Daniel Gordon, "Philosophy, Sociology, and Gender in the Enlightenment Conception of Public Opinion" (1992) 17:4 French Historical Studies 882 [Gordon].

20 Resnik, *supra* note 11 at 12-16; see Farrow & Watson, note 11.

that can support government objectives. Agreeing with these criticisms, Resnik claimed that publicity in democratic societies could become an arena where institutional decision-makers can earn prestige for acting in favour of specially situated interests. To these ends, Resnik cites Jürgen Habermas, who found that the public sphere of modern democracies serves as a performative space where leaders craft prestige by persuading the public to accept pro-social directives, as opposed to one for critical debate. To combat this trend, Habermas argued that strong public engagement is necessary to ensure that laws are developed with appropriate levels of popular legitimacy that can be derived from consistent social discourse.[21] Resnik echoed Habermas' conclusion that constant observation of state functions and meaningfully raising concerns regarding the legitimacy, efficiency, and accuracy of its outcomes is the only way to identify shortcomings for corrective action, which can be facilitated by popular dissent. Failure to do so risks allowing justice system decision-makers to subtly disregard public interests in favour of those that support their own.

Building from Habermas' views regarding performative publicity, Resnik drew from Nancy Fraser's conclusions regarding the plurality of social hierarchies, which she found to operate in democratic societies. To Fraser, groups distinguished based on race, gender, and class compete for participatory capacity in a zero-sum, competitive, and singular public sphere.[22] In this performative space, Resnik shared Fraser's belief that decision-makers can appeal to special interests to maintain public confidence in the administration of justice while other changes are made in the background. Such changes can reinforce hierarchical social orders while mitigating other special-interest concerns in democratic pluralities, which often stratify access and participation outcomes against Euro-centric criteria. In other words, the allocation of state benefits and interventions, as differentiated based on race, gender, and income, may maintain the interests of some communities better than others, despite the implementation of progressive system reforms. To combat these tendencies, Resnik asserted that formal state structures must be established to concretely improve access and participation for the inter-sectionally marginalized in ways that can approach meaningful parity with majoritarian

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21 Gordon, *supra* note 16.

22 Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," Craig Calhoun, ed, *Habermas and the Public Sphere* (Cambridge, Massachusetts: MIT Press, 1992.

members of the public, as opposed to the utilization of special-interest discourses to justify latent system changes while retaining existing institutional hierarchies.

The prevalence of the performative public sphere and its influence on state outcomes provides an illustrative example of why constitutional protections for judicial independence and impartiality of decision-makers are necessary safeguards regarding public confidence in the administration of justice. Resnik highlighted the importance of insulating executives because special interests risk influencing the outcomes of their decisions, which may prejudice state interests or the rule of law.[23] Canada, among other Western nations,[24] constitutionalized the expectation of an independent judiciary to ensure that the justice system could meaningfully hold legislators and other state agents accountable.[25] Canada is a federal country with a constitutional distribution of powers between federal and provincial governments and needs an impartial umpire to resolve disputes between two levels of government, as well as between governments and private individuals—a role that is filled by the courts as an institution and judges as decision-makers. At the same time, judges and the courts continue to be state agents themselves, which means that the open court principle, as well as its roots in Bentham's publicity, still serve as an important accountability measure in terms of preventing their collusion towards broader state interests.

Considering the contentious role of the court as arbiter and state agent, Resnick examined the implementation of new institutional practices to facilitate public participation, while also balancing other interests at play in the judicial process, such as privacy and judicial independence. As democratic enfranchisement expanded in the mid-20th century, the interests

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23 Resnik, *supra* note 11 at 20-23; see Farrow & Watson, *supra* note 11.

24 Guarantee of continued judicial independence, *Constitutional Reform Act 2005* (UK), s 3; US Const art III.

25 See Government of Canada, "The Judiciary: Judicial Independence" (1 September 2021), online: *Canada's Court System* <www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html> [perma.cc/9TBF-M5XN]; *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.; *R v Beauregard* , [1986] 2 SCR 56, 30 DLR (4th) 481; *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13; *R v KGK*, 2017 MBQB 96; affirmed 2019 MBCA 9; affirmed on other grounds 2020 SCC 7 (judicial independence is similarly acknowledged as foundational for public confidence in proper administration of justice and for maintaining constitutional separation of powers).

of marginalized groups came to dominate the public discourse, meaning they presented a heightened risk of influencing the decisions made in the distribution of justice. Resnik conducted a historical analysis of judicial independence in Western nations during this period to demonstrate the system's capacity to gradually implement new processes to standardize public access to published information regarding the administration of justice. While it can be argued that such changes also restricted publicity in the sense of direct access, Resnik's research revealed that Western judiciaries quickly adapted to contemporary realities which emerged as a consequence of war and genocide that drastically altered their role in society. Measures were taken to expand the dissemination of rulings on admissibility, jurisdiction, responsibility, sentencing, and reparations; but were also taken to prevent individuals from participating in court processes if they presented a risk to the independence or impartiality of the judgment. In making these changes, Resnik noted that the courts have made fair process a metric of evaluation, which can dictate whether state decision-makers are adequately providing the right quantum of legal process to ensure that an individual can meaningfully assert their rights while respecting the limits of the court and the discretion of its decision-makers. Borrowing from Pierre Bourdieu's theory of reflexivity, Resnik found that judges sought to create new methods of connecting the public with the administration of justice during the reformation process, whether that involved building new infrastructure, establishing new coordinating institutions, or implementing new technologies.[26]

Like the reformations that took place in the mid-20th century, a reflexive approach to judicial decision-making is more important than ever in the digital era. Continuous technological innovation radically amplifies the ability of the public to access information regarding the administration of justice. For example, some jurisdictions televise legal proceedings, post case details on electronic databases, and translate judgments into as many as twenty different languages to allow for broader dissemination.[27] The

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[26] See Pierre Bourdieu & Löic JD Wacquant, *An Invitation to Reflexive Sociology*,(Chicago: University of Chicago Press, 1992) at 235-236; Pierre Bourdieu, "Participant Objectivation"(2003) 9:2 J Royal Anthropological Institute 281; Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 Hastings LJ 814; Resnik, *supra* note 11; See Farrow & Watson, *supra* note 11.

[27] Supreme Court of Canada, "Frequently Asked Questions" online: <www.scc-csc.ca/contact/faq/qa-qr-eng.aspx> [perma.cc/46ZH-C52M] . The question of a media right to electronic access is explored in A Wayne MacKay, "Framing the Issues for

combined effect of broader participatory suffrage in Canada and the technologically expanded dissemination of information of administration of justice has drastically transformed the volume, content, and nature of the proceedings conducted in court. Dockets continue to grow, and backlogs seemingly can never be addressed. Canadian governments, like others, have failed to provide adequate funding to directly support litigants or sufficient alternative supports to help them access the justice system, pursue their claims, and achieve a satisfactory result. Rather than addressing the consequences of expanded demand for court services, Resnik identified several techniques that have promulgated in recent years which reconfigure court-based procedures to favour settlement, devolve formal court functions to obscure administrative agencies, and outsource decision-making to quasi-private adjudicators. These trends are concerning; Resnik claimed these practices operate together to facilitate a shift towards a privatization of justice processing, which may benefit state interests but may also hold deleterious potential for the most marginalized. Considering this direction and the risks it presents for constitutional principles like equality and the rule of law, we now turn to consider the measures being taken by Canadian judiciaries to manage the distributive flow of justice and access to system outcomes.

IV. Privatizing Justice: More Access, Less Oversight

Resnik has been skeptical of shifts towards privatizing the administration of justice because it undercuts the legitimating, correcting, and educating functions of the system. Privatized decision-making, in her view, renders litigants more dependent on judicial preference than on the rule of law.[28] She defined privatization as a series of processes undertaken by government to retain or concentrate control over its activities while reducing or eliminating avenues of public oversight. This includes the

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Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum" (1996) 19:1 Dalhousie LJ 139. In Canada, Supreme Court—but not lower court—proceedings are televised. Most courtroom proceedings are webcast live and are later televised by the Canadian Parliamentary Affairs Channel (CPAC).

28 Resnik, *supra* note 11; See Farrow & Watson, *supra* note 11; Antony Duff et al, "The Public Character of Trial" in , *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, vol 3 (Oxford: Hart Publishing, 2007); Judith Resnik, "Due Process: A Public Dimension" (1987) 29:2 U Fla L Rev 405.

transfer of government-based activities to non-governmental actors, as well as the transfer of institutional operations to entities in the market. She noted that both forms are prevalent in many countries in the West, holding influential potential for the respect of human rights both locally and internationally. Her research identified this trend has taken place over the last several decades in the United States, across Europe and throughout the commonwealth, including Canada.

In line with the court's reflexive approach to addressing the demand for justice services, Resnik identified three techniques that are prevalent in terms of shifting justice processes away from formal adjudication: reforming court-based procedures to privilege settlement, outsourcing adjudication to private service providers, and devolving more serious adjudicative functions to agencies that provide less access to the public.

In response to growing demands for justice services at the turn of the century, extra-judicial procedures became a suitable alternative to bringing issues to trial. For example, judicial alternative dispute resolution (J-ADR) services can be refereed by a judge who serves as a quasi-judicial case manager. Resnik noted that, in these instances, judges can act like senior partners that advise both parties regarding how to proceed in negotiations, mediations and arbitrations.[29] While J-ADR processes have proven their merit to decision makers in recent years,[30] Resnik remarked that it may be the single largest contributor to the "vanishing trial."[31] Dispute resolution practices have also extended beyond the justice system to include services that are provided on a strictly private basis. Parties to alternative dispute resolution (ADR) adjudication can choose which procedures are used to resolve their conflict, which authority renders judgment, and which issues fall within the purview of the public. While the details of ADR processes

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29 *887574 Ontario Inc v Pizza Pizza Ltd*, [1994] OJ No 3112, 23 B.L.R. (2d) 239; Canadian Judicial Council, "Alternative to Going to Court" (5 September 2021), online: *Know Your Judicial System* <cjc-ccm.ca/en/resources-center/know-your-judicial-system/alternative-going-court> [perma.cc/BGF2-LL76].

30 EC, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] OJ, L 136 at 3.

31 Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Legal Stud 459; Judith Resnik, "Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts" (2004) 1:3 J Empirical Legal Stud 783; Judith Resnik, "Trial as Error, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III" (2000) 113:4 Harv L Rev 924.

may vary between jurisdictions, Resnik has identified a trend towards their use throughout Western countries.[32]

In addition to establishing processes that allow users to circumvent formal trial proceedings, Resnik has identified a monumental shift towards administrative governance in the late 20th century. Rather than creatures of the court that share the constitutional authority of judges, these agencies function as an extension of the legislative or Parliamentary executive, whose members are appointed by the government in power. Acknowledging the prevalence of administrative adjudication in recent years, Chief Justice McLachlin offered remarks about the evolutionary relationship between Canada's courts and the growing use of administrative adjudication.[33] She explained that thousands of administrative systems occupy the legal landscape; the courts have lost jurisdiction over large areas of important social, economic, and political concern to the vast array of commissions and tribunals that operate at provincial and federal levels. In essence, Chief Justice McLachlin found that Western democracies are moving away from the traditional rule of law model of governance towards a synergistic model of dispersive state regulation. Chief Justice McLachlin acknowledged several new challenges this model creates for the legal system, such as developing adequate measures to maintain the rule of law and the constitutional division of powers; legal adjudication is not a function of the legislature or its executive but is the responsibility of the courts. In the context of the synergistic administrative state, such decisions are instead rendered by appointed delegates that exercise executive regulatory powers. Resnik has expressed agreement with Chief Justice McLachlin's remarks, noting that the wide-spread decline of using courts for adjudication favours processes and outcomes that are inherently less public, less regulated, and less accountable; they are also often in line with the interests of state officials.

While Chief Justice McLachlin's discussion of the administrative state maintained focused on the merits of the shift towards administrative governance, Resnik highlighted the deleterious potential these changes hold for the constitutional and historical obligations of judges and of the justice system more generally. In formal trial proceedings, everyone is treated

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32 *Supra* note 30.

33 Right Honourable Beverley McLachlin, PC, CJC, "Administrative Tribunals and the Courts: An Evolutionary Relationship" (27 May 2013), online: SCC *Speeches* <www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> [perma.cc/6QP9-UKJB].

equally, adjudicators are independent of the government that employs and deploys them, and trial records are disseminated to the public to facilitate discourse between observers, parties to the action and justice system agents like judges and lawyers. To Resnik, the shift towards delivering justice through administrative processes signifies an erosion of the democratic principles that advocates like Bentham held to locate sovereignty in the people and empowered them to hold elites accountable for their decisions. Resnik has expressed that diminishing public adjudication is a loss for democracy because doing so also reduces the frequency, quality, and consistency of the publicity that Bentham found necessary to maintain public confidence in the administration of justice. In the words of Chief Justice McLachlin, the shift towards privatized adjudication reduces the administration of justice to a credulity, as opposed to acts of reason.

As greater volumes of adjudication continue to move into the private sphere, Resnik has highlighted that discourse regarding justice system reform appear to adopt the language of marginalized communities like women, people of colour, and the poor to manufacture their consent to widescale system changes. Building from Resnik's observations, the authors believe that justice system executives are applying a strategy of "cooptation," which is an elite strategy of using seemingly cooperative practices to persuade opposing groups to accept structural changes in hopes of gaining benefits through compromise.[34] Scholars like Frances Piven and Richard Cloward have found that strategies of cooptation typically benefit elite executives while maintaining previous limits on those who seek change, although they may be re-oriented as reforms are put in place. Said differently, state executives can deploy inclusivity discourse to indicate interest in addressing historical issues regarding system access to persuade marginalized communities to accept a sweeping reformation agenda. This may reorganize the structure of their exclusion and, in some cases,

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[34] Frances Fox Piven, Richard Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Random House, 1964); William A Gamson, The Strategy Of Social Protest (Illinois: The Dorsey, 1975); Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California, 1949); De Lissovoy, N. (2008) Noah De Lissovoy, "Conceptualising Oppression in Educational Theory: Toward a Compound Standpoint"(2008) 8:1 Cultural Studies ⇔ Critical Methodologies82 at 92.; Michel Foucault *The Archaeology of Knowledge* (London: Tavistock, 1972) at 49; Michel Foucault, *Discipline and Punish* (London: Penguin, 1977) at 194-197; Michel Foucault, *Power/Knowledge: Selected interviews and other writings, 1972–1977*, ed by Colin Gordon, (New York: Pantheon, 1980).

exacerbate their inability to achieve meaningful participation by imposing new responsibilities that require new forms of knowledge to facilitate access.

Building from Resnick's observations and those identified by scholars like Piven and Cloward, the authors believe it is possible that a similar approach is being applied in current justice system reforms that are being made in Canada in response to the COVID-19 pandemic. In line with Resnick's claims regarding cooptation and privatization, it appears that justice system executives are appealing to the plurality of social hierarchies to maintain public confidence while measures are being taken to digitalize the delivery of justice services in Canada. In other words, state actors are using progressive, inclusionary discourse to encourage the public to accept wide-scale reforms to the justice system by appealing to the interests of groups who stand to benefit from broader access to justice. Although the stated objectives of the reformation agenda appear positive; improving system efficiency and expanding access to historically under-served populations, but Resnick's arguments make it clear that these changes may also hold potential to reinforce majoritarian, Euro-centric expectations to the detriment of the marginalized, such as those living in northern, remote, and Indigenous communities.

Although the perspectives offered by Chief Justice McLachlin and Resnick regarding access to justice and the role of public participation hold relevance in terms of modern justice system reform measures, both were written before the onset of the COVID-19 pandemic. Chief Justice McLachlin's statements regarding judicial reflexivity and Resnik's interest in meaningful democratic participation in the adjudication of legal disputes are both pressing considerations as provincial legislatures, Parliament, and the courts chart a new path for the delivery of justice services and access to justice amid this public health crisis. The pandemic inspired justice system executives to authorize the widespread digitalization of court processes and, in doing so, have made broadening access to justice one of their key objectives. Such reforms have already resulted in some positive outcomes in improvement of process efficiency and access to justice in a general sense, but the authors share Resnik's concerns regarding the risks such measures present for publicity and judicial accountability. Particularly, we believe that attention should be paid to the effects of these changes for women, people of colour, and the poor because the access to justice literature designates these populations as the most underserved by the justice system, both before and during the pandemic.

To evaluate the effects of pandemic reforms in relation to the most vulnerable, the following section examines the high-level recommendations of the Action Committee on Court Operations in Response to COVID-19 ("Action Committee") and their operationalization in the court systems in Manitoba through judicial Practice Directions and Notices.[35] The Action Committee conducted consultations across the federal-provincial-territorial justice network, which allowed judges and court administrators to share successes, failures, and recommendations that could meet the court system's statutory obligations while also offering a reflexive approach to delivering the justice outcomes that individuals expect of lawyers, judges, and the system overall. These recommendations were taken forward in provincial justice systems in a series of Practice Directions and Notices to the legal profession, as well as the ratification of several legislative changes that permanently authorize the use of digital technologies to meet traditionally manual justice functions. Keeping our focus on the outcomes of justice system reforms for marginalized populations, our analysis remains focused on the implementation of such measures in the province of Manitoba and their consequences for individuals charged with murder.

Scholars like Bruce MacFarlane explain that individuals from marginalized populations are disproportionately charged with violent offences, but these claims are often the result of structural biases as opposed to fact. [36] Across Canada and particularly in Manitoba,[37] law enforcement practices have disproportionately targeted Indigenous peoples, who are

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35 Department of Justice Canada, "Chief Justice of Canada and Minister of Justice Launch Action Committee on Court Operations in Response to COVID-19" (8 May 2020), online: *Department of Justice News Release* <www.canada.ca/en/department-justice/news/2020/05/chief-justice-of-canada-and-minister-of-justice-launch-action-committee-on-court-operations-in-response-to-covid-19.html> [perma.cc/24PZ-PXF9].

36 Bruce A MacFarlane, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" (Ontario: Ministry of the Attorney General: 2008), online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/MacfarlaneWrongful-Convictions.pdf> [perma.cc/WF8V-ASR5] [MacFarlane, Tunnel Vision]; Bruce A MacFarlane, "Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting" (2014) 47:2 UBC L Rev 597 at 597 [MacFarlane, "Shifting Sands"]; Bruce A MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403 at 403.

37 Nancy McDonald, "Welcome to Winnipeg: Where Canada's racism problem is at its worst" (22 January 2015), online: *Macleans Magazine* <www.macleans.ca/news/canada/welcome-to-winnipeg-where-canadas-racism-problem-is-at-its-worst/> [perma.cc/F4Z9-QT6R].

statistically more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned.[38] This community suffers from higher rates of victimization by crime, violent crime,[39] and negative criminal justice outcomes, including over-representation in correctional institutions, which is likely a function of systemic prejudice that may be a consequence of Canada's settler-colonial history.[40] Considering these realities with the objectives of the access to justice movement, our analysis in Part B of Manitoba's jurisprudence will focus on the courts' ability to deliver on expectations of publicity, judicial accountability and access to justice system outcomes, as opposed to simple access to the system that can be facilitated by technological means. With these objectives in mind, we now turn to the justice system's response to COVID-19, which involved both federal and provincial governments in Canada.

V. Pandemic Policy Changes

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38 *Report of the Aboriginal Justice Inquiry*, "Chapter 4 - Aboriginal Over-Representation" (Manitoba: AJIC, 2001), online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/C529-GTCD] [*AJI*]; *Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995) at 309-311; Jillian Boyce, "Victimization of Aboriginal People in Canada, 2014." *Juristat: Canadian Centre for Justice Statistics* (June 28, 2016) online: <www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> [perma.cc/XSA2-7B24] [*Boyce*]; Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (July 2014), online (pdf): *CCLA* <ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf > [perma.cc/D422-L3U7] at 19; Ivan Zinger, "Annual Report of the Office of the Correctional Investigator 2019-2020 – 8. Indigenous Corrections", *Office of the Correctional Investigator* (26 June 2020), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20192020-eng.aspx#s10> [perma.cc/9HJN-3B8K] [*CSC*].

39 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," *Ontario Ministry of the Attorney General* (9 March 2017), online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> [perma.cc/7RQP-RDDH] at 1-8, 36-40.

40 Boyce, *supra* note 38; CSC, *supra* note; Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, "Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta" (Edmonton: The Task Force, 1991) at 2-5, 2-46 to 2-51 [*Justice on Trial*].

A. Action Committee on Court Operations in Response to COVID-19

The COVID-19 pandemic disrupted many institutional structures that individuals depend on to meet their daily needs, including the criminal justice system. In response, federal and provincial lawmakers, as well as their associated judicial councils, adopted several policy measures to prevent unnecessary disease transmission and to implement justice system reforms that could address immediate, as well as longer-term, issues related to access to justice. COVID-19 poses a serious risk to public safety, but the necessary nature of meeting the daily needs of individuals forced decision-makers to find new ways to allow members of the public to access the justice system and for state agents to deliver its products. A key component of response measures was the authorization of technology to facilitate traditional court processes, which allows hearings to be conducted remotely, as well as to permit declarations and executions to take place without the physical presence of the parties. Bills, Practice Directives, and Notices have been issued by justice system executives to make many of these changes permanent, where many of these processes required in-person attendance before the pandemic.

Court functions were interrupted for a short period, but adjudication quickly resumed because digital resources were already in place, and mostly uniform response measures could be enacted across the country by virtue of strong communication channels between the federal-provincial-territorial justice network. This consistency was facilitated by the Commissioner for Federal Judicial Affairs Canada, who assumed responsibility for the Action Committee.[41] The Action Committee's mandate is to ensure that operational reforms are grounded in reliable information, that constitutional and social expectations are adequately considered, and that the courts' broader commitment to meeting the needs of everyone who depends on justice system outcomes continue to be supported under new frameworks.[42] Its purpose is to coordinate the restoration of court operations in ways that protect the health and safety of Canadians by making use of public health advice and expertise.

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41 *Supra* note 35.

42 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Terms of Reference for the Action Committee" (25 November 2020), online: *Government of Canada* <www.fja.gc.ca/COVID-19/reference-eng.html> [perma.cc/KMA9-KT4B].

To these ends, the Action Committee adopted four overarching principles that guide its work, in addition to the traditional doctrines of the common law justice system and pandemic public health principles. The Action Committee is committed to: providing national level guidance based on a common framework of parameters to enable coordination and consistency in the approach to COVID across the country; facilitating access to essential information, expertise and health and safety resources for chief justices and court administrators as they work to restore and stabilize court operations in their regions; highlighting best practices and facilitating communication, information-sharing and collaboration among courts, government and Canadian communities while also recognizing that local innovation can be valuable at the national level; and ensuring that early decisions around the resumption of court operations are framed within a wider vision of court modernization, meaning that Action Committee decisions should pave the way towards longer term transformation and increased resilience in Canada's justice systems.[43] These guiding principles work together with the fundamental principles of the justice system, of which the Action Committee places priority on: the open court principle, access to justice, the rule of law, judicial independence, federalism, and nexus to the community, or, in other words, ensuring that justice is rendered close to home by triers of fact that are connected to the community being served.

First and foremost, the Action Committee sought to keep court environments safe while the justice system continued to provide essential services to the public.[44] In addition to collating recommendations from the Public Health Agency of Canada, the Action Committee issued several tip sheets and tools to help local decision-makers adapt current processes to keep courts safe and accessible, as well as to provide a standardized approach that could be adopted across the country. Justice system participants were

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43 Office of the Commissioner for Federal Judicial Affairs Canada, "Core Principles and Perspectives" (30 July 2020), online: *Action Committee on Court Operations in Response to COVID-19* <www.fja.gc.ca/COVID-19/principles-eng.html> [perma.cc/B8CV-K69D].

44 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Message from the Action Committee: Keeping Our Court Environments Safe in the Midst of a Pandemic" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Safe-court-environments-Pour-des-tribunaux-surs-eng.html> [perma.cc/LJZ4-UDLP].

invited to contribute to an ongoing dialogue regarding procedures that could better protect users from health risks, which helped the Action Committee develop tools like the Orienting Principles on Safe and Accessible Courts,[45] the "Court Audit Tool,"[46] procedures for disinfection and protection of personnel,[47] guidelines for contact tracing,[48] and directives regarding the impact of vaccination on court operations.[49] It also created a space where best practices and resources could be shared between jurisdictions for conducting remote hearings, which included tools from provincial Canadian Bar Associations, various courts and tribunals, and comparable international jurisdictions.[50] Overall, these tools and resources

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45 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Safe and Accessible Courts – Orienting principles for Canadian Court Operations in Response to COVID-19" (6 April 2021), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/safety-eng.html> [perma.cc/53Z7-4QTJ].

46 Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Court Audit Tool – Adapting Small Court Spaces and Identifying Alternative Facilities" (9 February 2021), online: *Publications* <www.ccohs.ca/covid19/courts/audit-tool/> [perma.cc/Y2W3-CCHX].

47 Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Guidance on Protecting Court Personnel and Court Users and General Practices for Cleaning and Disinfecting" (9 February 2021), online: *Publications* <www.ccohs.ca/covid19/courts/general-practices/> [perma.cc/RRC6-KFET].

48 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Contact Tracing and the Justice System" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Contact-Tracing-La-recherche-de-contacts-eng.html> [perma.cc/7QFS-RS5G].

49 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Communiqué – the impact of vaccination on the courts" (30 July 2020), online: *Protecting the Health and Safety of Court Users and Personnel During the Pandemic* <www.fja.gc.ca/COVID-19/Impact-of-Vaccinations-on-the-Courts-Incidence-de-la-vaccination-sur-les-activites-des-tribunaux-eng.html> [perma.cc/ME9S-HWGJ]; Canadian Centre for Occupational Health and Safety, "Action Committee on Court Operations in Response to COVID-19: Impact of Vaccination on Court Operations" (25 June 2021), online: *Publications* <www.ccohs.ca/covid19/courts/courts-vaccination/> [perma.cc/G4PS-JSWM].

50 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Inventory of Existing Resources on Best Practices for Remote Hearings" (30 July 2020), online: *Open Hearings and Access to Court Services During and Beyond the Pandemic* <www.fja.gc.ca/COVID-19/Best-Practices-

serve to support Canada's courts as they work to protect the health and safety of all court users during the public health crisis, while simultaneously upholding the fundamental values of the justice system.

The Action Committee acknowledges that one of the most impacted values of the justice system in terms of the pandemic is the open court principle and its related considerations of privacy, security, and confidentiality. The Action Committee explains that the principle of open court promotes access to hearings for justice system participants, the media, and the public. Be that as it may, the court must balance these expectations against the privacy and safety interests of victims, vulnerable witnesses and accused persons, particularly while hearings are being conducted digitally. To assist court decision-makers in reaching this balance, the Action Committee issued a tip sheet that highlights best practices for assessing how privacy, security and confidentiality issues can be adequately addressed in a virtual court setting for all who benefit from open court.[51] The tip sheet describes six steps that local justice system leaders should consider when restricting court openness in favour of security and privacy interests: understanding risks and identifying available protection measures; assessing the functionalities and limits of the virtual platform or tool being used; establishing measures to regulate access; communicating procedures and rules of access; screening individual cases in advance to identify potential privacy, security or confidentiality issues; and establishing a proper course of action if rules of access are breached or security or confidentiality is otherwise compromised. In addition to these steps, the tip sheet includes an appended checklist of consolidated best practices from courts in different jurisdictions, as well as a sample Notice of Access rules for virtual hearings. Importantly, the Action Committee explains that the guidance provided in the tip sheet does not replace applicable laws, common law, regulations, court rules, notices or practice directions, and that additional considerations may be necessary in terms of assessing the impact of mandatory virtual hearings for marginalized community members. To these ends, the Action Committee recommends ongoing revision of open court guidelines to ensure that the unique contexts of local courts are

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for-Remote-Appeal-Hearings-Pratiques-optimales-audiences-dappel-virtuelles-eng.html> [perma.cc/3YTX-RD5S].

51 *Ibid.*

accommodated, and that information-technology and security experts can contribute to their ongoing improvement.[52]

In line with the traditional focuses of the access to justice movement, the Action Committee examined the disproportionate impact of the pandemic on access to justice for marginalized individuals. It notes that the protections offered by the *Charter* demand certain expectations of the court, which must be met at risk of undermining public confidence in the administration of justice. In the Action Committee's view, the pandemic has underscored and compounded several challenges regarding access to justice services and outcomes; these barriers are heightened for marginalized communities and individuals, who are disproportionately unable to access such services. The Action Committee considered these impacts in two studies: a judicial consultation regarding the restoration of court operations in northern, remote, and Indigenous communities; and a broader consultation with criminal justice stakeholders regarding the disproportionate impacts of the pandemic on access to justice for marginalized individuals, including those in metropolitan regions.

When the pandemic approached its first summer in 2020, the Action Committee consulted with judicial representatives from the Northwest Territories, Saskatchewan, Alberta, and British Columbia regarding how COVID-19 affected the delivery of court services in northern, remote and Indigenous communities.[53] It asked representatives about their experiences to share ideas about how the government could provide relevant supports to assist with the safe restoration of justice services in their communities. Their commentary highlighted that location, demography, and resources all drastically impact access to justice services and that resolving these issues requires a coordinated effort from all levels of government. In addition, all representatives agreed that it was essential to create a central role for Indigenous peoples to adequately restore the functions of the justice system to pre-pandemic levels. The panel identified several common issues between their jurisdictions: such as growing court processing backlogs; a lack of resources and capacity to implement health and safety measures; and

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52 *Ibid*.

53 Office of the Commissioner for Federal Judicial Affairs Canada, "Action Committee on Court Operations in Response to COVID-19: Restoring Court Operations in Northern, Remote and Indigenous Communities" (30 July 2020), online: <www.fja.gc.ca/COVID-19/Northern-Remote-and-Indigenous-Communities-Communautes-nordiques-eloignees-et-autochtones-eng.html> [perma.cc/27GZ-SLZC].

adjusting processes to adapt to the realities of remote service delivery, particularly in culturally relevant ways for Indigenous peoples and other marginalized populations. In the view of the contributors, digital technology acted both to the system's benefit and its detriment. Concerns regarding digital literacy and the availability of digital devices created new barriers to accessing justice services in technological forums. Panelists reported that inequalities of access are being exacerbated by minimal access to reliable telecommunications services, existing issues related to poverty and unstable housing, and the justice system's heightened reliance on digital alternatives to in-person proceedings. Members of some of these communities also hold historical reasons for fearing non-resident state actors because such communities have been devasted in the past by genocidal or otherwise deleterious state interests when these agents entered their communities. In the context of using technology to facilitate access to digital justice services, participants noted that the presence of such agents would likely be necessary as community members learned how to navigate the new dynamics of delivering justice remotely. The Action Committee acknowledged that such concerns affect the willingness of individuals to participate in the justice process, which can impact the integrity of submissions like statements, plea bargains, or even admissions of guilt.

With these concerns in mind, the Action Committee identified two supporting principles that, in its view, justify the shift to using technology to resume court operations in remote, northern, and Indigenous communities: individuals are increasingly turning to digital platforms to meet their daily needs, which makes it likely that marginalized users can adapt to the technological delivery of justice services; and that justice system authorities are duty-bound to encourage user adaptation to new system realities as reform measures are put in place, meaning that such guidance will be available as needed.[54] The Action Committee believes that pandemic reform measures should focus on building user knowledge of technological systems, as well as accessing counsel and participating in court processes using digital means, while also balancing considerations of the health, dignity, and rights of everyone involved in the process. In its view, those who seek to access the justice system must come to terms with the reality that better access to services connotes an expectation that users will learn how to make use of such opportunities. As a shared responsibility between

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54 *Ibid.*

users and authorities, the Action Committee explains that judges, courts, and all participants must work together to facilitate and support pandemic reformation measures. Such collaborative expectations may include learning how to use new technologies, helping to facilitate remote means of communicating with clients and participating in court hearings virtually; as well as working to ensure client understandings of adapted court processes and the historical concerns of remote, northern, and Indigenous community members. By approaching users as partners in this transition, legal professionals and governments can reinforce longer-term strategies for increasing state capacities to deliver justice, both during and beyond the pandemic. In other words, the Action Committee proposes measures that must be adopted by all system participants, and counsel and other justice system authorities must help users assume responsibility for knowing how to properly access the system. Although these expectations are great, the Action Committee acknowledges the unique challenges that face northern, remote, and Indigenous communities in terms of implementing their proposals for change.

In addition to identifying common areas of concern, the consultations also identified numerous successful initiatives that are being deployed in several provinces that hold potential to meaningfully resolve some of these concerns from an access to justice perspective. When considering how holistic services can be implemented to support Indigenous engagement with the justice system, British Columbia delegates shared the successes of the BC First Nations Justice Strategy and representatives from Alberta shared the accomplishments of the Native Counselling Services of Alberta. The Action Committee celebrated these initiatives and recommended their replication in other jurisdictions to facilitate stronger integration of Indigenous perspectives into justice system reforms, which could connect more deeply with local communities through thoughtful, creative, and culturally relevant uses of technology. The BC First Nations Justice Council recommends the formation of a Virtual Indigenous Justice Centre in appropriate communities that would be capable of delivering legal advice and advocacy, services related to addictions and mental health, and additional support to Indigenous individuals that seek to access the justice system, such as victims.[55] Building from the BC First Nations Justice

[55] Doug White, "BC First Nation Justice Strategy: February 2020" (Vancouver: BC First Nations Justice Council, 2020), online (pdf):

Council's proof of concept, the Action Committee recommends the establishment of liaison officers in northern, remote and Indigenous communities to facilitate the use of digital access points, including set-up and operation of local connectivity technologies, alerting court officials about community-specific needs, and acting as a point of contact in these communities who can communicate authoritatively with other governmental officials. The Action Committee notes that having a liaison officer in the community can help to facilitate better delivery of justice services both digitally and in person, which can help to address other, more traditional concerns of access to justice. In other words, the Action Committee anticipates that the delivery of justice services in northern, remote, and Indigenous communities will continue to be delivered using digital means and, with this in mind, it recommends the implementation of culturally-relevant processes to educate users on how to use technology to access justice services, as well as to establish local liaison officers to facilitate compliance with these options to balance the rights of, and respect for, community members.

The Action Committee also conducted a series of consultations that sought to address the pandemic's disproportionate effect on access to justice for marginalized individuals in a general sense, including access to courts and other justice services in metropolitan regions. To frame this broader analysis, the Action Committee's report offered a conceptual overview of the definitions that are relevant to the access to justice movement to ensure that justice system executives and administrators would understand the claims being put forward, as well as to orient the merits of its recommendations. To the Action Committee, "access to justice" means having confidence that the system will come to a just result, where the user will respect and accept the outcome, even if they do not agree with the verdict.[56] The Action Committee believes this definition is appropriate because it estimates nearly half of all adult Canadians will experience a

<www.bcafn.ca/sites/default/files/docs/news/First_Nations_Justice_Strategy_Feb_2020.pdf > [perma.cc/GB59-2PWJ].

56 Right Honourable Richard Wagner, PC, Chief Justice of Canada, "Access to Justice: A Societal Imperative," address (7th Annual Pro Bono Conference, delivered at the British Columbia Justice Summit, 4 October 2018),] online: <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> [perma.cc/J27P-32KV].

serious legal problem within a three-year period[57] and the high level of state expense that is associated with each one that is resolved through formal justice processes,[58] which means that the adoption of digital means to deliver justice services is necessary for all involved parties to stabilize demands for services and their associated costs for the state. Although the Action Committee noted these concerns as its primary focus, it also acknowledged the disproportionate impact of the pandemic on marginalized populations and their historic concerns regarding access to justice similarly to their commentary in their report on access to justice during the pandemic for northern, remote, and Indigenous communities: it recommends the establishment of court liaison officers that could facilitate the use of technology to meet the demand for justice services in local communities. These officers can leverage existing support programs offered by groups like legal aid, victim services, and court worker programs to help marginalized individuals access justice system products. In other words, these officers can coordinate the user's justice system experience through each service until they receive their judicial verdict, which must be accepted and respected, even if they do not agree with the outcomes.

In addition to the guidance offered by the liaison officer, the Action Committee suggests that universal delivery of services in a single location can maximize the connection of justice system services for users, including specialized addictions and mental health, dedicated technological support and access to necessary digital devices during hearings, and authorized use of secure premises to participate in such hearings.[59] Liaison officers can assist users while they make use of the facility and guide them through each relevant service, while also addressing other case management concerns like ensuring that individuals appear for hearings. In addition to offering access to justice services, the Action Committee believes that centres of this nature can also provide general access to the internet and other

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57 Canadian Forum on Civil Justice, "Everyday Legal Problems and the Cost of Justice in Canada: Spending on Everyday Legal Problems, Canadian Forum on Civil Justice" 2018 CanLIIDocs 11069, online: <canlii.ca/t/t1lx> [perma.cc/Z4R6-TMZZ].

58 *Ibid*; *supra* note 4, Canadian Bar Association "Reaching Equal Justice."

59 Office of the Commissioner for Federal Judicial Affairs, "Action Committee on Court Operations in Response to COVID-19: Statement from the Committee - Examining the Disproportionate Impact of the Covid-19 Pandemic on Access to Justice for Marginalized Individuals" (30 July 2020) at 3.3, online: <www.fja.gc.ca/COVID-19/Justice-for-Marginalized-Individuals-An-Overview-Acces-a-la-justice-pour-les-personnes-marginalisees-vue-densemble-eng.html> [perma.cc/WQ32-EUZZ].

telecommunications services for the general public. Perhaps most importantly, the central delivery of services for marginalized communities can be used by government to generate data about areas where services are lacking; where further resources are required or can be reduced, and how to improve access overall. To the Action Committee, this data could provide a comprehensive snapshot of the effectiveness of access to justice initiatives, such as whether the approach to justice system digitalization improved the accessibility of courts and related services, as well as the experiences that marginalized populations as users within the new structure. The Action Committee also believes this data can be used to determine which processes should continue to be delivered using digital means when the public health crisis ends to retain measures that sufficiently meet user needs while also reducing overall system costs.[60]

After the Action Committee completed its first year of work, Chief Justice Richard Wagner and federal Minister of Justice David Lametti issued a progress report that demonstrated the successful response measures and initiatives that allowed local justice systems to continue delivering justice services and meeting user needs during the health crisis.[61] They explained that the Action Committee's 17 meetings and 21 consultations significantly and efficiently strengthened information sharing and collaboration between the leaders of Canada's court systems, which helped elected decision-makers make expeditious and informed decisions regarding legislative reform as the pandemic continued to unfold. Although these groups worked closely together to implement adjustments as circumstances changed, the authors of the report note that the Action Committee's terms of reference stipulated that all members must keep the constitutional limits between judges and elected officials top of mind while they worked together to create solutions to the challenges COVID-19 imposed. These principles hallmarked the approach taken by the Action Committee towards federal-provincial-territorial collaboration. Rather than breach the constitutional limits of their relationship as institutional leaders, this forum allowed chief justices to share internal accounts of court processes, which could be taken forward to government by Ministers of Justice and their Deputy Ministers to inform

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60 *Ibid* at 3.4.

61 Office of the Commissioner for Federal Judicial Affairs, "Action Committee on Court Operations in Response to COVID-19: Action Committee – Progress Report" (28 July 2021) at "Strengthened Collaboration and Information-Sharing", online: <www.fja.gc.ca/COVID-19/Progress-Report-Bilan-eng.html> [perma.cc/8236-3GS2].

their approach to amending policy and law. The authors of the report attribute the Action Committee's timely and direct access to information from experts, senior officials across government institutions, and frontline organizations, who helped create a truly interdisciplinary response and ensure blind spots did not affect the overall outcomes, in allowing the agile and effective continuation of justice services.

Further to guiding the development of reforms to policy and law, the Action Committee's interdisciplinary collaboration allowed them to create 11 tip sheets and eight associated tools to help courts adapt public health and safety protocols into the context of court operations.[62] These response kits were disseminated by the Heads of Court Administration, the Canadian Judicial Council and the Canadian Council of Chief Judges, allowing chief justices, chief judges, justice ministries and court personnel to quickly retrofit the Committee's recommendations and develop companion protocols that were suited to their individual and unique needs. This information is continually updated and shared with the public through an online portal hosted by the Commissioner for Federal Judicial Affairs Canada.

Member organizations praised these publications as a strong avenue for promoting dialogue, coordinating, and highlighting best practices and creating benchmarks for action. Further to the utility of these publications served between system leaders, they also provided persuasive evidence convincing members of local judiciaries and ministries of justice to implement measures to safeguard public health as part of court operations and their associated functions. As measures were put in place, unconsidered circumstances were identified and concerns raised, which offered a new foundation for future revisions of Action Committee recommendations and allowed for more robust guidelines to be developed. Concerns were not the only local matters that were brought back to the Action Committee: best practices at the local level were communicated and promoted for national duplication, such as New Brunswick's automated system for jury summons and selection. Respondents to stakeholder engagements conducted by the Action Committee lauded efforts to share such ideas, which helped minimize the need for individual courts to create their own versions of work already done elsewhere. Special attention was taken to share initiatives and processes that could alleviate the heightened difficulties

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62 *Ibid* at "Publications That Made A Difference: Creating a Benchmark For Action".

that marginalized populations faced when accessing the justice system, which led to reports that investigated these realities in metropolitan regions and in remote, northern, and Indigenous communities. Perhaps most importantly, the progress report highlighted the value that Action Committee publications offered in terms of creating benchmarks for action, which helped regional justice systems stay ahead of the proverbial curve in measures that were necessary to preserve public health for all actors involved in the system. Despite regional variation in provincial safety measures, the Action Committee's benchmarks and best practices allowed justice system executives to proceed in lockstep to keep courts safe and operating. The Action Committee recommendations offered meaningful starting points for the institutional implementation of such measures, helped decision-makers accept the proposals put forward by participants, and created an accountability structure by drawing attention to jurisdictions that fell behind others in defending public safety.

In similar logic to the Action Committee's role as a driver of accountability, the progress report notes that internal stakeholders and their partners were most grateful for the leadership role that the organization served throughout the pandemic.[63] Stakeholder respondents unanimously believed the Action Committee inspired public confidence in the justice system from the earliest days of the pandemic. The united federal-provincial-territorial messaging provided compelling decisive leadership, and acted as a model for other institutional leaders across the country. The authors of the progress report attributed the merits of their strategy to the care taken to educate and inform participants and the public, as well as crafting the appropriate processes to change behaviours and attitudes in their target audiences. By acting as open-minded leaders, maintaining key drivers of necessity and expediency top of mind, and innovating every step of the process, the Action Committee believed that creative and effective action was bound to follow. All who participated or benefited from the work of the Action Committee believed that its collaborative framework exceeded the inter-governmental outcomes achieved before the pandemic and offered a valuable template for endeavours of its kind in the future.

The Action Committee played a key role in ensuring that the administration of justice could continue in every Canadian province during the pandemic by encouraging sharing of information, broader collaboration

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63 *Ibid* at "Leadership in a Time of Crisis" – "Conclusion".

and offering resource kits. Among these regions is the justice system in Manitoba, which applied many of these recommendations in their local courts to preserve public safety while meeting the justice needs of residents. With the work of the Action Committee in mind, the following section examines the public health measures that were implemented by the Government of Manitoba, as well as the Practice Directions and Notices that were issued by Manitoba's courts, to achieve these ends.

B. Manitoba's Court System

Manitoba's pandemic response was initiated by the Chief Provincial Public Health Officer (CPPHO), who issued COVID-19 Prevention Orders[64] that came into effect on April 17, 2020, and Self-Isolation and Contact Tracing Orders[65] that came into effect on August 28, 2020. To safeguard public health, the Prevention Orders prohibited gatherings of individuals, restricted non-essential business operations, and mandated several measures to prevent disease transmission, such as wearing face masks and maintaining two meter distances from others when interacting in person.[66] The Self-Isolation and Contact Tracing Order mandated any individual that is diagnosed by a public health official with COVID-19 to self-isolate at home for fourteen days.[67] Although operational amendments were made to these prohibitions as the pandemic unfolded, the CPPHO regularly renewed the Prevention Orders[68] and the Self-Isolation and Contact Tracing Orders[69]. The Government of Manitoba posts the most current details online regarding Orders made in response to an emergency to ensure that the public is informed at all times.[70]

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64 *The Public Health Act*, SM 2006, c 14, *COVID-19 Prevention Orders*, enacted on 17 April 2020, as repealed on 1 May 2020 [Original Prevention Order].

65 *The Public Health Act*, SM 2006, c 14, *Self-Isolation Order*, enacted on 28 August 2020, as repealed on 17 December 2020 [Original Self-Isolation and Contract Tracing Order].

66 Original Prevention Order, *supra* note 64.

67 Original Self-Isolation and Contract Tracing Order, *supra* note 65.

68 *The Public Health Act*, SM 2006, c 14, *COVID-19 Prevention Orders*, enacted on 3 September 2021, as repealed on 5 October 2021.

69 *The Public Health Act*, SM 2006, c 14, *Order Prohibiting Travel to Northern Manitoba and Remote Communities*, enacted on 11 June 2021, as repealed on 18 December 2021.

70 See Manitoba Laws, List of Orders made in an emergency, online: <web2.gov.mb.ca/laws/statutes/index_orders.php?o=title&x=1> [perma.cc/GDG8-MHX7].

While it was necessary for the CPPHO to issue prohibitions to protect public health, many matters could not be postponed indefinitely, including legal issues that involve life, liberty, and property. Conscious of these dual considerations, lawmakers in Manitoba passed several temporary orders to authorize the use of technology to remotely execute oaths, statutory declarations, wills, and powers of attorney. Those orders were later codified into law with the passage of Bill 42, which permanently permits remote commissioning and witnessing under s. 64(1) and (4) of the *Manitoba Evidence Act*[71], s. 10.1(1) and (2) of the *Powers of Attorney Act*[72], and s.4.1(1) and 4.2(2) of the *Wills Act*[73], among other amendments.[74] These amendments were influenced by research conducted by the Manitoba Law Reform Commission, who issued a final report regarding *Electronic Witnessing of Affidavit Evidence* shortly before stringent public safety measures were being put in place by the provincial government.[75] Although the report's research was conducted before the COVID-19 pandemic began in Canada, the decision to make use of its recommendations to amend the law to meet the contemporary needs of Manitobans provides an illustrative example of the value that forward-looking legal research holds in allowing legislators to quickly respond to pressing socio-legal challenges. As part of its investigation, the Commission considered existing processes for affirming evidence or declarations under oath, as defined under *The Manitoba Evidence Act (MEA)*, which mandated a physical meeting between participants to be adequately validated.[76] Considering the availability, and possible utility, of allowing such executions to be completed using digital technology, the report offered several recommendations to authorize remote execution of oaths and affirmations using digital means. With the onset of the pandemic, legislators ratified the Commission's recommendations into law; on a temporary basis at first, which were subsequently made permanent when Bill 42 received Royal Assent.

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71 *The Manitoba Evidence Act*, CCSM c E150, ss 64(1), 64(4).

72 *The Powers of Attorney Act*, CCSM c P97, ss 10.1(1), 10.1(2).

73 *The Wills Act*, CCSM c W150, ss 4.1(1), 4.2(2).

74 *The Remote Witnessing and Commissioning Act* (Various Acts Amended), SM 2020, c 25.

75 Cameron Harvey, QC, *Electronic Witnessing of Affidavit Evidence: Final Report* (Winnipeg: Manitoba Law Reform Commission, August 2020), online (pdf): *MLRF Publications* <www.manitobalawreform.ca/pubs/pdf/140-full_report.pdf> [perma.cc/78BV-3P83].

76 *The Manitoba Evidence Act*, CCSM c E150, s 64.

The report highlighted the historical barriers that the *MEA* created for individuals living in remote, northern, and Indigenous communities to underscore the opportunity for meaningful reform that arose with the onset of the pandemic. They concluded that s. 64(1) limited access to commissioning services for individuals residing in remote parts of Manitoba because of its physical presence requirements, as these individuals do not have stable access to commissioners who can take affidavit evidence. Considering the availability and relative accessibility of modern tools that can address these historical access-to-justice issues, the report recommended legislative amendments that would permanently authorize the use of digital options for executions of oaths, affidavits and other affirmations or declarations under the *MEA*.[77]

Consultations with legal professionals and research into the realities of accessing legal services in Manitoba's remote communities revealed that residents are often unable to have an oath, affirmation or statutory declaration administered, or affidavit taken remotely because of s. 64(1)'s compulsory physical meeting requirements. While in-person commissioning requirements were retained because of its value towards validating the authenticity of individuals completing such processes, the pandemic forced decision-makers to permit remote executions to prevent disease transmission. The Commission's final report proposed four recommendations to these ends that could permanently improve access to legal services in Manitoba, which were taken forward by legislators under Bill 42. The most important of these recommendations was to amend s. 64(1) of the *MEA* to permanently remove the physical presence requirement. Bill 42 ratified this change into law on December 3, 2020.[78] The Bill included amendments to *The Health Care Directives Act*, *The Homesteads Act*, *The Powers of Attorney Act*, *The Real Property Act*, and *The Wills Act* to authorize the use of technology for remote witnessing and commissioning in each of their respective contexts.[79]

Lawmakers also passed several other legislative amendments to improve access to justice for Manitobans during the pandemic, such as broadening

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77 Harvey, *supra*, note 75 at vi – vii.

78 Bill 42, *The Remote Witnessing and Commissioning Act*, 3rd Sess, 42nd Leg, Manitoba, 2020 (assented to 3 December 2020).

79 *The Health Care Directives* Act, SM 1992, c 33; *The Homesteads Act*, SM 1992, c 46; *The Powers of Attorney Act*, *supra* note 72; *The Real Property Act*, RSM 1988, c R30; *The Wills Act*, *supra* note 73.

eligibility requirements for justices of the peace and the statutory limits regarding the training and collaboration of judges in Manitoba's courts, expanding the range of service providers who can provide legal services beyond lawyers, and allowing administrative tribunals to decide questions of constitutional significance. Cognizant of the pressing need to allow justice system executives to undertake collaborative efforts with their counter-parts across the country, as well as to increase the number of available decision-makers to ensure that the adjudication of matters could continue while public safety measures were put in place, the Government of Manitoba proposed and ratified Bill 46, *The Court Practice and Administration Act*.[80] While the Office of the Commissioner of Federal Judicial Affairs was establishing the Action Committee on Court Operations in Response to COVID-19, chief judges were invited to participate, but the costs of doing so fell to the province under the existing legal framework, even though the federal government was willing to assume the costs of participation in order to encourage participation from every Canadian justice system. With these cost saving considerations in mind, Bill 46 amended *The Court of Appeal Act*[81] and *The Court of Queen's Bench Act*[82] to allow judges to attend conferences dealing with the administration of justice, with a primary interest in allowing the federal government to assume the costs of attendees. In line with this logic, amendments were also made to *The Court Services Fees Act* to clarify that some services related to court proceedings are not provided by government, but would be assumed by the relevant party.[83] In addition to changes that allowed the federal government to pay for the costs associated with the participation of Manitoba judges in the work of the Action Committee, amendments were made to *The Provincial Court Act* and *The Jury Act* to expand the availability of decision-makers in trial processes of first instance. Amendments were made to *The Provincial Court Act* to clarify the eligibility requirements for justices of the peace, primarily to eliminate existing limits on the number of retired judges who could perform judicial functions in the provincial court.[84] In addition

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80 Bill 46, *The Court Practice and Administration Act (Various Acts Amended)*, 1st Sess, 42nd Leg, Manitoba, 2021 (assented to 20 May 2021).

81 *The Court of Appeal Act*, RSM 1987, c C240, ss 12.2, 25.1, 25.2, 33(a.1).

82 *The Court of Queen's Bench Act*, SM 1988-89, c 4, ss 10.1, 89.

83 *The Court Services Fees Act*, RSM 1987, c L80, ss 1, 2, 3, 4, 7, 10.

84 *The Provincial Court Act*, RSM 1987, c C275, ss 6.5(4), 41, 42.2(4), 75(b.1).

to bolstering the number of justices of the peace that were available to hear matters in provincial court, Bill 46 amended *The Jury Act* in order to eliminate barriers to jurors who had been convicted for summary conviction offences from participating as a trier of fact in jury trials.[85] Changes made to *The Jury Act* permit a person convicted of a criminal offence to serve as a juror, unless they had been convicted of an indictable offence. Amendments under Bill 46 also sought to address long-standing issues regarding juror compensation, which was woefully inadequate when compared to other Canadian jurisdictions.[86] The Bill amended sections 42 and 53 of *The Jury Act* to eliminate previous limits on juror payments and to allow the Lieutenant-Governor-In-Council (LGIC) to set compensation rates under regulations.[87]

To allow Manitobans to meet more routine legal needs without requiring the assistance of a formal lawyer, lawmakers ratified Bill 24, the *Legal Profession Amendment Act*.[88] Although the *Legal Profession Act*[89] already allows specified non-lawyers to perform legal functions that are defined in the Act, Bill 24 allows the Law Society to make rules that permit such persons to provide additional legal services that are defined in Society rules, as well as to define conditions and restrictions regarding individuals who can be authorized to provide these supplementary services.[90] To operationalize these new powers, the Bill allows the Law Society of Manitoba to issue limited practice certificates, which authorize non-lawyers to engage in limited legal practices, subject to conditions and restrictions that are defined by the LGIC in regulations.[91] To receive such a practice certificate, the applicant must meet certain educational and training requirements, which are regulated by the Law Society of Manitoba directly. The amendments put in place under Bill 24 were a result of a consultation that was conducted by the Law Society of Manitoba that began in 2018.[92]

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85 *The Jury Act*, RSM 1987, c J30, ss 2, 3, 3.1, 26, 34, 42, 53.

86 Badre Law, "Juror Pay – Not Enough!" (4 August 2020), online: *Badre Law Employment Law* <badrelaw.com/juror-pay-not-enough/> [perma.cc/3A63-ND94].

87 *The Jury Act*, RSM 1987, c J30, ss 42, 53.

88 Bill 24, *The Legal Professional Amendment Act*, 3rd Sess, 42nd Leg, Manitoba, 2021 (assented to 12 May 2021).

89 *The Legal Profession Act*, SM 2002, c 44, ss 20 – 25, 26 – 29.

90 *Ibid*, ss 25.1 – 25.5.

91 *Ibid*, ss 25.4, 25.5, 25.2.

92 The Law Society of Manitoba, "Consultation Document: Alternative Legal Service Providers" (31 January 2021), online (pdf): *Law Society of Manitoba*

The *Alternative Legal Services Providers Consultation Document* describes the outcomes of this consultation, which was engaged to meet the organization's Strategic Plan Objective regarding their leadership in terms of advancing, promoting, and facilitating the increase of access to justice. The document explains the interest of Law Society Benchers in allowing non-lawyers to deliver prescribed legal services in family law, so long as such authorized individuals acted under the supervision of a person with a limited licence or a formal lawyer. After the consultation came to a close and the results were reported to the profession and to government officials, the Law Society posted a notice that highlighted the intentions of the consultation, as well as the government's favourable response to their recommendations; which culminated with the introduction of Bill 24.[93] The Bill was introduced on October 14, 2021 and received Royal Assent on May 12, 2021, meaning that the Law Society of Manitoba is now authorized by law to designate non-lawyer service providers to perform routine legal tasks.[94] Although unmentioned in Bill 24, it appears that the Law Society is most interested in authorizing such service providers to assist with the delivery of legal services related to the area of family law.[95] The amendments made under Bill 24 align with a national movement to permit paralegals and other non-lawyers to deliver legal services in the spirit of access to justice.[96]

Because of the sweeping nature of public safety guidelines and their implications for workers in a variety of sectors, as well as their potential to conflict with the constitutional limits of governmental powers, legislators in Manitoba also introduced legislation to authorize administrative tribunals

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<lawsociety.mb.ca/wp-content/uploads/2020/12/Consultation-Paper-Alternate-Legal-Service-Providers.pdf>.

93 The Law Society of Manitoba, "Alternative Legal Services Providers: Exploring Options for Persons who are not Lawyers to Provide a Limited Scope of Services – Background Information" (1 November 2020), online: *LSM Initiatives* <lawsociety.mb.ca/about/lsm-initiatives/alternative-legal-services-providers/>.

94 Legislative Assembly of Manitoba, "Status of Bills: Third Session, Forty-Second Legislature, 2020-21" (7 October 2020 to 14 October 2021), online (pdf): *Legislative Assembly of Manitoba* <web2.gov.mb.ca/bills/42-3/billstatus.en.pdf>.

95 Bill 24, *supra* note 88.

96 Ontario Bar Association, "Non-Lawyer Legal Services: An International Round-Up" (16 June 2017), online: *Just. For People With a Calling* www.oba.org/JUST/Archives_List/2017/June-2017/Non-lawyer-global-3 [perma.cc/KM2K-E5PY].

to decide questions of constitutional law.[97] The *Administrative Tribunal Jurisdiction Act* permits the LGIC to issue regulations that would grant jurisdiction to any administrative tribunal to make determinations regarding a question of constitutional law.[98] If an individual proceeds to raise a question of constitutional significance with an administrative tribunal with such authorization, they must give notice to the Attorney General of Canada, the Attorney General of Manitoba, all other parties to the proceeding, and the administrative tribunal that conducts the hearing; any notified party is permitted to make submission regarding the case.[99] While the motivations for Bill 27 did not explicitly mention the pandemic, David Said explains that similar actions are being taken across the country to permit regulatory agencies to determine the application, and exemption from, vaccination laws and mandates.[100] Writing about the new role that regulatory bodies like the Ontario College of Physicians and Nurses, and the College of Nurses of Ontario have in terms of regulating immunization expectations and their exemptions, he notes that such organizations are taking a much greater role in rendering decisions that hold constitutional significance. In the context of Manitoba, it is likely that Bill 27 is intended to allow regulators like the College of Registered Nurses of Manitoba, the Workers' Compensation Board of Manitoba, or other administrative agencies that issue decisions related to workplace matters to consider constitutional issues like vaccination requirements. Public organizations have already taken to challenging public safety measures in court, on the basis that the orders infringe on the rights enshrined under sections 2(a), 2(b), 2(c), 7, and 15 of the *Charter*.[101]

These Bills provide an illustrative example of the measures that are being taken by the Government of Manitoba to improve access to justice during the pandemic; they authorize a series of processes that can allow legal

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97 Bill 27, *The Administrative Tribunal Jurisdiction Act*, 3rd Sess, 4nd Leg, Manitoba, 2021 (assented to 20 May 2021).

98 *The Administrative Tribunal Jurisdiction Act*, SM 2021, c 28, s 2.

99 *Ibid*, ss 3, 4

100 David Said, "How regulatory agencies, not the courts, are imposing COVID-19 vaccine mandates" (24 October 2021), online: *The Conversation* <theconversation.com/how-regulatory-agencies-not-the-courts-are-imposing-covid-19-vaccine-mandates-169306> [perma.cc/5Q4G-ZVQJ].

101 *Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 219 at paras 6-7, 361-362; *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 ss 2(a), 2(b), 2(c), 7, 15.

processes to take place outside of court and lays the foundation for their application in formal judicial proceedings. Like the approval of various out-of-court measures by way of LGIC-issued regulation, the operationalization of measures to improve access to justice in processes that require formal adjudication must be declared in the Practice Directives and Notices of the Court of Queen's Bench, the Court of Appeal, and the Provincial Court. To meet these new expectations, leaders of the Provincial Court, Court of Queen's Bench and Court of Appeal unanimously issued new Practice Directions and Notices to update the procedural rules for participating in a hearing or other court process.[102] They published Notices that restricted physical court access to individuals whose presence was necessary for proceedings to occur. All who were permitted to attend court were required to meet standard pandemic safety protocols, such as wearing face masks, maintaining physical distancing and temperature screening.[103] To limit the number of people required to conduct a trial, jury trials were cancelled and rescheduled as a hearing by judge alone or delayed. Although the courts were closed to the public for a short period, processes were established to permit members of the public and the press media to virtually witness justice being done as a means of honouring the open court principle.[104] Aside from

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102 Chief Judge and Chief Justices of Manitoba, "COVID-19 – Manitoba Courts: Posted March 13, 2020", online: *Manitoba Court Notices* <www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/> [perma.cc/Q49E-8L92]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession & Notice to the Media – Re: COVID -19" (9 April 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_and_media_-_covid-19_-_april_9_2020.pdf> [perma.cc/942E-4MLW].

103 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession: Re Use of Masks" (7 September 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_-_use_of_masks_september_7_2020.pdf> [perma.cc/N3AL-MYZE]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession" (28 September 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_september_28_2020.pdf> [perma.cc/SY86-8UQN].

104 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Re Response from the Courts Relating to Recent Changes to Public Health Orders" (6 August 2021), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-

general guidelines, each level of court published their own Practice Directives to ensure that every court process would be compliant with the guidelines issued by the Manitoba CPPHO.[105] A common theme among these publications is an acknowledgement that access to justice has been diminished during the pandemic, and the solution to those issues is the authorization of audio/video-conferencing technology for mandatory trial processes or the use of administrative or alternative dispute resolution measures for less-pressing matters.

Although lawmakers and decision-makers within the justice system have implemented a series of processes to allow administrative and other less-serious and less-formal legal matters to proceed using audio-video conferencing technology, measures have not been put in place to allow serious formal proceedings to take place, like violent criminal offences.

VI. PART A – CONCLUSION

In Part A, we have thoroughly examined background motivations for and issues pertaining to the open court principle along with access-to-justice initiatives, informed by the work of leading scholars and jurists. We have also provided significant overview information about the COVID-19 response measures adopted in Manitoba. In Part B, we examine the pandemic response regarding serious criminal matters, specifically focusing on murder trials scheduled to take place during the midst of the pandemic. We proceed to detail the impact of the Manitoba courts' pandemic measures on the open court principle, access to justice, and *Charter* rights. We then provide four recommendations for addressing the concerns we identify in Part B, informed by the foundation we have outlined in Part A.

_response_of_the_courts_to_recent_changes_to_public_health_orders.pdf> [perma.cc/W4ZC-AFEL].

[105] Manitoba Court of Queen's Bench, "Court of Queen's Bench COVID-19 Notices and Practice Directions" (1 September 2021), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-queen-s-bench-covid-19-info/>[perma.cc/D3NH-7NH8]; Manitoba Court of Appeal, "Court of Appeal Court COVID-19 Notices and Practice Directions" (19 August 2021), online: *Manitoba Courts* <http://www.manitobacourts.mb.ca/covid-19/court-of-appeal-covid-19-information/> [perma.cc/EL4M-6TTK]; Manitoba Court of Appeal, "Court of Appeal Court COVID-19 Notices and Practice Directions" (31 August 2021), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-appeal-covid-19-information/> [perma.cc/ZFJ5-KSH7]

Part B
Drawing the Curtains in the House of Justice: Analyzing the Impact of Pandemic Measures within Manitoba Courts on the Open Court Principle, Access to Justice, and *Charter* Rights

SHAWN SINGH & BRANDON TRASK*

ABSTRACT

The authors have embarked on an extensive analysis of the open court principle, access to justice concerns, and how these have been impacted by the Manitoba courts' pandemic response measures. Due to the length of this analysis, it is divided into two parts, to be published as separate articles in the same Issue: Part A ("Setting the Stage") and Part B ("Drawing the Curtains in the House of Justice"). These papers are intended to be read in conjunction. In Part B, the authors apply the observations and recommendations of the federal Action Committee on Court Operations in Response to the Pandemic, discussed in Part A, to the pandemic-response approach taken in Manitoba to evaluate whether the measures achieved the access movement's objectives. Particular attention is paid to outcomes for

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individuals charged with murder, who are guaranteed the right to a jury trial under the *Charter of Rights and Freedoms*. The authors examine the various Practice Directions and Notices that were issued by the leaders of the court system to identify the subtle disregard for the *Charter* rights of these individuals. Informed by various reports, the authors offer four recommendations to improve the state's response to the pandemic, including on a prospective basis.

Keywords: Open Court Principle; Publicity; Access to Justice; Pandemic Measures; Pandemic Response; Court Digitalization; Court Technology; Pandemic Court Operations; Virtual Court; Manitoba Courts; Justice System Oversight; Judicial Accountability; Judicial Independence; Marginalization

I. INTRODUCTION

In Part A (*Setting the Stage*),[1] we outlined the importance of the open court principle and access to justice considerations. We also briefly summarized legislative, regulatory, and practice changes meant to facilitate continued access to justice—specifically, for ordinary administrative functions, civil matters, and less-serious criminal matters—in the face of pandemic concerns. In Part B, we examine the pandemic impacts regarding serious criminal matters—with a particular focus on murder charges—before Manitoba courts.

In Part B, first, we will examine the measures taken in Manitoba trial courts. To illustrate the connection of these measures to broader trends in criminal justice reform, we will return to the positions taken by the Right Honourable Beverley McLachlin and Judith Resnick, discussed in detail in Part A, to project their long-term effects, as well as to guide our recommendations to justice system decision-makers regarding state action that can address the most pressing challenges in access to justice. To start, we now turn to the law regarding murder charges, as well as their status as a s. 469 offence, where accused persons have a right to be tried by a jury of their peers.

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[1] See page 171 in this Issue.

II. Measuring Policy Effects Towards Formal In-Court Process

As noted in Part A, legislative amendments were made and judicial Practice Directions and Notices were issued to allow routine proceedings to continue amid the COVID-19 pandemic, as well as less-serious matters, using digital-technology options while public safety guidelines remained active. When contemplating these measures in the context of socio-economic marginalization, it becomes apparent that such measures act to the benefit of those with greater knowledge of navigating the legal system, who are typically the more affluent in society. In contrast, formal court proceedings involving violent offences have yet to benefit from the measures being taken to broaden access to justice. In considering the movement's interest in expanding access for Canada's marginalized populations this disparity is concerning, primarily because such populations are disproportionately affected by violent offences, both as victims and as accused persons. Law enforcement practices disproportionately create criminal outcomes for people of colour and economically disadvantaged individuals in Canada, particularly in Manitoba. For example, Indigenous peoples in Manitoba are statistically more likely to be arrested, charged, detained in custody without bail, convicted and imprisoned.[2] In a similar

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[2] See *Report of the Aboriginal Justice Inquiry*, Chapter 4 - Aboriginal Over-Representation (Manitoba: AJIC, 2001), online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/VX47-QN9Z] [*AJI*]; *Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995) at 309-311; Jillian Boyce, "Victimization of Aboriginal People in Canada, 2014." *Juristat: Canadian Centre for Justice Statistics* (June 28, 2016) online: <www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> [perma.cc/7SMM-AFE9] [*Boyce*]; Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, "Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta" (Edmonton: The Task Force, 1991) at 2-5, 2-46 to 2-51 [*Justice on Trial*].

Canadian Civil Liberties Association and Education Trust, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (July 2014), online (pdf): *CCLA* <ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf> [perma.cc/T6WN-XQMG] at 19; Ivan Zinger, "Annual Report of the Office of the Correctional Investigator 2019-2020 – 8. Indigenous Corrections", *Office of the Correctional Investigator* (26 June 2020), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20192020-eng.aspx#s10> [perma.cc/2VX2-V3X5] [CSC].

fashion, women, people of colour and the poor also suffer from higher rates of victimization in both property and violent crime.[3] Considering these realities along the access to justice movement's traditional objectives of improving the delivery of justice services for these communities, this section reviews the effect of pandemic response measures in murder proceedings for the accused, and for victims, as well as the processes that have been followed under the jurisprudence of Manitoba's courts. Our analysis focuses on the effects that recent policy changes have had towards the open court principle, as well as its impacts towards broader access to justice principles like publicity and judicial accountability.

Individuals charged with indictable offences (or hybrid offences, where the Crown elects to proceed by way of indictment) typically benefit from the right to elect their mode of trial under s.536(2) of the *Criminal Code*, but this election is not available for adults charged with murder because it is an exclusive jurisdiction offence under s. 469.[4] This means that such hearings presumptively proceed by way of a judge and jury trial in superior court.[5] In any case, an adult murder trial cannot proceed in provincial court.[6] While a trial by jury is presumed for murder charges, s. 473 permits an accused who is charged with a s. 469 offence to opt-out of a jury trial in favour of a trial by a superior court judge sitting alone, if consent is secured from the Crown along with the accused. If consent is secured from the Crown and the accused, subsection (2) removes the parties' ability to withdraw consent, meaning their decision is irrevocable, regardless of whether the accused has a change of heart.

Criminal justice processes like these were established to ensure procedural fairness is provided to individuals accused of serious charges, though upholding them has been a challenge during the pandemic. From the declaration of the Chief Provincial Public Health Officer (CPPHO)'s first COVID-19 Prevention Orders, public safety protocols limited access to any public process that required the gathering of individuals, including

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3 See Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," *Ontario Ministry of the Attorney General* (9 March 2017), online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> [perma.cc/EDZ4-X4QB] at 1-8, 36-40.

4 *Criminal Code*, RSC 1985, c C-46, s 536(2).

5 *Criminal Code*, *supra* note 11, s 471

6 *Ibid.*

court processes like jury trials that make use of members of the community to try the facts of the case.

Although Manitoba's courts limited formal proceedings that carried such requirements during the pandemic, internal procedures were established to allow hearings which made use of technology to proceed, such as civil matters that focused on the executions of oaths, affirmations, declarations, and affidavits, as well as other routine functions of the legal system. General court functioning rapidly resumed because court executives authorized the use of remote technologies, in partnership with elected officials; and were able to quickly do so because many of the necessary technologies were already in place. To these ends, the Chief Judge of the Provincial Court, the Chief Justice of the Court of Queen's Bench, and the Chief Justice of the Court of Appeal unanimously issued new Practice Directions and Notices to update the procedural rules regarding participation in trials, hearings, or other court process.[7]

To maintain public safety, Practice Directions and Notices were issued that strictly limited physical access to the courts to those that are required to attend. Aside from general guidelines, each level of court also published their own Practice Directives to ensure that every court process would be compliant with the guidelines issued by the Manitoba CPPHO.[8] These Directives established expectations regarding the use of personal protective equipment and acceptable behaviours in order to be granted continuing access, such as wearing face masks and maintaining physical distancing.[9]

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7 Chief Judge and Chief Justices of Manitoba, "COVID-19 – Manitoba Courts: Posted March 13, 2020", online: *Manitoba Court Notices* <www.manitobacourts.mb.ca/news/covid-19-manitoba-court-schedule-changes/> [perma.cc/P93F-QLB8]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession & Notice to the Media – Re: COVID -19" (9 April 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_and_media_-_covid-19_-_april_9_2020.pdf> [perma.cc/A7BE-SM2U].

8 Manitoba Court of Queen's Bench, "Court of Queen's Bench COVID-19 Notices and Practice Directions" (1 September 2021), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-queen-s-bench-covid-19-info/>[perma.cc/LG84-8WTR]; Manitoba Court of Appeal, "Court of Appeal Court COVID-19 Notices and Practice Directions" (last modified 1 March 2022), online: *Manitoba Courts* <www.manitobacourts.mb.ca/covid-19/court-of-appeal-covid-19-information/> [perma.cc/XF7X-SFMX].]

9 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession: Re Use of Masks" (7 September 2020), online (pdf):

Although the courts were completely closed for a short period, the processes established allowed formal hearings to proceed and allowed members of the public and the press media to attend to honour the open court principle.[10] While these measures were sufficient in providing confidence that COVID-19 would not be transmitted through the courts, processes that carried a higher expectation of public participation remained on hold; jury trials were cancelled and proceedings would go forward by judge-alone only, at least until jury processes could adequately be executed using audio-video conference or the pandemic came to an end.

While access to justice has generally broadened during the pandemic by way of remote access and digital delivery, the measures taken by Manitoba's courts appear to be at odds with the statutory expectations of those accused with murder as a s. 469 offence.[11] As previously noted, murder charges are presumptively tried by judge and jury, but the accused can consent to proceed as a judge-alone hearing, with the combined consent of the Crown under s. 473.[12] Proceeding under s. 473 offers the accused the option to be heard by a judge alone, but activation of this process requires their prior informed consent as the choice to do so cannot be withdrawn once the decision to proceed is accepted. In other words, the consequences regarding the outcome of the decision must be accepted by the accused once they accept a hearing by a superior court judge alone.

Section 11(f) of the *Charter* guarantees any person charged with an offence the benefit of a trial by jury where the maximum punishment for

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Manitoba Court Notices <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_the_profession_-_use_of_masks_september_7_2020.pdf> [perma.cc/VQG4-8CH4]; Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Notice to the Profession" (28 September 2020), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_september_28_2020.pdf> [perma.cc/H6AR-KGEW].

10 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Re Response from the Courts Relating to Recent Changes to Public Health Orders" (6 August 2021), online (pdf): *Manitoba Court Notices* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_response_of_the_courts_to_recent_changes_to_public_health_orders.pdf> [perma.cc/STF7-9JRJ].

11 *Criminal Code*, *supra* note 4.

12 *Criminal Code*, *supra* note 5.

the offence is imprisonment for five years or a more severe punishment.[13] In the context of Manitoba, the right to a trial before an impartial jury was most recently contested before Justice Bond in *R v Kon and Duke*.[14] This pre-pandemic trial involved a challenge to the federal repeal of s. 634 under 2019's Bill C-75, which eliminated peremptory challenges during the selection of jury members.[15] As part of Justice Bond's decision, it was confirmed that s. 11(f) of the *Charter* promotes fair and impartial trials, which acts to encourage public confidence in the administration of justice.[16] In a separate decision that followed *Kon and Duke*, the Supreme Court of Canada (SCC) considered the constitutionality of amendments to s. 634, as per Bill C-75. While confirming that the elimination of peremptory challenges is, in fact, constitutional, the *R v Chouhan* Court confirmed the value jury trials provided in encouraging public confidence in the sound administration of justice. [17] Although these decisions confirm the constitutionality of Parliament's decision to remove peremptory challenges to jury membership, they also confirm that the expectations set under s. 11(f) of the *Charter* provide valuable benefits to an accused, as well as to broader public expectations regarding confidence in the administration of justice in Canadian courts.[18]

Although individuals accused of murder are guaranteed the right to a jury trial under s. 11(f) of the *Charter* and its ensuing jurisprudence, the Practice Directions and Notices that were first issued by court executives may have persuaded accused individuals held in custody to consensually waive these rights under s. 473 because they would quite possibly be detained until they could be tried, as per s. 515(11).[19] This means that those accused of murder, along with other s. 469 offences, who had not obtained judicial interim release would have otherwise been detained in custody until

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

14 *R v Kon and Duke*, 2019 MBQB 161 [*Kon and Duke*].

15 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019, c 25 (assented to 2019 June 21).

16 *Kon and Duke*, *supra* note 14 at paras 8-9.

17 *R v Chouhan*, 2021 SCC 26 at paras 44, 47, 85 [*Chouhan*].

18 *Chouhan*, *supra* note 17 at paras 85; *R v Kokopenace*, 2015 SCC 28 at paras 61, 70 [*Kokopenace*].

19 *Criminal Code*, *supra* note 4 , s 515.

their right to a jury trial could be met. Said differently, those accused of murder, who had not obtained judicial interim release, would have been forced to remain in custody until jury trials could be facilitated using digital (or other) means, until the end of the pandemic, or until they relinquish their right to a jury trial; overall, this significantly served to heighten the accused's risk of contracting COVID-19 and, by extension, their risk of death or serious injury as a consequence of the disease while in custody.[20] Such exposure would consequently be a result of state decisions.

In line with other institutional measures to prevent disease transmission, justice system executives cautiously implemented measures that allow hearings to proceed while also minimizing the physical presence of individuals in attendance using audio-video technology, but such measures were not been extended to jury trials. Updates to court policies regarding admission and participation have focused on digitalizing routine civil matters and criminal proceedings of a less-serious nature, while suspending other hearings that are viewed as "unessential." Ultimately, the approach taken by the Manitoba Court of Queen's Bench (MBQB) and other levels of court claimed to prioritize the movement of lesser charges through court while remote systems or other alternatives were implemented to meet the constitutional expectations of individuals accused with serious charges like murder, as stipulated under s. 11(f).

The first Practice Directions that were issued by Manitoba's courts informed all stakeholders that in-custody hearings would be considered based on counsel's submissions to determine if the proceeding would be heard or if the accused would be released. While less urgent cases were adjourned in the beginning and subsequently scheduled using remote-access procedures, more serious cases that required adjudication by a jury were cancelled until they could be organized through digital means.[21] To

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20 See Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:4 Man LJ 145 at 162-170; Richard Warnica, "The Hidden Pandemic: Social Distancing is Nearly Impossible in Care Homes, Prisons and Shelters" (25 April 2020), online: *National Post* <nationalpost.com/news/canada/the-hidden-pandemic-social-distancing-is-nearly-impossible-in-carehomes-prisons-and-shelters> [perma.cc/PHY5-755Z]; John Ivison, "John Ivison: Prisoners are Sitting Ducks as Ottawa Lets COVID-19 Sweep through Canadian Jails" (21 April 2020), online: *National Post* <nationalpost.com/opinion/john-ivison-prisoners-are-sitting-ducks-as-ottawa-lets-covid-sweep-through-canadian-jails > [perma.cc/BK4F-T22F].

21 See Manitoba Court of Queen's Bench, " Notice Re: COVID-19 Suspension and Restriction of Hearings" (2 April 2020), online (pdf): *Court of Queen's Bench COVID-19*

ensure that members of the public were informed about the new process, all levels of court issued a unanimous Media Notice on May 4, 2020. Although the Notice declared that hearings would generally proceed using digital media, it also informed justice system stakeholders that all judge and jury trials that were scheduled prior to June 30, 2020, would instead proceed by way of judge-alone trial; if the accused disputed this approach, their hearing would be rescheduled when jury trials could safely be conducted, either with the end of the pandemic or the availability of new technological resources to achieve these ends.[22] Leading up to the publication of the May 4, 2020, Notice, the courts took a lenient approach to releasing non-violent offenders when counsel presents a reasonable argument or bail plan, but those charged with violent crimes in Manitoba often remained in custody until their matter could be adequately heard in the appropriate level of court.[23] Other jurisdictions, such as Ontario, chose to release many individuals on bail that were charged with violent crimes instead of increasing the number of detainees that are held in custody before trial during the pandemic, although such decisions have sometimes challenged public confidence in the administration of justice.[24]

Notices and Practice Directions <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_covid-19_suspension_and_restriction_of_hearings_2020_april_2.pdf> [perma.cc/CZ9D-3ECG]; Joe Scarpelli, "Coronavirus: Manitoba's courts preparing for backlog, experimenting with new technology" (31 March 2020), online: *Global News* <globalnews.ca/news/6756845/coronavirus-manitoba-courts-backlog-new-technology/> [perma.cc/56NR-E2D9?view-mode=server-side&type=image]; Manitoba Court of Queen's Bench, "Re: Notice of COVID-19 Suspension and Restriction of Hearings" (16 March 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1964/notice_-_provincial_court_-_covid-19_march_16_2020.pdf > [perma.cc/4PU6-F927].

22 Manitoba Court of Appeal, Manitoba Court of Queen's Bench & Manitoba Provincial Court, "Media Notice Re: COVID-19" (4 May 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_to_profession_-_may_4_20.pdf> [perma.cc/925R-CMQW].

23 See Will Reimer, "Manitoba's correctional centres making adjustments to prevent spread of COVID-19" (9 April 2020), online: *Global News* <globalnews.ca/news/6802835/manitoba-correctional-centres-adjustments-covid-19/> [perma.cc/F9D7-9F7B].

24 See Stewart Bell, "Canada: Judges release growing number accused of violent crimes due to COVID-19fears" (8 April 2020), online: *Global News*

Since the summer of 2020, subsequent scheduling notices reversed previous cancellations and expressed intentions to mandate the use of audio-video conferencing for all hearings except where oral testimony, or *viva voce* evidence, was being submitted.[25] As the severity of public health protocols ebbed and flowed, the courts limited the hearings that could proceed to those involving accused held in custody, but allowed other scheduled trials to proceed.[26] For example, a practice direction was issued on January 14, 2021, to inform members of the legal profession that MBQB would resume in-person judge-alone criminal trials commencing on February 1, 2021.[27] Even when judge-alone hearings for in-custody accused

<www.globalnews.ca/news/6788223/coronavirus-prisons-inmates-released/> [perma.cc/5GTY-JBFJ?view-mode=server-side&type=image].

25 See Manitoba Court of Queen's Bench, "Notice Re: Scheduling Protocols" (1 October 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_scheduling_protocols_october_1_2020-1.pdf> [perma.cc/5N9Q-LWKP].

26 See Hon Chief Justice Glenn Joyal, "Notice Re: Adjustments to Current Scheduling Protocols – November 16 to December 11, 2020" (10 November 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_november_16_to_december_11_2020_2020_nov_10.pdf> [perma.cc/4JZ8-HNTY]; Hon Chief Justice Glenn Joyal, "Notice Re: Adjustments to Current Scheduling Protocols – December 14, 2020 to January 8, 2021" (3 December 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <hwww.manitobacourts.mb.ca/site/assets/files/1966/notice_-_adjustments_to_current_scheduling_protocols_-_december_14_2020_to_january_8_2021_2020_dec_3__docx.pdf> [perma.cc/5X4S-8DDZ].

27 See Hon Chief Justice Glenn Joyal, "Practice Direction Re: Adjustments to Current Scheduling Protocols –January 11 to 29, 2021, Video Conference Civil Trials and the Continuation of other Remote Services" (18 December 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_adjustments_to_current_scheduling_protocols_-_january_11_-_29_2021_video_conference_civil_trials_and_the_continuation_of_other_remote_services.pdf> [perma.cc/RKE6-LSXL]; Hon Chief Justice Glenn Joyal, "Practice Direction Re: Resumption of Judge-Alone Out-of-Custody Criminal Trials" (14 January 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_resumption_of_judge-alone_out-of-custody_criminal_trials_docx.pdf> [perma.cc/GU8Z-36BS].

individuals were able to proceed, jury trials continued to be postponed until public health restrictions were virtually eliminated in summer 2021.

When the decision to use audio-videoconference technology became mandatory as a matter of court policy, Chief Justice Glenn Joyal of the MBQB recognized the obstacles the pandemic created for the delivery of justice services, and, in response, issued a sweeping Practice Direction that mandated the use of audio-videoconferences for all criminal proceedings in his courts.[28] Chief Justice Joyal made use of the MBQB's inherent jurisdiction to regulate its proceedings to ensure the proper administration of justice to mandate the application of s. 715.23 to all criminal proceedings in the MBQB for the duration of the pandemic. He explained that s. 715.23 of the *Criminal Code* authorizes the court to order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate in the circumstances. Such orders must be made with full consideration of the location and personal circumstances of the accused, the costs that would be incurred if the accused were to appear personally, the suitability of the location from where the accused will appear, the accused's right to a fair trial and public hearing, and the nature and seriousness of the offence.[29] Because Chief Justice Joyal's Practice Direction made s. 715.23 the formal policy of the MBQB during the pandemic, presiding judges who failed to order an accused to participate in their hearing by audioconference or videoconference were required to provide reasons to the Office of the Chief Justice, as per s. 715.23(2).[30] To provide clarity in terms of instances where such reasons would be acceptable, Chief Justice Joyal prescribed the procedures, presumptions, and relevant factors that would be considered when an accused submitted a request to postpone their trial until they could be heard in person. In essence, judges were expected to apply the process outlined in the Practice Direction in a principled sense to determine how the "proper

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28 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" (17 November 2020), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1966/practice_direction_-_criminal_trials_-_accused_s_remote_appearance_by_video_conference_2020_nov_17.pdf> [perma.cc/5TVD-9T6Q].

29 *Criminal Code*, *supra* note 4 , s 715.23(1).

30 *Ibid*, s 715.23(2).

administration of justice" can be addressed, while balancing the "colliding interests" or "rights in tension" that must also be respected between the accused, the Crown, and the administration of justice. For example, Chief Justice Joyal noted that concerns regarding delay in the delivery of justice highlighted in *R v Jordan* were important but must be balanced against the prejudicial implications of rescheduling the trial if the only reason for delay was the accused's refusal to participate in a video-conference.[31]

To justify his use of the court's inherent jurisdiction to implement s. 715.23 as a matter of institutional policy, Chief Justice Joyal reviewed the relevant jurisprudence regarding the inherent jurisdiction of superior courts. He explained that the justice system's fundamental objective is to deliver a fair trial to secure public confidence regarding the proper administration of justice. He cited Justice McLachlin, as she then was, who explained that a fair trial upholds the s. 7 *Charter* rights of the accused by ensuring that their guaranteed right to make full answer and defence is upheld. This does not require perfect justice, but rather a practical balancing of the limits of the justice system, the interests of other parties, and the rights of the accused.[32] Building from her conclusions regarding the scope of a fair trial, Chief Justice Joyal explained that superior courts retain powers of inherent jurisdiction to ensure that essential aspects of the administration of justice is upheld, including the court's ability to amendment its own processes to allow the system to function in a regular, orderly, and effective manner. While superior court executives benefit from the superior court's inherent jurisdictional powers in this regard, they remain limited by other statutory and constitutional considerations.[33] In the context of the pandemic, Chief Justice Joyal interpreted factors to mean that safeguarding the proper administration of justice requires action from the MBQB executive team to ensure that both access to and delivery of justice could continue using new methods that still achieve a fair and equitable

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31 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *R v Jordan*, 2016 SCC 27 [*Jordan*].

32 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28 ; *R v O'Connor*, [1995] 4 SCR 411 at para 193, 1995 CanLII 51.

33 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *R v Anderson*, 2014 SCC 41 at para 58; *R v Cunningham*, 2010 SCC 10 at para 18; *Endean v British Columbia*, 2016 SCC 42 at para 60.

trial result, with due consideration of the other competing interested that are involved in providing a fair trial.

With these consideration in mind, Chief Justice Joyal argued that the Court's processes must be revised to allow fairs trials to continue while the justice system is faced with the unprecedented challenges imposed by the pandemic.[34] He explained that adjournment and rescheduling was the only available avenue in the early stages of the pandemic for criminal trials, but that digital alternatives progressively allowed court processes like pre-trial conferences, resolution conferences, case management conferences, bails, bail reviews, motions, summary conviction appeals, and sentences to resume. Noting that the adjournment of criminal trials typically occurs in only the most exceptional cases, he proceeded to outline several new procedures and factors that would allow criminal trials to proceed, which would be applied in situations where an accused was unable to physically attend court during their trial, whether in whole or in part. These considerations were made to determine if their appearance using audio-videoconference would be appropriate, and therefore necessary, in their circumstances.

If an accused was not willing to attend their trial using digital means, this Practice Direction allows the Crown to submit an application to proceed by audio-videoconference under the authority of s.715.22 and 715.23 of the *Criminal Code*. The presiding judge would engage a principled consideration of the application, including prevailing pandemic conditions, the rights of the parties, and the greater objectives of achieving the proper administration of justice, such as providing a fair trial to the accused. Their consideration must involve a contextual approach to the factors that balance several "rights in tension," such as the accused's right to a trial within a reasonable time and their right to be present at their own hearing, as well as constitutional principles of judicial independence,[35] at least in terms of the Court's control over its operations, resources, and administration.

To underscore the merits of authorizing the court to mandate the hearing of criminal trials by audio-videoconference, despite the lack of consent from the accused, Chief Justice Joyal used the *Jordan* case to highlight that allowing adjournments on this basis holds prejudicial

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34 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28.

35 See *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 40-43.

implications to the Court's ability to properly administer justice, as well as to the other parties involved in the case.[36] Chief Justice Joyal asserted that unnecessary delays arising from unjustified or unpersuasive opposition, such as resistance to being heard using audio-videoconference technology, unduly prejudices the justice system's ability to adequately maintain public confidence in the administration of justice. To further justify the mandatory implementation of audio-videoconference under s.715.23 under the auspices of Parliamentary intention, Chief Justice Joyal made reference to the codification of such powers into the *Criminal Code*, which, in his view, was undoubtedly made to empower judges to make use of audio-videoconference technology when they became necessary in properly administrating the delivery of justice.[37] On the basis of this reasoning, Chief Justice Joyal issued his Practice Direction on November 17th, 2020.[38]

Although Chief Justice Joyal implemented these changes under the aforementioned Practice Direction, Manitoba's Court of Appeal chose to implement the same changes by way of regulatory amendment to *The Court of Appeal Rules*.[39] The rules were amended on April 17, 2020, to add s. 37.2 to the *Rules*, which empowers the court or a judge to issue a direction that a hearing of appeal, motion, or application would be conducted, in whole or in part, remotely by audioconference or videoconference.[40] Subsequent subsections of s. 37.2 outline several terms and conditions that must be

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36 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference" *supra* note 28; *Jordan*, *supra* note 31.

37 *Criminal Code*, *supra* note 4, s 715.23.

38 Hon Chief Justice Glenn Joyal, "Notice Court of Queen's Bench of Manitoba Re: Adjustments to Current Scheduling Protocols – January 10 to March 4, 2022, for the Courts of Queen's Bench General and Family Divisions" (24 December 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1994/qb_notice_-_adjustments_to_current_scheduling_protocols_-_jan_10_to_mar_4_2022_for_the_court_of_queen_s_bench_gd_and_fd_2021_dec_24.pdf> [perma.cc/2NZN-PK8A]; Hon Chief Judge Margaret Wiebe, "Notice Provincial Court of Manitoba Re: COVID-19 Suspension and Restriction of Hearings" (23 December 2021), online (pdf): *Provincial Court COVID-19 Notices and Practice Directions* <www.manitobacourts.mb.ca/site/assets/files/1993/notice_77_-_provincial_court_-_covid-19_-_suspension_and_restriction_of_hearings_december_23_2021_-_e.pdf> [perma.cc/62VH-JF7N].

39 Man Reg 32/2020, s 2; Man Reg 555/88 R, s 37.2 [*Court of Appeal Rules*]; *The Court of Appeal Act*, RSM 1987, c C240, ss 33–35, 38.

40 *Court of Appeal Rules*, *supra* note 39.

upheld when conducting matters remotely, such as prohibitions on private recordings of court proceedings, as well as new operational requirements like the court's power to retain a permanent recording of the hearing. The approach taken by Chief Justice Richard Chartier was arguably more expeditious and provides a greater degree of certainty for parties to an action, but making such amendments to the *Court of Appeal Rules* was only possible because s. 33 of the *Court of Appeal Act* does not contain the comparable limits to its equivalents under *The Court of Queen's Bench Act* and *The Provincial Court Act.* Section 33 of *The Court of Appeal Act* permits judges of the Court to unilaterally make rules regarding the practice and procedure of the court, including alteration of substantive law, such as: rules respecting the Court's proceedings, specific cases that receive leave to appeal, establishing tariff of costs for services, forms that are required for court proceedings, and authorizing the registrar to act towards any process that falls under the court's jurisdiction.[41] In contrast to the Court of Appeal's broad rule-making powers, s. 92 of *The Court of Queen's Bench Act* permits the rules committee to make rules regarding their practices and procedures, in consultation with the Minister of Justice, subject to 28 limiting subsections, most relevant of which are limits against changes to the mode and conduct of trials under subsection 92(s).[42] *The Provincial Court Act* does not authorize the Provincial Court to make rules regarding their practices and procedures, but rather leaves these decisions to the Lieutenant-Governor-In-Council (LGIC), or, in other words, the legislative cabinet.[43] Considering the differences between the rule-making powers of Manitoba's courts, it is clear that issuing unilateral rule changes as was done at the Court of Appeal was not an available option for the MBQB and the Provincial Court, which necessitated the use of Practice Directions and Notices and the extensive justification process that Chief Justice Joyal undertook above. In the view of the authors, these powers are not available to trial courts to hold judges accountable in making significant changes to trial operations, as stipulated in s.92 of *The Court of Queen's Bench Act* and s.26.9 of *The Provincial Court Act.* This Practice Direction could have the effect of masking an erosion of judicial accountability for the duration of the implementation of pandemic-related public safety measures.

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41 *The Court of Appeal Act*, *supra* note 39, ss 33, 35.

42 *The Court of Queen's Bench Act*, CCSM c C280, ss 92, 92(s), 92(2).

43 *The Provincial Court Act*, CCSM c C275, s 26.9.

The Practice Directions and Notices issued by the MBQB therefore established the operative framework for trial operations during the pandemic, including the processes involved with trials involving charges of murder and decisions by a jury. The applicable rules in this regard were carried forward from the start of the pandemic: the courts postponed the hearing of jury trials until adequate audio-videoconference technologies were available or public safety measures would allow such gatherings to take place. Digital alternatives to in-person jury trials have not been put in place, but some cases have proceeded when public safety guidelines were lifted. Of the 48 cases related to murder charges that were heard from the start of the pandemic, only two MBQB decisions indicated intentions to schedule proceedings before a jury[44] and no reported decisions from the Manitoba Court of Appeal referenced a jury trial having taken place during the pandemic in the MBQB. Although two jury trials were presumptively scheduled in the MBQB, eight decisions were rendered at that level of court regarding charges murder, all of which were heard by a judge sitting alone.[45] (As well, there were seven Court of Appeal decisions related to murder cases during this time.[46]) As part of our research into murder jury trials in Manitoba during the pandemic period, two jury trial decisions were reported in the media in the last quarter of 2021.[47]

In line with the Government of Manitoba's #RestartMB Pandemic Response System plans for summer 2021, the two MBQB decisions that referred to jury trials were issued at a time that public safety measures were

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44 See *R v B (HEJE)*, 2021 MBQB 223 at paras 1–3, 39 [*B (HEJE)*]; *R v Jensen*, 2021 MBQB 139 at paras 1–4, 92–93 [*Jensen*].

45 See *R v Ducharme*, 2020 MBQB 177; *R v Moar*, 2021 MBQB 9; *R v Belyk*, 2021 MBQB 12; *R v Assi*, 2021 MBQB 36; *R v Weldekidan*, 2021 MBQB 164; *R v Williams*, 2021 MBQB 205; *R v McKay*, 2021 MBQB; *R v King and Laquette*, 2021 MBQB 274.

46 See *R v Kionke*, 2020 MBCA 32; *R v Castel*, 2020 MBCA 41; *R v Miles*, 2020 MBCA 45; *R v Overby*, 2020 MBCA 121; *R v Telfer*, 2021 MBCA 38; *R v Schuff*, 2021 MBCA 54; R v Linklater, 2021 MBCA 65.

47 See Shane Magee, "Rodney Levi inquest jury deliberates on cause of death, possible recommendations" (7 October 2021), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/rodney-levi-inquest-jury-1.6202896> [perma.cc/PPQ8-X2WR]; Riley Laychuk, "Brandon man found guilty of murdering his wife before 2019 house explosion" (10 December 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/robert-hughes-trial-brandon-deliberations-friday-1.6280653> [perma.cc/T3S6-U4Y5]. Please note that it is possible additional jury trial proceeded during the pandemic but were not reported publicly.

being lifted for vaccinated individuals.[48] All signs indicated that public institutions would be able to hold indoor gatherings as they had before the pandemic, as long as all members were vaccinated, so Manitoba's courts prepared to resume proceedings involving trial by jury. The first case the authors discovered where a trial by jury was scheduled was *R v Jensen*.[49]

In that case, the accused was charged with first degree murder of his girlfriend's young child. The couple lived together in a rented house shared with another family with teenage children. On October 29, 2019, the two parent-couples went out together and the teenagers babysat the toddler. While the parents were out at the Northern Hotel, the accused and the toddler's mother argued throughout the night; he later assaulted the mother outside of the hotel until bystanders intervened. Local video surveillance captured the accused walking home, where he was let in by one of the teenagers. He told the babysitter that he wanted to check on the child, proceeded to do so, then promptly left the residence at a running pace. The teenagers later discovered that the child was bleeding and called 911. He was taken to the Children's Hospital, where he was put on life support; he died several days later from brain damage that resulted from severe blood loss caused by six stab wounds to his head and neck.[50] Justice Remple considered the issue of whether the video surveillance evidence of the accused's assault of the child's mother and his previous threats to take the child admissible at trial. The issue was answered in the affirmative, meaning the evidence was taken forward for consideration of the jury at a trial that was scheduled for September 2021.[51] Brittany Hobson from *The Canadian Press* reported that the accused, Daniel Jensen, was ultimately found guilty of first-degree murder.[52] Hobson reported on the details of the case, which

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48 Government of Manitoba, "News Release: Province Continues State of Emergency Extension" (25 June 2021), online: <news.gov.mb.ca/news/index.html?item=51495&posted=2021-06-25> [perma.cc/7DY8-4E3L]; Christian Monnin, Dany Théberge & Christine Jeroski, "MB Caution (Yellow): Province Announces New Public Health Measures" (29 October 2021), online: *MLT Aikins COVID-19* <www.mltaikins.com/covid-19/mb-health-regions-caution-yellow-level/> [perma.cc/4J5V-CUWH].

49 *Jensen*, *supra* note 44.

50 *Ibid* at paras 5-12.

51 *Ibid* at paras 1-4, 13, 92-93.

52 Brittany Hobson, "Jury finds Daniel Jensen guilty of murder in stabbing of 3-year-old Hunter Straight-Smith" (29 September 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/daniel-jensen-murder-trial-verdict-1.6194081>

focused on the evidence that was admitted by Justice Remple. Prosecutors explained to the jury that Jensen fought violently with the child's mother throughout the night and became markedly upset after being informed that she would be leaving him to move northeast of Winnipeg. Video surveillance footage demonstrated the scope and scale of his assaultive behaviour, as well as his departure from the hotel. Based on this evidence, the prosecution told the jury that Jensen wanted to hurt the mother in the most "cruel and permanent" way possible by taking her only child. It was inferred that he stabbed the toddler before fleeing the house, which was corroborated with the child's blood that was recovered from Jensen's clothing. The jury convicted the accused with first-degree murder, which carries a life sentence with no chance of parole for 25 years.

The second case the authors located involved a trial by jury was for an Indigenous youth that was found guilty on two counts of second-degree murder that took place at a house party in Bloodvein, Manitoba, on January 30, 2019. The accused was 16 at the time of his offences and was held in custody until April 2021, where the Crown applied under s.64 of the *Youth Criminal Justice Act* for his sentencing as an adult.[53] The jury found him guilty on both murder charges on April 16, 2021; Justice Kroft considered the Crown's application on October 28, 2021, before his sentencing hearing.[54] He considered the evidence against the criteria defined under s.72(1) of the *YCJA* to determine whether an adult sentence would be appropriate. The provision explains that a youth court justice will impose an adult sentence if they are satisfied that the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and that a youth sentence would not be of sufficient length to hold the young person accountable for their offending behaviour, with due consideration of the purpose and principles set out in s. 3(1)(b)(ii) and s. 38, such as fair and proportionate accountability using just sanctions that have meaningful consequences.[55] Based on the evidence, the personal circumstances of the accused, and the arguments put forward by the Crown, Justice Kroft was

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[perma.cc/G8U2-LGN7]; Ian Froese, "Winnipeg man accused of killing 3-year-old boy wanted to hurt mother in the cruellest way, court told" (13 September 2021), online: *CBC News Manitoba* <www.cbc.ca/news/canada/manitoba/daniel-jensen-2nd-degree-murder-trial-wfpcbc-cbc-1.6172712> [perma.cc/PRN3-PFJL].

53 *Youth Criminal Justice Act*, SC 2002, c 1, s 64 [YCJA].

54 *B (HEJE)*, *supra* note 44 at paras 1-3.

55 YCJA, *supra* note 53 ss 72(1), 3(1)(b)(ii), 38.

satisfied that the Crown rebutted the presumption of diminished moral blameworthiness of HB and agreed with their arguments that an adult sentence would be most appropriate[56]. On this basis, Justice Kroft granted the Crown's application for an order that the accused be sentenced as an adult, meaning that he would serve a life sentence of imprisonment with no chance of parole for at least seven years.[57] While the details of HB's jury trial were not fully discussed as part of Justice Kroft's judgment, Dean Pritchard from the *Winnipeg Free Press* shared his observations of the jury trial on April 7, 2021.[58] The jury was told about one fatality caused by four critical stab wounds to the victim's chest and neck, as well as the death of the second victim as a result of 21 stab wounds in separate areas around their body. The accused plead not guilty to his two charges of second-degree murder, based on a self-defence claim. The brawlers came together at a Bloodvein house party, where they were drinking before an altercation arose. Several partygoers witnessed the fight and one witness saw the accused leaving while covered in blood. RCMP were called and two officers attended the scene around 4 am. They found the two victims alone and clearly deceased at the back porch of the residence. The RCMP major crimes unit investigated the following day and came to suspect the accused as the perpetrator; he was arrested later that day. Although the major crimes unit could not be certain, they suspected that methamphetamines played a key part in the altercation and subsequent killing. At Pritchard's time of writing, the trial was scheduled to proceed for another two weeks, but the Crown was confident of its ability to demonstrate the guilt of the accused beyond a reasonable doubt. Pritchard also wrote an article in follow up to Justice Kroft's decision on November 2, 2021, which provided greater detail about the offender and the incident that took place in Bloodvein.[59] The reports used in reaching his sentence revealed that the offender was entrenched in a gang life and

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56 *B (HEJE)*, *supra* 44 at paras 6-25, 26–38.

57 *Ibid* at para 39.

58 Dean Pritchard, "Murder trial for 2019 Bloodvein stabbing deaths gets underway" (7 April 2021), online: *Winnipeg Free Press* <www.winnipegfreepress.com/local/murder-trial-for-2019-bloodvein-stabbing-deaths-gets-underway-574151762.html> [perma.cc/5GNW-F7HF?view-mode=server-side&type=image].

59 Dean Pritchard, "Adult sentence for teenage gangster in Bloodvein slayings" (2 November 2021), online: *Winnipeg Free Press* <www.winnipegfreepress.com/local/adult-sentence-for-teenage-gangster-in-bloodvein-slayings-575662932.html> [perma.cc/SW5Y-TDFG?view-mode=server-side&type=image].

that he was at a very high risk of re-offending. While awaiting trial in custody, the offender planned an assault on another youth and tried to escape. Testimonials at trial explained that the victims arrived at the party uninvited and proceeded to bully the offender, and one notable witness attempted to ally with the accused by claiming that they were, in fact, the killer. Pritchard explained the Crown's theory that the offender stabbed the first victim four times in the chest and neck, then proceeded to the second, who tried to defend himself with a window frame. His attempt was unsuccessful: the offender continued to stab him 21 times, where the last laceration embedded the knife into his ear. Evidence showed that the offender was drinking and under the influence of drugs but was aware of his actions. He sent several text messages to others at the party to indicate that it was "them or me." In the view of the Crown, the severity of the accused's attack and his subsequent behaviour demonstrated that he was not defending himself but rather proceeded with substantiated intent to kill. The accused's counsel claimed that the offender was scared for his life and acted in response to that fear, in addition to the influences of alcohol, cocaine, and methamphetamines. Justice Kroft agreed with the Crown, which meant that the jury's finding of guilt regarding the two murder charges would proceed for an adult sentence of life in prison with no chance of parole for at least seven years.

Reporters like Dean Pritchard and Brittany Hobson were able to report the details of these cases and others because the Chief Justice of the Court of Queen's Bench and the Chief Judge of the Provincial Court issued Practice Directions and Notices to permit their attendance, via audio-videoconference when public safety guidelines were strict and subsequently in person when they were lifted. For example, Chief Justice Joyal issued a February 26, 2021, Notice that outlined governing expectations for public attendees at virtual court hearings, which expressed intentions of honouring the open-court principle as soon as reasonably possible, with a view to restore public participation to its former pre-pandemic glory.[60] Under the February Notice, members of the public could also request to attend virtual hearings being held at the Winnipeg Judicial Centre by contacting the clerk

[60] Hon Chief Justice Glenn Joyal, "Notice Re: Public Viewing/Attendance at Virtual Hearings" (26 February 2021), online (pdf): *Court of Queen's Bench COVID-19 Notices and Practice Directions*: <www.manitobacourts.mb.ca/site/assets/files/1994/notice_-_public_viewing_-_attendance_at_virtual_hearings_2021_feb_26.pdf> [perma.cc/3DHD-UH2C].

registry by email at least two business days prior to the hearing date of interest and sharing their personal information to confirm their request, such as their contact information, relevant file numbers, the nature of the hearing, and other miscellaneous identifying data regarding the case they would like to attend. The Notice also outlined several criteria that must be adhered to by public attendees when viewing a hearing by video conference, as well as for hearing conducted by teleconference. In addition to routine check-in protocols, the Notice prohibited dissemination of videoconference contents or teleconference details in any published manner. Importantly, this meant that members of the public were not permitted to discuss the case in a digital medium, like Twitter or other social media platforms, because doing so would constitute *de facto* publication of such information by virtue of its written form and public form of dissemination.

Considering the cumulative effect of the Practice Directions and Notices that were issued during the pandemic in the context of jury trials for charges of murder, it is clear that the s. 11(f) rights of accused were not being met in Manitoba's courts. While it is outside the scope of our discussion here, such extended delays in custody also implicate the rights these individuals hold to be tried within a reasonable time under s.11(b) of the *Charter*.[61] In similar fashion to the selective ignorance taken towards the right to be heard by a jury under s. 11(f), Manitoba's courts claim that delays caused by COVID-19 are not included in delay calculations under the SCC's *Jordan* framework because it "represents a discrete event which could not have been reasonably avoided."[62] Notably, other jurisdictions have chosen to respect the *Charter* expectations of individuals accused of violent crimes by releasing them until the justice system could reasonably meet their processing expectations or by constructing specially designed jury-trial facilities to allow for socially distanced jury trials during the pandemic.[63] In

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61 *Charter*, *supra* note 13, s 11(b).

62 *Jordan*, *supra* note 32 at para 105; *R v KCCF*, 2021 MBQB 253 at paras 2-5.

63 See Stewart Bell, "Canada: Judges release growing number accused of violent crimes due to COVID-19 fears" (8 April 2020), online: *Global News* <www.globalnews.ca/news/6788223/coronavirus-prisons-inmates-released/> [perma.cc/XM5W-7THM?view-mode=server-side&type=image]; Government of Nova Scotia, "First Purpose-Built COVID-19 Compliant Courthouse Opens" (30 March 2021), online: Government of Nova Scotia <https://novascotia.ca/news/release/?id=20210330004> [https://perma.cc/6UZS-NYWT].

essence, the policies and decisions of Manitoba's courts allowed individuals charged with violent offences like murder to languish in custody while public safety guidelines were in place, regardless of the rights they are guaranteed under the *Charter of Rights and Freedoms*.

Adding to the justice system's inability to recognize these rights, the commitment to the open court principle was also tenuous at best, when considering the traditional tenets the principle intends to uphold. Court policies were established to allow reporters and members of the media to observe justice being done, but many individuals were only granted access to virtual hearings after public safety guidelines were in place for nearly a year. Public observers were only permitted when they registered well in advance and know specific details about the case they would like to observe, understand how to navigate the necessary virtual technologies, and respect the heightened security rules involved with being present. Perhaps most importantly, members of the public were not permitted to disseminate their observations in any method that can be considered publication, which includes social media posts on platforms like Twitter and Facebook. These limits fly in the face of the fundamentals of Jeremy Bentham's publicity, which, in his view, serves as the bedrock of holding justice system decision-makers accountable.

This section has provided a fulsome review of the legal response measures put in place in Manitoba's justice system to allow the administration of justice to proceed during the pandemic. New processes were quickly put in place to allow routine and non-violent proceedings to continue almost immediately after public safety measures were put in place, which allowed most legal matters to proceed as needed. While that is the case, proceedings involving charges for violent offences were put on hold until, in most cases, the accused relinquished their entitlement to a trial by a jury of their peers. Policies were also implemented to eliminate the state's obligation to provide their hearings within a reasonable time, because the pandemic could not be reasonably avoided. Although their reasons for doing so express remorse that alternatives are not available to the justice system to meet these expectations, examination of the measures taken to allow routine proceedings to take place reveals that the real issue is the level of investment required to facilitate juror participation by digital means. Rather than make investments in the necessary infrastructure over the two years of the public safety crisis, justice system executives have simply chosen to wait until the risks associated with the pandemic largely dissipated before

delivering jury trials for those charged with murder and doing so within reasonable time, despite the risk to the personal security of accused held in custody[64] and the *Charter* implications involved. Considering the disparity between the justice system's approach and the rights that are guaranteed to the effected accused, the following analysis considers the Canadian Bar Association's review of access to justice during the pandemic, with particular focus on the open court principle.

III. Access to Justice – Canadian Bar Association

To monitor immediate and evolving problems regarding the delivery of legal services during the pandemic, the Canadian Bar Association (CBA) established its Task Force on Justice Issues Arising from COVID-19 ("Task Force"). This Task Force's mandate was to report on justice system changes and offer recommendations on how courts, tribunals, and other dispute resolution processes could change methods of service delivery to meet stakeholder needs during and after the pandemic.[65] Following consultation with CBA internal membership and external stakeholders in the justice sector, the Task Force published *No Turning Back*, an analytical report that builds on previous CBA initiatives that prioritize a wide-scale expansion of legal service delivery through justice system reform.[66] Its report recognized that commonwealth jurisdictions, including Manitoba, have adopted the

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64 See Valérie Ouellet & Joseph Loiero, "COVID-19 taking a toll in prisons, with high infection rates, CBC News analysis shows", CBC Investigates (17 July 2020), online: <www.cbc.ca/news/canada/prisons-jails-inmatescovid-19-1.5652470> [perma.cc/7QSU-DK72].

65 Canadian Bar Association, "No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19" (Ottawa: Canadian Bar Association, February 2021), online (pdf); <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf> [perma.cc/924F-H7MP] [CBA, "No Turning Back"].

66 Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act – Equal Justice: Balancing the Scales" (Ottawa: Canadian Bar Association, August 2013) at 60, online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf > [perma.cc/M8N8-6NJ4] [CBA, "Reaching Equal Justice"]; Canadian Bar Association Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada" (14 August 2014), online(pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf> [perma.cc/UDU5-8Y43].

use of audio/video conferencing, virtual hearings, online dispute resolution mechanisms, and other emerging technologies to continue delivering judgments in courts, administrative tribunals, mediations, arbitrations, and other forms of adjudication.[67] Respondents told the Task Force that these measures were successful in the context of access to justice: remote proceedings were especially effective for appeals, simpler matters, and those with lower monetary values at stake. Feedback also highlights the benefits of removing travel and associated financial burdens that are typically bundled to accessing justice services. Court e-filing systems, authorization to remotely witness or commission important documents, and virtual fee payment portals were all reported as major improvements in every jurisdiction.

The significance of these improvements for majoritarian populations cannot be understated. Be that as it may, Task Force respondents also expressed several concerns that prejudice the ability of justice system users to effectively access satisfactory outcomes, particularly in criminal proceedings.[68] The report emphasised the heightened level of digital complexity that court proceedings now involve, which can make routine functions like participating as a party or being called as a witness much more difficult. Respondents indicated that counsel often struggled to support their clients through technological means and were prevented from supporting them in person by public safety guidelines. In addition to this, counsel commonly argued that assessing credibility was particularly challenging using online means, as opposed to being with the subject in person. Beyond the issues that digital participation presents in formal proceedings, accused persons regularly benefit from the informal supports that counsel provides while attending in person, such as walking to the prisoners' dock for a discrete conversation. Remote proceedings remove many, if not all, opportunities for informal interaction, which respondents found to be a barrier to building trust and, ultimately, providing effective counsel to their client.

In essence, *No Turning Back* illustrates that pandemic response measures have been effective at broadening access to justice services but fail to sufficiently address operational access issues like supporting users who lack digital literacy, connecting users with adequate legal assistance and funding, or addressing the myriad opportunities for personal and structural biases to

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67 CBA, "No Turning Back," *supra* note 65 at 6-8.

68 *Ibid* at 9.

affect justice outcomes. With these shortfalls in mind, the CBA calls for greater state investment to address the rising demand for legal services by creating the necessary infrastructure to help litigants navigate the system in ways that are accessible and understandable to the user.[69] By providing users with timely and relevant assistance, they are more likely to achieve resolution of their issues and can resume normal life, as opposed to becoming an extended burden on other government systems. By adequately resourcing support organizations like Legal Aid with digital and human assets, individuals facing literacy barriers can meaningfully access and participate in the justice system.

The Task Force highlights that marginalized communities are often the most affected by literacy barriers and these challenges are exacerbated with new procedural requirements that are now necessary to deliver justice digitally.[70] Heightening these concerns is the fact that many courthouses and registries were closed or had significantly limited access due to public safety reasons, which prevented individuals who cannot make effective use of technology from access the help they need to obtain legal information. To address these issues, the Task Force recommends greater state resourcing for technological support; funding that can be realized as operational efficiencies are created with the comprehensive implementation of digital justice processes. Doing so can empower disadvantaged individuals to access the justice outcomes they need.[71]

A key challenge of implementing support initiatives of this nature is creating delivery spaces and methods that are sufficiently accessible and are not an additional burden on public resources. Community Legal Education Ontario (CLEO) identified this barrier in *Community Justice Help*, a discussion paper that advocates for a collaborative approach to delivering justice services that leverages existing community organizations that are

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69 *Ibid* at 19 CBA, "Reaching Equal Justice," *supra* note 66.

70 See Joe McIntyre, Anna Olinyk, & Kieran Pender, "Civil Courts and COVID-19: Challenges and Opportunities in Australia" (May 2020) Alt LJ, online (pdf): <auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/> [perma.cc/VQX4-GR7G].

71 See HM Courts and Tribunal Service, "HMCTS online event, 15 July 2020: Use of remote hearings to maintain justice during the coronavirus outbreak" (15 July 2020), online (video): <www.gov.uk/guidance/hmcts-online-event-15-july-2020-use-of-remote-hearings-to-maintain-justice-during-the-coronavirus-outbreak> [HM Courts].

already providing assistance to disadvantaged individuals at no cost.[72] Julie Matthews' and David Wiseman's research confirmed that social disadvantage increases the risk and prevalence of experiencing legal problems, as well as the demand for legal assistance from non-legal community organizations.[73] Respondents to Matthews' and Wiseman's study indicated a common interest in receiving combined community services in a central location that could address both legal and non-legal issues in one place. Although Matthews and Wiseman conducted their research prior to the pandemic, they argued that collaborating with the community service sector can broaden access to the justice ecosystem, build into already existing relationships of trust and knowledge, and make better use of already allocated funding for justice system operations. In their view, people should be able to access justice services without the formality of trial. Rather, system processes should be aligned with the needs and capacities of users to ensure that outcomes meet their expectations and allow them to move on.[74]

Perhaps the most significant pitfall that has yet to be addressed in justice system reforms is the prejudicial risk that remote justice delivery presents in terms of individual and structural biases. Cognitive biases have plagued criminal justice system operations consistently and hold potential to exponentially disadvantage marginalized communities if applied using technologies like artificial intelligence and algorithmic decision-assistance.

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72 Julie Matthews & David Wiseman, "Community Justice Help: Advancing Community Based Access to Justice" (Toronto: Community Legal Education Ontario, June 2020), online (pdf): <cleoconnect.ca/wp-content/uploads/2020/07/Community-Justice-Help-Advancing-Community-Based-Access-to-Justice_discussion-paper-July-2020.pdf> [perma.cc/JJV9-59B3] [Matthews & Wiseman].

73 A Currie, "Nudging the Paradigm Shift, Everyday Legal Problems in Canada" (Canadian Forum on Civil Justice, 2016), online (pdf): <cfcj-fcjc.org/sites/default/files/publications/reports/Nudging%20the%20Paradigm%20Shift%2C%20Everyday%20Legal%20Problems%20in%20Canada%20-%20Ab%20Currie.pdf> [perma.cc/66U8-99C4] at 7-15 [Currie]; Trevor C W Farrow at al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (Toronto: Canadian Forum on Civil Justice, 2016) online (pdf): <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [perma.cc/KKQ8-WMCY] [Farrow].

74 See R Engler, "Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners" in M J Trebilcock, Lorne Sossin & A J Duggan, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 145 at 171; Matthews & Wiseman, *supra* note at 29-31.

To these ends, Bruce MacFarlane expressed grave concerns regarding the operations of cognitive bias in the justice system and its prejudicial effects for marginalized individuals. As one of Canada's leading scholars on the effect of bias on criminal justice outcomes, MacFarlane's literature continues to inform federal and provincial governments about the factors that can predispose biased operations, how they are used by actors within the system, as well as methods that can interrupt and limit functioning in the adjudication of law. Canadian governments have made use of MacFarlane's research in several reports regarding inquiries into wrongful conviction, which found that cognitive biases hold serious implications for the administration of justice across the country.[75] He defines cognitive bias as a psychological process that causes an individual to unconsciously select information that supports preferred conclusions while procedurally eliminating alternatives.[76] MacFarlane's research focused on sensationalized cases of wrongful conviction, which led him to conclude that cognitive biases can layer between actors in the justice system through information sharing and, in some cases, can taint the operations of entire teams as they accept the observations of their colleagues. [77] In similar fashion, Kate Robertson, Cynthia Khoo and Yolanda Song explain that biases of this nature can be built into the processes and outputs of algorithmic systems

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75 See *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, (Ottawa: Public Prosecution Service of Canada, 2019), online: <www.ppsc-sppc.gc.ca/eng/pub/is-ip/toc-tdm.html> [perma.cc/6Z4R-2UJW]; Bruce A MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* (Ontario: Ministry of the Attorney General: 2008), online: <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf> [perma.cc/WF8V-ASR5] [MacFarlane, *Tunnel Vision*]; Bruce A MacFarlane, "Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting" (2014) 47:2 UBC L Rev 597 at 597 [MacFarlane, "Shifting Sands"]; Bruce A MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403 at 403.

76 See MacFarlane, *Tunnel Vision*, *supra* note 75; MacFarlane, "Shifting Sands," *supra* note 75; Keith A Findley, "Tunnel Vision" in Bryan Cutler, ed, *Conviction of the Innocent: Lessons from Psychological Research*, 2nd ed (Washington, DC: APA Press, 2010).

77 See Keith A Findley & Michael S Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) Wis Law Rev 291 at 309; MacFarlane, *Tunnel Vision*, *supra* note 75 at 20–26; "Lawyer defends use of informant in Sophonow inquiry", *CBC News* (8 May 2001), online: <www.cbc.ca/news/canada/lawyer-defends-use-of-informant-in-sophonow-inquiry-1.257920> [perma.cc/TJD5-7FPM].

like artificial intelligence while remaining unseen by decision-makers in the criminal justice system. Algorithmically trained decision-supplementation systems present a prime opportunity for systemic biases to taint output results because of the technology's primary reliance on historical policing information, the "black-box" approach to generating its recommendations, and the lack of meaningful accountability measures in existing software. In other words, the system unilaterally generates output recommendations using self-generated formulas and methods, which are based on historical policing information; case details that the criminological literature tells us is rife with structural bias against marginalized groups like Indigenous communities, people of colour, women, and the poor. The recommendations generated by algorithmic systems are used by frontline officers to justify decisions to intervene with persons of interest, whether that suspicion is validly informed or not, all without active oversight mechanisms to ensure that recommendations are respecting the rights of such persons.[78] To these ends, Kate Robertson and her colleagues at Citizen Lab remark, "If systemic biases permeate data sets that are produced in Canada's criminal justice system, these biases may become embedded in and perpetuated by (algorithmic systems) to the further detriment of individuals and communities that have been the subject of historic discrimination."[79]

These observations are shared by the Task Force, which considers the implementation of algorithmic decision-making systems in the American criminal justice system. The Task Force explains that such processes carry serious implications for access to justice because they hold the potential to entrench and perpetuate discriminatory outcomes for the marginalized. Remarkably, Robertson, Khoo and Song note that algorithmic systems can already write like humans and will likely begin passing judgment in criminal justice settings soon.[80] Considering these risks, the Task Force echoes these recommendations to insist that measures be taken to build more inclusive

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78 Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (1 September 2020) at 31-32, online (pdf): *Citizen Lab: Transparency and Accountability in Research* <citizenlab.ca/wp-content/uploads/2020/09/To-Surveil and-Predict.pdf> [perma.cc/P6QX-MR39] [Robertson, Khoo & Song].

79 *Ibid* at 15.

80 Jared Council, "AI Can Almost Write Like a Human – And More Advances Are Coming" (11 August 2020), online: *Wall Street Journal* < www.wsj.com/articles/ai-can-almost-write-like-a-humanand-more-advances-are-coming-11597150800> [perma.cc/5C7J-NHEF]; CBA, "No Turning Back," *supra* note 65 at 16-17.

oversight structures in these technologies to ensure that marginalized communities are not left behind in during the digital transition.[81]

With the recommendations put forward by the CBA in mind, the following section reconsiders the pandemic response measures that were put in place in Manitoba to propose areas of improvement that can improve access to justice for all Manitobans, including the most marginalized.

IV. Recommendations to Improve Access to Justice and Honour the Open Court Principle

Applying the findings of the CBA reports to the Manitoba's justice system reforms in response to the pandemic, the benefits and pitfalls of Manitoba's approach appears to reflect experience in other Canadian jurisdictions. Decision-makers in Manitoba acted quickly to create avenues that would allow the administration of justice to continue, at least in terms of using existing resources and infrastructure. At the onset of the pandemic, lawmakers in Manitoba passed legislation to permit legal services to be delivered outside of court. Laws were passed or amended to allow for electronic witnessing and remote executions, to expand the range of service providers authorized to provide legal services beyond formal lawyers, and to permit administrative tribunals to decide questions of constitutional significance when authorized by the legislative executive. These changes allowed routine processes like land title transfers and other civil matters to continue with negligible interruption. To operationalize their application in court, Chief Justices and the Provincial Chief Judge issued Practice Directions and Notices to set expectations regarding court attendance and participation. Although these measures ebbed and flowed with the rigour of public safety guidelines, less-serious formal court processes were able to continue after a short hiatus. The success of these measures depended on existing digital infrastructure within the court system, the knowledge that court personnel built over their experience, and the level of understanding that parties could achieve with the support of counsel and staff. In essence, the legal system quickly shifted towards the digital delivery of services because operators knew how to navigate their use and the necessary hardware was already in place.

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81 CBA, "No Turning Back," *supra* note 65 at 16-18.

While these measures were largely successful, some legal processes were not able to benefit from the digital shift because users were not comfortable using electronic interfaces, the distribution of technological hardware was unequal, and the physical spaces that were available to the court system were not amenable to maintaining social distancing requirements. Our analysis focused on the implications of public safety measures on jury trials, which generally did not proceed during the pandemic. Rather than acting to facilitate jury trials via digital means or in alternative locations, executives of the court, and the justice system more generally, typically chose to postpone these hearings until public safety measures were lifted. This approach is clearly demonstrated by the timing of the two recovered jury trial decisions: both were ultimately scheduled to proceed when most Manitobans were vaccinated, and the provincial government was preparing for the shift into post-pandemic living. As previously noted, charges for violent offences are disproportionately laid against members of marginalized communities like Indigenous peoples, people of colour, and the poor—and members of these marginalized communities are also disproportionately victims of violent crime. On this basis, it is safe to assume that decisions to postpone hearings until public safety guidelines are lifted impact these communities the most, both as offenders and as victims.

Considering the extension of public safety guidelines and the ongoing infringement they hold in terms of the *Charter* rights of accused (especially those detained in custody pending trial), the authors believe that it is incumbent on the Government of Manitoba to invest in the necessary infrastructure to bridge these concerns for the future. Doing so can also address longstanding access to justice concerns for marginalized populations in metropolitan regions, as well as remote, northern, and Indigenous communities. Both the federal Action Committee on Court Operations in Response to the Pandemic ("Action Committee") and the CBA Task Force mentioned above suggest the amalgamation of socio-legal services into a single location, which can include the necessary infrastructure to deliver justice in local communities. *Community Justice Help* advocates for a collaborative approach to delivering justice services that is united with existing community organizations because their respondents are overwhelmingly interested in meeting their socio-legal needs in a single location that is nearby.[82] This approach can also reduce other government

[82] Matthews & Wiseman, *supra* note 72 at 29-31 "; see Currie, *supra* note 73 at 7-15; Farrow, *supra* note 73.

expenditures that fund different community organizations by eliminating space rentals and duplication of services, which can offset the necessary up-front investments to create such facilities over time.[83] The federal Action Committee agrees with the CBA Task Force's recommendations in this regard; it is suggested that the universal delivery of services in a single location can maximize the connection of justice system services for users, including access to secured premises with the necessary hardware to participate in remote hearings and dedicated support staff to effectively use such technology, as well as other social services like addictions and mental health treatment. The Action Committee acknowledges that nearly half of all adults Canadians will experience legal problems that will require formal resolution in every three year period, which means that implementing the right infrastructure now can drastically reduce overall state costs in the long run.[84] Beyond these cost efficiencies, the Action Committee notes that acting now to create local "houses of justice" can also meaningfully address the historic access to justice concerns for northern, remote, and Indigenous communities, as well as marginalized populations who reside in metropolitan regions.

Although these facilities have yet to be opened in Manitoba, it appears that legislators are taking action towards these recommendations. On April 28, 2021, the Government of Manitoba announced investments to improve access to justice and support the modernization of the justice system.[85] Nearly $3 million was set aside to hire more full-time judges, expand court administrative and judicial support resources, and hire two new Crown Attorneys; $2.3 million was provided to Legal Aid Manitoba to create a duty counsel position and expand on-call shifts to increase access to

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83 See HM Courts, *supra* note 71.

84 Office of the Commissioner for Federal Judicial Affairs, "Action Committee on Court Operations in Response to COVID-19: Statement from the Committee - Examining the Disproportionate Impact of the Covid-19 Pandemic on Access to Justice for Marginalized Individuals" (30 July 2020) at 3.3, online: <www.fja.gc.ca/COVID-19/Justice-for-Marginalized-Individuals-An-Overview-Acces-a-la-justice-pour-les-personnes-marginalisees-vue-densemble-eng.html> [perma.cc/WSL3-PEUY]; see Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Spending on Everyday Legal Problems*, (Canadian Forum on Civil Justice, 2018) online: CanLIIDocs 11069 <canlii.ca/t/t1lx>.

85 Government of Manitoba, "Province Providing More than $5 Million to Enhance Criminal Justice Supports" (28 April 2021), online: *News Release* <news.gov.mb.ca/news/index.html?item=51182> [perma.cc/CY5T-5H5S].

representation. Perhaps most relevant to these objectives, the provincial government committed $15 million to renovate the Dauphin courthouse, which was repurposed to "provide accessible and efficient justice services to those living in Dauphin and surrounding communities."[86] The renovations are intended to enhance security, create a video-conferencing area for lawyers and their clients, and to expand office spaces for court staff. While the connection of this project towards creating a "house of justice" is not clear, the authors remain hopeful that these investments are being made with the advice of the federal Action Committee and the CBA Task Force in mind.

Access to participatory functions for routine, administrative and less serious criminal matters expanded considerably with the use of audio-video technologies, but many of the informal benefits of in-person proceedings that helped disadvantaged populations were lost as part of the transition. Rather, new digital requirements create new barriers that users must overcome, which marginalized populations do not have the resources or the knowledge to navigate on their own. The CBA Task Force and the federal Action Committee recognized the lack of digital literacy as a pressing concern, both for users and court staff, in using technology to deliver services. Using remote technologies requires an understanding of the hardware that is being used to achieve connectivity, such as computers, cameras, and microphones, as well as various software applications, like Microsoft Teams, Zoom, PDF viewers, and others. Many of these technologies are relatively new and have taken a primary role during the pandemic in facilitating meetings, conducting work, and maintaining connection to broader organizational goals for the broader public. In the context of the justice system, the use of such technologies is further complicated by privacy and security concerns, as well as more traditional requirements like meeting court decorum, procedure, and confidentiality requirements, which must all be met by users as their issues are heard and decisions are rendered.

The CBA Task Force acknowledges the effective roll-out of digital access options during the pandemic to increase access to justice services, but CBA members believe that governments have failed to adequately bridge the

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86 Winnipeg Free Press, "Province adds $4M to now-$15M Dauphin courthouse renovations" (29 January 2022), online: *WFP Local* <www.winnipegfreepress.com/local/province-adds-4m-to-now-15m-dauphin-courthouse-renovations-576141032.html>.

digital literacy gap in terms of connecting users with the right support mechanisms to ensure that outcomes appropriately reflect their circumstances. In the view of the Task Force, marginalized communities are the most impacted by digital literacy barriers, arguably making these failures an extension of the structural or systemic biases that have traditionally effected their ability to access acceptable outcomes from the justice system.[87] These barriers were further heightened because public safety guidelines continued to restrict physical access to court facilities, which prevented marginalized individuals from getting the help they needed when seeking to obtain or submit legal information. The federal Action Committee echoes these observations and, to address them, it recommends the establishment of court liaison officers that can facilitate the use of technology in local communities at designated "houses of justice." The Action Committee believes that implementing court liaison officers within these central service centres will help users coordinate their experiences before, during, and after judicial verdicts to ensure that every service is used to its maximum potential, while also providing confidence to users as each of their socio-legal needs are met. The Action Committee believes that court liaison officers can also assist with the delivery of additional programming like victim services, court worker programs and legal aid, which can build trust with users, eliminate duplication, and reduce costs as part of delivering these justice system products in a single location.

Currently, limited action has been taken towards implementing a liaison officer in Manitoba's justice system. To facilitate public observation of court proceedings, the court clerk's office has taken a key role in scheduling individual requests to observe court proceedings, as well as to provide training in the use of video-conference platforms for parties to a trial. In addition to the support clerks are providing to users, legal counsel have also been asked to contribute their knowledge when preparing their clients to help them participate using virtual means. While these support measures are positive, they are woefully inadequate in providing a sense of confidence for users and fails to extend beyond formal proceedings. Considering these shortfalls in terms of digital literacy and broader support

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87 Joe McIntyre, Anna Olinyk, & Kieran Pender, "Civil Courts and COVID-19: Challenges and Opportunities in Australia" (May 2020) Alt LJ, online (pdf): <auspublaw.org/2020/05/courts-and-covid-19-challenges-and-opportunities-in-australia/> [perma.cc/KS98-ELX7].

in terms of accessing justice services, we recommend that justice system executives act towards the recommendations of the CBA Task Force and the federal Action Committee. However, it is possible that the Government of Manitoba intends to move in this direction after its repurposing of the Dauphin Courthouse is complete.

Stepping back from the recommendations offered by the CBA Task Force and the federal Action Committee, the Practice Directions and Notices that were published by Manitoba's courts also acted towards concerns regarding publicity and judicial accountability, as identified by Judith Resnick and Chief Justice McLachlin. As noted at the start of our discussion in Part A, the open court principle has played a key role in the research and recommendations offered by the CBA Task Force and the federal Action Committee. Its tenets of public participation and broadening access to justice services was a central focus in their proposals, primarily to safeguard public confidence in the administration of justice by ensuring that justice could continue to be seen as it was being done. Although these factors are important in the open court principle, Resnick referred to the work of Jeremy Bentham, the principle's progenitor, to identify the foundational role that "publicity" and judicial accountability play in terms of making such observations participatory for the public, while also serving to create avenues for issues to be raised when rights and expectations are not being upheld by system executives.

Resnick explained that Bentham constructed the original concept of publicity as a means of allowing the public to oversee the decisions of judges and other justice system decision-makers to ensure the system continued to meet their needs, as well as those of the community. Resnick summarized the purposes of publicity into the search for truth, public education regarding the justice system and its operations, and providing public oversight of justice system decision-making. Court openness supports the search for truth by allowing members of the public to identify issues by virtue of media reporting and individual observation, which could be called out and presumptively corrected. The dissemination of case details was also believed to serve a function of public education, in that media consumers would learn about the rule of law and their obligatory relationship with the state. Finally, public dissemination of such information was believed to impose a level of oversight regarding the operational and structural decisions being made by justice system executives, who risked reprimand through the political system if their decisions did not maintain focus on the

best interests of the community and the rule of law. By allowing simplistic interpretations of the law and its jurisprudence, the public would be protected from judicial errors and omissions, as well as from justice system operations that would serve state interests over those valued by local communities. [88]

With the traditional concept of publicity in mind, it is clear that the approach taken to public participation by Manitoba's courts did not provide adequate avenues to raise concerns about the judicial process for members of the public.[89] Chief Justice Joyal's Notice regarding the expectations that were mandatory to observe with regard to a proceeding expressed intentions to honour the open court principle, but in fact implemented a series of new requirements to attend, as well as limits on the ability of attendees to discuss their observations during and after the hearing.

Although these prohibitions had some potential merit, in the context of the privacy of the parties and the security of the proceeding, the blanket nature of the Notice's ban is problematic. It is common practice to share concerns about government processes on social media platforms like Twitter and Facebook, and more than ever during the COVID-19 pandemic. The Notice did not allow publication and dissemination in any form. To bring the publication ban in line with the open court principle and its foundational expectation of publicity, the authors recommend the amendment of these policies to establish reasonable limits in terms of when publication can take place. We believe that a measure of dissemination and publication is necessary to fulfill this facet of the open court principle. Although limits are necessary to balance the interests at stake, we believe it is equally important to provide a pathway that can allow public observers to share their views about a particular case, as well as its outcomes, to hold the justice system accountable, which is one of the most fundamental values of the open court principle.

As opposed to simply allowing public participation, adequate measures of publicity were also intended to hold judges and other justice system executives accountable for their decisions. Resnick acknowledged the

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88 Judith Resnik, "Bringing Back Bentham: 'Open Courts', 'Terror Trials' and Public Sphere(s)" (2011) 4 L & Ethics Human Rights at 6-18; see Trevor C W Farrow & Garry D Watson, "Courts and Procedures: The Changing Roles of the Participants" (2010) 49:2 SCLR 205.

89 Hon Chief Justice Glenn Joyal, "Notice Re: Public Viewing/Attendance at Virtual Hearings," *supra* note 60.

common criticisms of this approach: public perceptions could be manipulated by media influences and a lack of public engagement. Be that as it may, she argued that public commentary through research and the production of literature by academics and members of the legal profession could ensure that the decisions being made in the justice system remained focused on the best interests of society, as opposed to the convenience of system executives or administrators. Such discourse, in her view, would ensure that the outcomes of the system remained legitimate, efficient, and accurate, while also identifying shortcomings for corrective action in the future. She notes that these functions are most critical for populations differentiated on the basis of race, gender, and income, whose experiences with the justice system are often different from other, more-affluent communities.

The most salient issue that arose in terms of pandemic response measures taken in Manitoba's courts was Chief Justice Joyal's Practice Direction from November 17, 2020, which mandated the use of audio-videoconference as a matter of court policy.[90] Notably, Chief Justice Joyal proceeded to implement this policy under a Practice Direction, invoking the inherent jurisdiction of the MBQB, whereas the Court of Appeal issued new operational regulations using its powers under *The Court of Appeal Act*.

In the view of the authors, these powers are not available to trial courts to hold judges accountable in terms of making significant changes to trial operations as spaces of first instance, as stipulated in s. 92 of *The Court of Queen's Bench Act* and s. 26.9 of *The Provincial Court Act*. This approach to implementing this new process did not follow the prescribed procedure under *The Court of Queen's Bench Act* regarding changes to the trial process, but rather involved the issuance of a unilateral decision to implement the new process while simultaneously justifying a subtle closure of judicial accountability regarding the *Charter* rights of individuals accused of murder or other indictable offences with a punishment exceeding five years of imprisonment. Considering the *Charter* rights that were implicated by this Practice Direction, such as the s. 11(f) rights of individuals charged with murder, the authors believe this is an illustrative example of how justice system executives may occasionally act in favour of interests that are beyond their immediate roles. With this in mind, we recommend the review of this

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90 Hon Chief Justice Glenn Joyal, "Practice Direction – Re: Criminal Trials: Accused's Remote Appearance by Video Conference," *supra* note 28.

Practice Direction by the Minister of Justice and, if interested in carrying its contents forward, to articulate them in regulations through the LGIC. Doing so can allow the political and administrative processes to bring additional oversight to their infringement on *Charter* rights, including constitutional review.

In summary, the measures taken to allow the administration of justice to continue in Manitoba's courts were largely successful but also carried serious consequences for individuals charged with murder, as well as for the access interests of marginalized populations more generally. Considering these shortfalls, the authors offer four recommendations that can allow justice system operations to better adhere to the expectations of the open court principle and to objectives of the access to justice movement.

First, we recommend stronger state investments in infrastructure to establish houses of justice, which can also create operational efficiencies by reducing duplication and uniting the delivery of socio-legal services into one location.

Second, we propose further state investments to create court liaison officers in these houses of justice to help community members make use of digital technology when accessing the justice system, as well as to guide them through the various other services that can be delivered in the same location. Doing so can address long standing concerns regarding access to justice and ensure that community members benefit from a whole of justice approach to meeting their legal needs.

Third, we recommend the amendment of public participation policies to establish reasonable limits in terms of when publication can take place. We believe that a measure of dissemination and publication is necessary to adequately fulfill publicity expectations of the open court principle, while also balancing the security interests that are also at stake.

Finally, we propose a form of Ministerial action in light of Chief Justice Joyal's November Practice Direction regarding the mandatory use of audio-videoconferencing for criminal trials (regardless of the consent of the accused). The Practice Direction implicated the *Charter* rights of accused persons and did so outside of the unilateral powers of the court. By revising this process and codifying it into regulations, elected officials can be held accountable for their infringement on *Charter* rights, while also addressing the decisions of convenience that were made to facilitate the ongoing administration of justice during the pandemic.

V. CONCLUSION

The open court principle is a fundamental tenet of constitutional significance that is recognized throughout Canada. Although it was originally theorized by scholars like Jeremy Bentham as a means of oversight and accountability for the justice system, it has become part of a broader movement that focuses on improving access to justice services for the public, with particular focus on the marginalized, such as Indigenous communities, people of colour, and the poor. The onset of the COVID-19 pandemic brought access to justice to the forefront of legal reforms as executive leaders took action to allow the administration of justice to continue while public safety protocols were put in place to prevent disease transmission. The primary method of achieving these ends has been the implementation of digital technologies in legal processes, both inside and outside of court. Although the wholesale shift towards delivering justice using digital means is a novel phenomenon, the use of technology is not new to the justice system. Considering this, our discussion has outlined the scholarship of the Right Honourable Beverly McLachlin, former Chief Justice of the Supreme Court of Canada, as well as Judith Resnick to provide a foundational understanding of the open court principle and its relationship to the digital future. Building from their theories of the open court in modern times and its priorities of meaningful public participation, education regarding the rule of law, and maintaining accountability for judicial decisions, we examined its recent articulation by the federal Action Committee on Court Operations in Response to COVID-19 and its efforts to preserve the administration of justice in provincial justice systems using digital technologies. We applied the observations and recommendations of the Action Committee to the approach taken in Manitoba to consider whether the measures were achieving the access movement's objectives.

As part of our analysis of Manitoba's pandemic response measures, we paid particular attention to outcomes for individuals charged with murder, who are guaranteed the right to a jury trial under the *Charter of Rights and Freedoms.* In addition to reviewing the suite of laws that were introduced or amended by legislators in response to the pandemic, we examined the various Practice Directions and Notices that were issued by the leaders of the court system to identify the subtle disregard for the *Charter* rights of these individuals, who were rather allowed to languish in custody and were

unduly exposed to the novel coronavirus while decision-makers waited for public safety guidelines to be lifted.

In essence, the measures that were implemented were successful, primarily because they reoriented existing resources and infrastructure to address the challenges that were imposed by the public safety emergency. Perhaps most notably, our analysis revealed that justice system executives were issuing directives that arguably infringed on the *Charter* rights of individuals accused of murder as a matter of convenience, which spoke to the fears that were expressed by Judith Resnick in terms of the system's propensity to serve the state's interest instead of those of the community when avenues of publicity were reduced or eliminated.

With these deficits in mind, we compared the feedback that was received by the Canadian Bar Association regarding measures to further the objective of access to justice during the pandemic, as well as the recommendations offered by the federal Action Committee on Court Operations in Response to the Pandemic to the measures taken by legislators and justice system executives in Manitoba to draw conclusions about their successes and pitfalls.

Using these conclusions, we offered four recommendations that could align the outcomes being achieved with the state's responses with the traditional objectives of the access to justice movement. First, we recommended stronger state investments in infrastructure to establish houses of justice, which could also create operational efficiencies by reducing duplication and uniting the delivery of socio-legal services into one location. Second, we proposed further state investments to create court liaison officers in these houses of justice to help community members make use of digital technology when accessing the justice system, as well as to guide them through the various other services that could be delivered in the same location. Third, we recommended the amendment of public participation policies to establish reasonable limits in terms of when publication can take place. Finally, we proposed Ministerial action in light of Chief Justice Joyal's November Practice Direction regarding the mandatory use of audio-videoconferencing for criminal trials. By revising this directive-making process and codifying it into regulations, elected officials could be held accountable for their infringement on *Charter* rights, while also addressing the decisions of convenience that were made to facilitate the ongoing administration of justice during the pandemic.

In the view of the authors, implementation of these recommendations can ensure that the measures taken to respond to the pandemic address the long-standing concerns of the access to justice movement, rather than serving the short-term interests of delivering justice while public safety guidelines are in place. Beyond addressing these concerns, adequate investment at this time can significantly broaden the delivery of justice services so that marginalized communities, as well as individuals living in remote, northern, and Indigenous communities, can make meaningful use of the justice system to meet their legal needs, build trust with the state and, ultimately, approach parity with other Canadians, like the access-to-justice movement has traditionally sought to achieve.

A Call for Diminished Responsibility in Canada

ALEXIA BYSTRZYCKI *

ABSTRACT

The defence of diminished responsibility reduces a murder conviction to one of manslaughter where the defendant successfully demonstrates that their actions were impaired by a recognized medical condition. While this partial defence to murder exists in several common law jurisdictions including the United Kingdom, it is not recognized in Canada. This paper explores whether diminished responsibility should find its way into Canadian law. To do so, Part I of this paper contends that the current state of defences applicable to homicide laws is crying out for further reflection and legislative reform. Part II then critically examines diminished responsibility as enacted in the United Kingdom. Part III explores alternatives to the defence of diminished responsibility and concludes that, despite its imperfections, the defence of diminished responsibility ensures that convictions and sentences are commensurate to the level of moral blameworthiness, given that a murder conviction carries the most severe stigma and punishment. Consequently, the defence should be recognized in Canadian criminal law.

Keywords: Partial defence to murder; Criminal Law; Diminished Responsibility; Mental Illness; Mental Disorder

I. INTRODUCTION

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While murder is recognized as one of the most heinous crimes,[1] the interests of justice are not served by "over and under-convicting" individuals, therefore imposing disproportionate sanctions.[2] By the nineteenth century, courts in Scotland understood that mandatory capital punishment was not justified in every murder case given medical advancements. These advancements revealed that "the narrow view of insanity employed within the criminal law began to appear unduly restrictive."[3] Indeed, Lord Deas observed that "there might be men of habits of mind who should not be punished with the capital sentence of death, as they would have been if in full possession of all their faculties."[4] As a result, common law partial defences to murder such as diminished responsibility developed in response to this inflexible sentencing regime.[5] If successfully plead, the defence of diminished responsibility reduces a murder charge to manslaughter, thus sparing the offender from the gallows.

While the underpinnings of criminal responsibility and retribution as a sentencing principle continue to permeate our criminal justice system, there have been significant changes. In Canada and in the United Kingdom, capital punishment is no longer a fixture of the sentencing landscape. Both society and the criminal justice system have recognized scientific developments dispelling the myth that humans are purely autonomous and rational.[6] These changes do not, however, extinguish the need for partial defences to murder as they are critical tools to ensuring that

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1 See *R v Martineau*, [1990] 2 SCR 633 at 646, 58 CCC (3d) 353 [*Martineau*].

2 UK, The Law Commission, *Murder, Manslaughter and Infanticide*, Project 6 of the Ninth Programme of Law Reform: Homicide, Law Com No 304 (London: The Stationery Office, 2006) at 16 [Law Commission].

3 Chloe Kennedy, "Ungovernable Feelings and Passions: Common Sense Philosophy and Mental State Defences in Nineteenth Century Scotland" (2016) 20:3 Ed L Rev 285 at 285 [Kennedy].

4 Robert S Shiels, "The Uncertain Medical Origins of Diminished Responsibility" (2014) 78:6 J Crim L 467 at 475, citing *HM Advocate v Gove* (1882) 4 Couper 598 at 598-9.

5 See Eric Vallillee, "Deconstructing Infanticide" (2015) 5:4 UWO J Leg Stud 1, online: <ir.lib.uwo.ca/uwojls/vol5/iss4/1> at 3 ["Vallilee"]. For instance, Parliament codified infanticide into the *Criminal Code* as a reaction to jury nullifications arising in cases involving sympathetic mothers who took the lives of their newborn children. Juries were reluctant to convict these mothers of murder, even where guilt was evident, as its sentence was capital punishment.

6 See David Wasserman & Josephine Johnston, "Can Neuroimaging Teach Us Anything about Moral and Legal Responsibility?" (2014) 44:2 Hastings Center Report S37 at S38 [Wasserman and Johnston].

offenders are both properly convicted and sentenced. Unlike the United Kingdom, Canada does not have a statutory defence of diminished responsibility. Given that murder convictions attract mandatory life imprisonment and a high level of stigma, the absence of a defence of diminished responsibility bears profound impacts on individuals being convicted and sentenced. As a result, this essay explores whether this partial defence should be introduced into Canadian criminal law.

Part I canvasses complete and partial defences relevant in Canadian homicide laws to argue that the *status quo* is crying out for further reflection and reform. Part II then introduces the defence of diminished responsibility as enacted in the United Kingdom, tracing the origins of the partial defence and culminates with a closer examination of the current defence as revised by s. 52 of the *Coroners and Justice Act*.[7] Part III considers whether the defence should be included in Canadian criminal law. In assessing the merits of the defence of diminished responsibility, two criteria are utilized: first, any criminal legal reform must acknowledge that criminal responsibility lies on a continuum, and second, it must ensure that convictions and sentences are commensurate to the level of moral blameworthiness given that a murder conviction carries the most severe stigma and punishment.[8] Despite its imperfections, the defence of diminished responsibility aligns with and gives effect to the fundamental principle of proportionality in both securing proportionate convictions and sentences. Consequently, the defence should be recognized in Canadian criminal law.

II. A Brief Portrait of Defences to Homicide in Canada

Rational choice and autonomy are the cornerstone of criminal liability.[9] While the law does not expect everyone to have the same capacity

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7 *Coroner's Justice Act 2009* (UK), s 52.

8 The Supreme Court of Canada in *R v Martineau, supra* note 1 at 645 held: "A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime."

9 See *R v Bouchard-Lebrun*, 2011 SCC 58 at para 48 [*Bouchard-Lebrun*].

to reason, it does expect minimal capacity for reason and control.[10] Criminal liability also depends on the ability to choose and distinguish between right and wrong.[11] As noted by Steven Penney, "[i]f there is at least *some* capacity for control, then criminal responsibility must follow."[12]

Consequently, mental state is a relevant consideration in the determination of criminal liability.[13] An altered mental state can lead to involuntary acts, thereby absolving the person charged from criminal responsibility. Alternatively, an altered state may raise a partial defence. This section will address some of the defences relating to altered mental states. First, this section will begin with a cursory review of complete defences such as automatism and the defence of Not Criminally Responsible on the Account of a Mental Disorder ("NCRMD"). Second, it will turn to partial defences to murder, namely provocation and infanticide. This section will demonstrate that the defence of diminished responsibility could fill the current void among defences to murder.

A. Complete Defences

Automatism is a state of impaired consciousness "in which an individual, though capable of action, has no voluntary control over that action,"[14] There are two recognized forms of automatism: mental automatism and non-mental automatism. Mental automatism falls under falls under the scope of section 16 of the *Criminal Code* and is subsumed within the defence of mental disorder, also known as NCRMD.[15] The NCRMD requirements are satisfied, on a balance of probabilities, where the accused demonstrates that, at the material time, they either possess (a) a mental disorder that renders them incapable of appreciating the nature and quality of their act; or (b) that their mental disorder renders them

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10 See *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632.

11 See *R v Ruzic*, 2001 SCC 24 at para 45.

12 Steven Penney, "Irresistible Impulse and the Mental Disorder Defence: The Criminal Code, the Charter and the Neuroscience of Control" (2013) 60:2 Crim LQ 207 at 233.

13 See e.g. *More v The Queen*, [1963] SCR 522; *R v Swain*, [1991] 1 SCR 933, [1991] SCJ No 32 at para 41; *R v MacKinnon*, 2021 ONSC 4763 at para 49. Though beyond the scope of this paper, it is important to note that altered mental states, such as intoxication or a mental disorder, may be considered on sentencing – see *R v Priorello*, 2012 ONCA 63.

14 *R v Stone*, [1999] 2 SCR 290 at para 156, 173 DLR (4th) 66 [*Stone*].

15 *Ibid* at para 160.

incapable of knowing that it was wrong.[16] Both branches presume that a mental disorder caused the incapacity.[17] While the determination of a mental disorder draws on medical information, "it remains a legal issue, not a medical one."[18] If successful, the trier of fact presents a special verdict – one of "not criminally responsible." This verdict is neither an acquittal nor a conviction.[19] Instead, it diverts individuals who are found to be NCR into an administrative process aimed to both treat the individual and ensure public safety.[20]

Non-mental automatism refers to involuntary actions that do not stem from a "disease of the mind."[21] A person under a state of automatism cannot perform a voluntary and willful act given that automatism deprives them of their ability to carry out such acts.[22] Courts have found that automatism can be triggered by physical forces (i.e. cranial trauma), hypoglycemia, and in some cases, extreme intoxication.[23] The Supreme Court of Canada ("SCC") in *Daviault* recognized the controversial defence of involuntary intoxication, which may apply to both specific and general intent offences. subject to s 33.1 of the *Criminal Code*.[24] A successful automatism defence will lead to an acquittal.[25]

Both NCRMD and automatism deprives the individual from performing willful acts and appreciating their consequences. Therefore,

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16 *Criminal Code*, RSC 1985, c C-46, s 16 [*Criminal Code*].

17 See *R v Minassian,* 2021 ONSC 1258 at para 26.

18 *Ibid* at para 27.

19 *R v Conway*, 2010 SCC 22 at para 87.

20 *Ibid* at para 88; *Bouchard-Lebrun, supra* note 9 at para 52. Unlike an acquittal, an NCRMD verdict has consequences on the rights and freedoms of the individual. For further reading on NCRMD dispositions see Anne Crocker et al, "Dynamic and Static Factors Associated with Discharge Dispositions: The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder (NCRMD) in Canada" (2014) 32:5 Behav Sci & L577.

21 *Stone*, *supra* note 14 at para 157.

22 *R v Daviault,* [1994] 3 SCR 63 at para 103, 93 CCC (3d) 21 [*Daviault*].

23 See *Bleta v The Queen*, [1964] SCR 561; *R v Frost*, 2003 BCSC 1930; *Daviault, supra* note 21 at para 101.

24 On May 13, 2022, the Supreme Court of Canada in *R v Brown*, 2022 SCC 18 invalidated s. 33.1 of the *Criminal Code. This provision prohibited an accused from raising* self-induced intoxication akin to automatism as a defence against violent offences identified in s. 33.1(3). See also *R v Sullivan*, 2022 SCC 19.

25 See *R v Parks*, [1992] 2 SCR 871 at 872, 95 DLR (4th) 27.

convicting an individual for their involuntary acts would "undermine the foundations of the criminal law and the integrity of the judicial system."[26] Diminished responsibility, however, differs from both defences as it presumes some degree of volition.[27] Therefore, it is properly a partial defence.

B. Partial Defences to Murder in Canada

Unlike the United Kingdom and other jurisdictions, there are no recognized statutory or common law defences of diminished responsibility in Canada. In fact, the SCC in *Chartrand v the Queen* rejected the existence of diminished responsibility in Canadian law.[28] Similarly, the Court of Appeal for Ontario recently declined to recognize the partial defence at common law on the basis that it can only be properly addressed by Parliament.[29] Yet, some argue the negation of the requisite *mens rea* by way of psychiatric evidence is tantamount to diminished responsibility.[30] The Court of Appeal for Quebec in *R v Lechasseur* confirmed that evidence which falls short of establishing the defence of insanity under s. 16 may "still be sufficiently strong to create a reasonable doubt as to the capacity of the accused to formulate the specific intent that the law requires."[31] Mark Gannage argued that a significant number of cases uphold a principle that resembles diminished responsibility without calling it by that name despite appellate authority to the contrary.[32]

Nevertheless, Canadian legal scholars continued to debate whether diminished responsibility ought to be formally recognized in criminal law. Meanwhile, legislators remained relatively quiet on the issue.[33] Despite

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26 *Minassian, supra* note 16 at para 25; *Bouchard-Lebrun, supra* note 8 at para 51.

27 See Louise Kennefick, "Introducing a New Diminished Responsibility defence for England and Wales" (2011) 74:5 Mod L Rev 750 at 760 [Kennefick,].

28 *Chartrand v the Queen*, [1977] 1 SCR 314 at 148, 1975 CanLII 188 (SCC).

29 *R v Dobson*, 2018 ONCA 589 at para 38 [*Dobson*].

30 See Mark Gannage, "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19:2 Osgoode Hall LJ 301 at 319-20 [Gannage].

31 *Regina v Lechasseur*, 1977 CanLII 2074 (QC CA) at 320; *R c Dufour*, 2010 QCCA 2413 at para 41 [*Dufour*].

32 Gannage, *supra* note 30 at 314.

33 A search of legislative debates revealed that it has only been discussed peripherally. In 1956, the Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases revealed that diminished responsibility was superficially examined and outright rejected the inclusion of the defence in Canadian law. "Report of the Royal

legislative inertia vis-à-vis diminished responsibility, Parliament legislated two other statutory offences, infanticide and provocation, to recognize some form of diminished responsibility. As partial defences, both infanticide[34] and provocation – if successfully plead – can spare offenders from murder convictions. Similar to the United Kingdom, murder convictions are followed by mandatory life sentences and lengthy periods of parole ineligibility. As well, the repeal of section 745 (the faint hope clause) means there is no longer a review mechanism for those whose parole ineligibility is greater than 15 years.[35] Consequently, the sentencing landscape provides very little flexibility to ensure that sentencing embodies and gives effect to the principle of proportionality. Therefore, partial defences to murder are critical in ensuring that offenders are properly convicted and sentenced.

In this section, both partial defences – provocation and infanticide– will be briefly described to demonstrate that the current absence of a broader defence of diminished responsibility in Canadian criminal law does not result in proportional conviction and sentencing of those unable to avail themselves of a partial defence.

1. Ontario

A murder charge can be reduced to manslaughter if the accused committed the offence in the "heat of passion caused by sudden provocation."[36] Put differently, the impairment in judgement is caused by emotion rather than a mental illness or disturbance. Justice Renke described provocation as relying on an extension of legal realism, or "what might be called the 'correspondence theory' implicit in the criminal law."[37] Provocation recognizes the diminished blameworthiness of a provoked

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Commission on the Law of Insanity as a Defence in Criminal Cases" (1956) at 46 & 64, online (pdf): <www.lareau-legal.ca/CommissionInsanity.pdf> [perma.cc/L2PE-67FP]. The defence of Diminished Responsibility was re-examined in 1984 by the Department of Justice and raised once more in 1992 at the Subcommittee regarding the recodification of the General part of the *Criminal Code*.

34 For the purposes of this essay, infanticide is referred to as a partial defence. However, it also operates as a stand-alone offence. See *R v Borowiec*, 2016 SCC 11 at para 15.

35 Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001), 39 Osgoode Hall LJ 655 at 661-63 [Grant].

36 *Criminal Code*, *supra* note 16, s 232.

37 Wayne Renke, "Calm like a Bomb: An Assessment of the Partial Defence of Provocation" (2010) 47:3 Alta L Rev 729 at 761 [Renke].

killer: while the provoked killer intended to kill, they did not "have the same degree of freedom of choice as the unprovoked killer."[38]

While provocation recognizes the "human frailties which sometimes lead people to act irrationally and impulsively," it is a deeply controversial defence.[39] For instance, provocation has been historically relied upon by men and reinforces the conception – or justification– of women as men's property.[40] As well, the qualifying conditions for the partial defence have been substantially narrowed since the amendments provided in the *Zero Tolerance for Barbaric Cultural Practices Act*.[41] Since 2015, provocation arises from conduct of the victim that would both constitute an indictable offence and "deprive an ordinary person of the power of self-control."[42] Previously, the victim's provoking actions did not need to amount to an indictable offence. Instead, it required "a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of self-control … if the accused acted on it on the sudden and before there was time for his passion to cool." Both Isabel Grant and Debra Parkes argue these amendments fail to confront provocation's central weakness: provocation privileges male rage often arising in domestic contexts or same-sex advances.[43]

While it is beyond the scope of this essay, it is worth noting that the *Coroners and Justice Act* replaced the defence of provocation in the United Kingdom with a new defence, one of "loss of self-control," in response to similar critiques.[44]

2. Infanticide

Infanticide occurs when the accused causes the death of her newly born child, if at the time of the act or omission she is not fully recovered from

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38 *Ibid.*

39 *R v Thibert*, [1996] 1 SCR 37 at para 4, 131 DLR (4th) 675.

40 See Renke, *supra* note 37 at 755; *R v Simard*, 2019 BCSC 531 at para 21.

41 *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29.

42 *Criminal Code*, *supra* note 16, s 232(2).

43 Isabel Grant & Debra Parkes, "Equality and the Defence of Provocation: Irreconcilable Differences" (2017) 40:2 Dal L Rev 455 at 458. In *R v Simard*, 2019 BCSC 531, the Court found that s 232(2) as amended in 2015 infringes s 7 of the *Canadian Charter of Rights and Freedoms*.

44 R D Mackay, "The Coroners and Justice Act 2009—Partial Defences to Murder (2) The New Diminished Responsibility Plea" (2010) Crim L Rev 290 at 295. [Mackay]. See also *Coroners and Justice Act* 2009 (UK), c 25, s 54-56.

childbirth and "by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed."[45] Unlike a conviction for manslaughter, the maximum sentence for an infanticide conviction is five years imprisonment.[46]

Nearly forty years after promulgation, the Law Reform Commission recommended the repeal of section 233 given its legal redundancy and absence of robust medical evidence supporting the underlying rationale for the offence. Instead of retaining the infanticide offence, the Law Reform Commission suggested that mothers experiencing postpartum psychosis may advance the defence of mental disorder and seek diversion.[47]

While the Law Reform Commission's call for reform have gone unanswered, the issues raised are still live: there is little evidence supporting the current form of section 233, that is, that childbirth and lactation cause a disturbed mind. It appears that postpartum disorders are exacerbated by socioeconomic factors, stress, and other psychological factors rather than hormonal changes.[48] Noted by Sanjeev Anand, infanticides are primarily committed in response to the stresses of childrearing rather than the effects of childbirth or lactation.[49] As a result, the offence should not be limited to women. Additionally, the combination of the low maximum penalty with the broad definition of disturbed mind arguably trivializes the killing of newborn children. The problematic features of the infanticide offence could be resolved by subsuming it into the defence of diminished responsibility.[50] As a result, the defence would allow for flexible sentencing while ensuring that the loss of newborn life is not trivialized. [51]

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45 *Criminal Code*, *supra* note 16, s 232.

46 *Criminal Code*, *supra* note 16, s 236(b)–237(a).

47 See Vallillee, *supra* note 5 at 10.

48 See Sanjeev Anand, "Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence" (2010) 47:3 Alta L Rev 705 at 722.

49 *Ibid.*

50 See Sanjeev Anand & Kent Roach, "Inertia, Uncertainty, and Canadian Homicide Law: An Introduction to the Special Issue" (2010) 47:3 Alta L Rev 643 at 643 [Anand & Roach].

51 See Scott Mair, "Challenging Infanticide: Why Section 233 of Canada's Criminal Code is Unconstitutional" (2018) 41:3 Man LJ 241; see also H Archibald Kaiser, "Borowiec: Exploring Infanticide, 'a particularly dark corner' and Providing Another Reminder of the Need for Reforming Homicide Sentencing" (2017) 65 CLQ 242 at 8.

In sum, the purpose of this section is to provide a glimpse, rather than a thorough assessment, of the maelstrom of issues engendered by both defences. As well, this section illustrates how these partial defences only capture a narrow pool of individuals, thereby excluding a larger population of accused individuals with medical conditions that may have substantially impaired impulse control, ability to think through consequences, or form alternative courses of action.[52] Consequently, it follows that the limited scope of application and the pitfalls of the defence of infanticide could be avoided entirely if Parliament turned its mind to alternatives, such as enacting a defence of diminished responsibility.

III. DIMINISHED RESPONSIBILITY IN ENGLISH LAW: FROM INCEPTION TO REFORM

This section traces the origins of the defence of diminished responsibility and culminates with a critical examination of the current defence.

Prior to the advent of the defence of diminished responsibility, the law dichotomized the "sane or insane; responsible or not responsible, bad and mad."[53] Described as an anomaly in English law, the defence of diminished responsibility arose from judicial creation.[54] Acknowledging the difficulty in defining diminished responsibility, the court in *HM Advocate v Savage* described the concept to the jury as:

"[An] aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions."[55]

While there were references to incarnations of diminished responsibility in case law as early as 1704, *HM Advocate v Dingwall* is often

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52 See Wasserman & Johnston, *supra* note 6 at S47.

53 Alan Reed & Michael Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Burlington Ashgate Pub, 2011) at184.

54 See Gannage, *supra* note 30 at 302.

55 *HM Advocate v Savage*, [1923] JC 49 (HCJ Scot) at para 51 [emphasis added].

associated as the herald of this defence into Scottish law.[56] Mr. Dingwall was charged with the death of his wife following an episode of *delirium tremens*. Though his condition did not constitute insanity, Lord Deas instructed the jury that he "could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence," and that Mr. Dingwall's condition – his weakness of mind – could be considered in arriving at their decision.[57] The jury returned a verdict of culpable homicide (manslaughter) rather than one of murder. Given that the defence recognized the complexity of criminal responsibility and the need to divert some offenders away from mandatory capital punishment, the defence gained traction and continued to develop among Scottish courts.

Nearly a century later, the defence of diminished responsibility was introduced into English law by way of section 2 of the *Homicide Act 1957* .[58] It was intended as a new defence for those who could not avail themselves of the insanity defence but regarded as "insane in the medical sense and those who are not insane in either sense, are seriously abnormal, whether through mental deficiency, inherent causes, disease or injury." [59]

To raise the diminished responsibility defence, two requirements must be satisfied on a balance of probabilities. First, the accused must have suffered from an "abnormality of the mind" and second, this abnormality must have substantially impaired the accused's mental responsibility for the killing.[60] Unlike its common law predecessor, the defence of diminished responsibility under the *Homicide Act* only applied to murder cases. A successful defence translated into the reduction of a murder charge to a manslaughter rather than an acquittal. This remedy originally arose out of apparent necessity given that a manslaughter conviction avoided the

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56 *HM Advocate v Dingwall*, (1867) 5 Irv 466. See also Louise Kennefick, "Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law" (2011), 62:3 N Ir Leg Q 269 at 270; Kennedy, *supra* note 3at 307.

57 Kennedy, *supra* note 3 at 307.

58 *Homicide Act 1957* (UK), 5 & 6 Eliz 2, c 11, s 2.

59 Rudi Fortson, "The Modern Partial Defence of Diminished Responsibility" in Alan Reed & Michael Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Burlington, VT: Ashgate Pub, 2011) at 22 [Fortson].

60 Kennefick, *supra* note 27 at 755.

imposition of capital punishment. As well, the sentence reduction results in wider sentencing options and flexibility.[61]

The original wording of section 2 of the *Homicide Act* 1957 defined diminished responsibility as:

Such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.[62]

A. *Coroners and Justice Act 2009*: A Revised Defence of Diminished Responsibility

Several high-profile cases in the United Kingdom prompted the government to order the Law Commission to examine its homicide laws. [63] In 2006, the Law Commission published its report "Murder, Manslaughter and Infanticide," which called for several legislative reforms. While the Law Commission found that diminished responsibility should be retained, its definition required clarification and modernization to "accommodate developments in expert diagnostic practice." [64] Two problematic features arose with respect to the original definition of section 2 of the *Homicide Act*. First, it failed to describe how the effect of an abnormality of mind can reduce culpability for an intentional killing as it says nothing about what is involved in a substantial impairment of mental responsibility.[65] This ambiguity arguably resulted in inconsistent outcomes in interpretations and applications of the defence. Second, the definition did not align with medical science: "abnormality of mind" is not a psychiatric term and thus its meaning has been developed by the courts, rather than the medical community.[66] In addition to the two challenges raised by the Law Commission, section 2 of the *Homicide Act* also attracted criticism due to its generous catchment. The defence of diminished responsibility was judicially interpreted to include a wide range of mental conditions such as

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61 See Gannage, *supra* note 30 at 303.

62 Fortson, *supra* note 59 at 22.

63 See Anand & Roach, *supra* note 50 at 633.

64 Law Commission, *supra* note 2 at paras 5.107, 5.83-5.84.

65 *Ibid* at para 5.110.

66 *Ibid* at para 5.111.

alcoholism, volitional insanity, psychopathy, and even mercy-killing.[67] This liberal interpretation resulted in accusations of permitting "benign conspiracies" wherein psychiatric evidence was stretched "so as to produce a greater range of exemption from liability for murder than its terms really justify."[68]As a result, the Law Commission formulated a new definition of diminished responsibility. The Government accepted some of the Law Commission's proposals, such as a revised definition of diminished responsibility.[69] Section 52 of the *Coroners and Justice Act* 2009 ("CJA") now redefines diminished responsibility as:

> **52 Persons suffering from diminished responsibility (England and Wales)**
>
> (1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—
>
> "(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

B. A Closer Look at the Revised Defence of Diminished Responsibility

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67 See Kennefick, *supra* note 27 at 755. See also Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford: Oxford University Press, 2012) at 236 [Loughnan].

68 Mackay, *supra* note 44 at 295.

69 See Fortson, *supra* note 59 at 24. Predictability, perhaps, the Government declined the graduated system for homicide offences or to abolish mandatory life sentences.

While the objectives of modernizing diminished responsibility are laudable, a closer examination of the revised defence will reveal its strengths, ambiguities, and shortcomings.

1. Section (1)(a) – The abnormality of mental functioning arose from a medical condition

Contrary to its previous incarnation, diminished responsibility requires evidence of a recognized medical condition and encourages expert evidence, including diagnosis per the DSM-5 or ICD10.[70] Consequently, the defence no longer applies to cases such as highly stressed killers and mercy-killings.[71] While it narrows the scope of application, it also provides clarity for other conditions. For instance, it may extinguish any doubts that alcoholism or alcohol dependent syndrome is distinct from intoxication and could fall within the ambit of diminished responsibility. The definition also encompasses post-traumatic stress disorder, including those arising from domestic violence.[72]

2. Section (1)(b) – Substantial impairment due to abnormality of mental functioning

Jurisprudence shaped and defined "substantial impairment" to signify an impairment that is not necessarily "total," but rather more than trivial or minimal.[73] In *Golds*, the United Kingdom Supreme Court held that "substantial impairment" should be understood in its ordinary meaning.[74] If the jury seeks clarification on the meaning of substantial, the trial judge "should explain that whilst the impairment must indeed pass the merely trivial before it need be considered, it is not the law that any impairment beyond the trivial will suffice."[75]

3. Section (1)(c) – A causal link between the abnormality of mental functioning and the killing

Unlike its predecessor, the revised definition of diminished responsibility now requires a causal link. The expression "provides an

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70 See Law Commission, *supra* note 2 at para 5.114.

71 See Mackay, *supra* note 44 at 295. See also Kennefick, *supra* note 27at 750.

72 See Law Commission, *supra* note 2 at para 5.116.

73 Kennefick, *supra* note 27 at 760.

74 *R v Golds*, [2016] UKSC 61 (BAILII) [*Golds*] at para 43.

75 *Ibid* at para 43.

explanation" suggests that this is a low threshold and is arguably self-evident; perhaps even a temporal connection.[76] This may be helpful in situations where a medical condition may impair cognition even though it may not be the sole contributory factor. However, the requirement for causation raises some concerns. Nicholas Hallett criticized the new provisions as an anomaly given that no other jurisdiction with a defence of diminished responsibility requires such a link.[77] In fact, the M'Nagthen Rules – the United Kingdom's equivalent of the Canadian defence of NCRMD – do not require a causal connection.[78] While the requirement for an explanation is a lower threshold than strict causation, this approach may narrow the scope of the defence of diminished responsibility.[79] Given the differences between diminished responsibility and NCRMD, it is arguably appropriate to expect that some causation be required to successfully plead diminished responsibility. Indeed, this requirement aligns well with current sentencing principles in Canada: while a mental condition may lessen the offender's moral blameworthiness, mitigation requires a causal link between the condition and the offender's conduct.[80]

4. Section 2(1A)(a) – The accused's ability to understand the nature of their conduct

There is little to no guidance to interpret the meaning of section 2(1A)(a): the accused's "ability to understand the nature of their conduct." The Law Commission provided only one example as an interpretative, but non-exhaustive, aid in their report. They cited the example of a ten-year-old boy who was essentially raised on violent video games. One day, the child lost his temper and killed another child. It was evident from the interview that the child does not understand that when someone is killed they cannot be revived as it happens in video games.[81] This example would be unhelpful in the Canadian context given that a ten-year-old child would not be

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76 Loughnan, *supra* note 67 at 243.

77 Nicolas Hallett, "Psychiatric evidence in Diminished Responsibility" (2018) 82:6 J Crim L 442 at 455 [Hallett]. In Canada, for instance, the infanticide provision merely requires a temporal association between the mental disturbance and the infant's death. (*R v Borowiec*, [2016] 1 SCR 80 at para 35).

78 See Mackay, "*The Coroners and Justice Act*", *supra* note 44 at 298.

79 See Loughnan, *supra* note 67 at 244.

80 See e.g. *R v Prioriello*, 2012 ONCA 63 at para 11.

81 See Law Commission, *supra* note 2 at para 5.121(1)(a).

criminally responsible in any event. Assuming the example involved an adult, it appears that a lifetime of violent video games, combined with one or more underlying conditions affecting cognition, substantially impaired the accused's capacity to understand the nature and consequences of his actions. This first prong hearkens back to both section 16(1) of the *Criminal Code* (NCRMD) and the M'Naghten Rules. Fortson remarks that this definition is wide enough to include a normative element akin to the outdated definition of insanity, whereby the accused by way of his condition either failed to appreciate the quality and nature of their actions or did not know it was wrong.[82]

Despite its similarity, section 2(1A)(a) is neither a reproduction nor a more "stringent" version of the M'Naghten rules. Involuntary acts cannot attract punishment: either the defect of reason means that the accused could "not to know the nature or quality of his or her act, or that the act was wrong, or the defect of reason did not have that effect."[83] In contrast, diminished responsibility presumes some degree of volition.[84] Therefore, a conviction and sentence commensurate to the degree of responsibility is justified.

5. Section 2(1A)(b) – The accused's ability to form a rational judgement

This second prong of the revised defence requires that the accused's ability to form a rational judgment is substantially impaired. The Law Commission provided some examples to illustrate how the abnormality of mental functioning might manifest itself such that a successful plea of diminished responsibility could succeed under section 2(1A)(b). The first example relates to a woman experiencing post-traumatic stress disorder as a result from intimate partner violence who "comes to believe that only burning her husband to death will rid the world of his sins."[85] The final example involves a man with depression who cared for his spouse. The man's spouse has a terminal illness and the man killed his spouse upon her request. While the man found it more difficult to stop his spouse's requests from "dominating his thoughts to the exclusion of all else," the man took his wife's life because he felt that he could never think straight until he

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82 Fortson, *supra* note 59 at 32.

83 Law Commission, *supra* note 2 at para 5.142.

84 See Kennefick, *supra* note 27 at 760.

85 Law Commission, *supra* note 2 at para 5.121(2)(a).

acceded to her requests.[86] As noted by Ronnie Mackay, judgement implies a weighing of options before arriving at a particular decision.[87] As a result, this section calls upon the trier of fact to consider the accused's thought process rather than limiting their deliberations on the actual outcome. While expert evidence may assist the trier of fact in their assessment of whether the medical condition substantially impaired the accused's ability to form a rational judgement, this determination is legal rather than medical.

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86 *Ibid* at para 5.121(2)(c).

87 Ronnie Mackay, "The Impairment Factors in the New Diminished Responsibility Plea" (2018) 6 Crim L Rev 462 at 468.

88 Law Commission, *supra* note 2 at para 5.121(2)(a).

89 *Ibid* at para 5.121(2)(c).

90 Ronnie Mackay, "The Impairment Factors in the New Diminished Responsibility Plea", (2018) 6 Crim L Rev 462 at 468.

6. Section 2(1A)(c) – The accused's impaired ability to exercise self-control

Unlike the defence of loss of control (previously known as provocation), section 2(1A)(c) is concerned with the degree to which the accused's medical condition impaired their ability to control their conduct. The Law Commission illustrated the third prong, the accused's impaired ability to exercise self-control, by way of the following example: "a man says the devil takes control of him and implants in him a desire to kill, a desire that must be acted on before the devil will go away."[91] This brief example, similarly to those preceding it, raises several issues. First, Hallett noted that this example was strange given that it was more similar to delusion than impulsivity.[92] Second, the example evokes an individual who could be experiencing psychosis or symptoms related to schizophrenia or schizoaffective disorder.[93] Assuming that, at the material time, the man did not appreciate the nature of his actions or did not know that his actions were morally wrong, it appears at first glance this example aligns best with the NCRMD defence rather than diminished responsibility. However, the example suggests that the motivation to kill appears to be under some control, in contrast with other cases including those where the NCRMD defence is invoked.

It is curious that the Law Commission chose this example rather than the more commonplace occurrence of individuals whose organic brain damage impaired their ability to control their impulses. In any event, it does illustrate one of the challenges faced by the trier of fact: distinguishing between cases where the accused's medical condition indeed impaired their ability to control their conduct versus those who chose not to attempt to control their conduct.[94]

C. The Role of Diminished Responsibility Post-Conviction

Once a court finds the accused's responsibility diminished, the murder charge will be reduced to a manslaughter conviction. The offence reduction translates into a greater range of sentencing options. Sentencing judges in

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91 Law Commission, *supra* note 2 at para 5.121(3)(a).

92 Hallett, *supra* note 77 at 453.

93 Similarly, to cases such as *R v Onochie,* 2015 ONSC 7928, where the accused, who would hear a voice associated with God, thought his father was possessed by the devil. He believed killing the snake, who took over his father's body, would liberate his father and restore him to his normal state.

94 See Fortson, *supra* note 59 at 34.

the United Kingdom may impose a hospital order pursuant to s. 37 of the *Mental Health Act* 1983.[95] The Law Commission noted that roughly half of those who plead diminished responsibility will be subject to a hospital order, often coupled with restriction orders to tighten conditions for release. Offenders typically spend nine years in hospital before their release. Meanwhile, offenders who are sentenced to prison will typically receive sentences up to 10 years.[96] In contrast, Canadian judges cannot impose hospital orders as a sentencing disposition despite calls from the Law Reform Commission of Canada in 1976 to introduce hospital orders.[97]

IV. Discussion: Should Canada Embrace the Defence of Diminished Responsibility

At this juncture, this essay will examine whether the defence of diminished responsibility should find its way into Canadian law. In doing so, it will use the following two premises as evaluating criteria. First, any criminal reform must acknowledge the complexity of criminal responsibility and respond properly to those who do not fall under the purview of s. 16 of the *Criminal Code*. Second, any amendment must ensure that individuals are convicted and sentenced in a manner that reflects their blameworthiness. As noted by Andrew Ashworth, "fairness demands that offenders be labelled and punished in proportion to their wrongdoing."[98] In arriving at the conclusion that there should be some recognition of diminished responsibility, this essay will proceed in three parts. First, it will reflect on whether the defence of diminished responsibility should be codified as a partial defence. Second, it will assess whether repealing mandatory life imprisonment constitutes an appropriate alternative which satisfies the twin objectives of proportionate conviction and sentencing. Finally, this essay will culminate by advancing a compromise: diminished

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95 *Mental Health Act* 1983 (UK), c 20.

96 Law Commission, *supra* note 2 at 96.

97 See Aman Patel, "Landing in the Cuckoo's Nest: The Hospital Disposition of Guilty Mentally Ill Offenders – Lessons from the United Kingdom" (2002) 39:4 Alta L Rev 810 at 816 [Patel].

98 Andrew Ashworth, *The Elasticity of Mens Rea* in C F H Tapper ed, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981) at 53-54 [Ashworth].

responsibility can be subsumed as a statutory exception in sentencing only in relation to mandatory life imprisonment.

A. In Defence of Diminished Responsibility in Canada

The partial defence of diminished responsibility represents an attractive solution. First, the defence recognizes that criminal, legal, and moral responsibility is a question of degree rather than an absolute binary. Second, its recognition of the continuum of responsibility translates into both the reduction of the degree of the offence and the reduction of sentence. As noted by Professor Ferguson, this is significant since the "name attributed to an offence inherently indicates the seriousness and/or culpability of the person convicted – e.g. murder versus manslaughter."[99] Put differently, diminished responsibility does more than simply shield from mandatory life imprisonment. In *R v Dobson*, the appellant raised the principle of "fair labelling" in seeking the recognition of the partial defence of diminished responsibility in Canadian common law. The outcome of the defence, "a manslaughter verdict, coupled with the broad sentencing discretion available for that offence, would properly reflect the different levels of culpability."[100] Fair labelling contends that an offence should fairly represent the nature of the criminalized act.[101]

Importing the defence of diminished responsibility into Canadian law would also require the introduction of hospital orders. These orders are intended for individuals who are found criminally responsible for their actions and have been diagnosed with a mental disorder.[102] While hospital orders are intended to be therapeutic, they are also detention orders. Without the introduction of hospital orders, Canadian courts would continue to be ill-suited to provide a meaningful disposition for individuals with mental illness, as sentencing judges should not rely on correctional

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99 Gerry Ferguson, "Submission to the Parliamentary Committee on Recodification of the Criminal Law: Mental Disorder, Diminished responsibility and automatism" to the Standing Committee on Justice and the Solicitor General (Ottawa: House of Commons, 18 November 1992) at 5A: 199, at para 45 [Ferguson].

100 *Dobson, supra* note 29at para 36.

101 Ashworth, *supra* note 98 at 53.

102 See Marilyn Pilon, "Mental Disorder and Canadian Criminal Law" (22 January 1999) at 8, online (pdf): *Government of Canada* <publications.gc.ca/site/eng/299888/publication.html> at 8.

institutions to provide adequate mental health services.[103] Hospital orders achieve several sentencing objectives simultaneously: protecting society by separating offenders from the community, while also providing rehabilitative opportunities that offenders would otherwise have been unable to access in prison. Moreover, hospital orders also contain a punitive component given the liberty restrictions against the offender. A conditional sentence, crafted to turn into a de facto hospital order, may also be an unsuitable substitute. For instance, Aman Patel noted that an accused could decline this form of disposition and serve their sentence in jail.[104] As well, conditional sentences are still unavailable for a series of offences including manslaughter as a result of the *Safe Streets and Communities Act*.[105] Just as finite resources cannot justify delay in criminal proceedings,[106] lack of funding should not deter Parliament from introducing hospital orders and ensuring that all patients – including forensic patients – have access to treatment through adequate funding from both levels of government. [107]

However, there are several issues that must be resolved before accepting the defence of diminished responsibility as it is framed in the United Kingdom. The two principal objections relate to the overreliance on expert evidence and ambiguities related to both the defence's form and substance. First, the defence of diminished responsibility calls for expert evidence to substantiate the accused's medical condition, which substantially impairs the accused's ability to do one or more of the following: understand the nature of their conduct; form rational judgement; and/or exercise self-control. The new provisions attempt to depart from a moral assessment to embrace a more "medicalized" offence. In Nicholas Hallet's view, however,

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103 Patel, *supra* note 97 at 815.

104 *Ibid* at 819.

105 Although the Court of Appeal in *R v Sharma*, 2020 ONCA 478 found that section 471(c) contravened sections 7 and 15 of the *Charter*.

106 See *R v Jordan*, 2016 SCC 27.

107 For instance, the 2016 Annual Report of the Office of the Auditor General of Ontario remarked that limited funding translated into the net reduction of 134 long-term psychiatric beds across the province; see "2016 Annual Report" (19 January 2022), online: *Office of the Auditor General of Ontario* <www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html> [perma.cc/YS8C-WCUD] at 623.

the new provisions have given psychiatric evidence too much authority.[108] Empirical studies demonstrate that expert evidence is critical in diminished responsibility cases and, as a result, Loughnan posits "expert evidence is a de facto requirement, placing expert knowledge at its heart."[109] Despite the central role of expert evidence, the determination of whether an accused's condition substantially impaired their abilities under ss. 2(1A)(a)-(c) does, and ought to, remain with the trier of fact. This risk can be mitigated in the Canadian context given it is trite law that experts cannot usurp the function of the trier of fact. As gatekeepers, judges must assess the costs and benefits of admitting expert evidence.[110] It is entirely possible that medical experts testify on similar hypothetical scenarios and the accused's disorder's likely effects while restraining themselves from opining on the ultimate issue: whether the disorder amounts to a substantial impairment of mental responsibility.[111] Nonetheless, these concerns should not deter Parliament from studying and eventually incorporating this defence into Canadian law.

Second, issues have been raised surrounding the defence's current model in the United Kingdom. While the defence was revised to modernize and recognize scientific developments, the new defence arguably resulted in unintended consequences. For instance, Mackay and Mitchell found the revised defence has resulted in "more contested pleas with convictions for murder being returned in 34.4% of these cases compared to a murder conviction rate of 14% under the old plea."[112] Therefore, the revised definition is more restrictive than its previous incarnation. The previous version of diminished responsibility may have facilitated flexible interpretation which developed "developed beyond identification of the narrow range of causes of an abnormality of mind." [113] While the revised definition was intentionally crafted to preclude rational mercy killing cases

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108 Hallett, *supra* note 77 at 456. Hallett argues that legislators "have been mistaken in thinking that psychiatry can answer these questions definitively and have encouraged psychiatrists to step outside their area of expertise and usurp the function of the jury."

109 Loughnan, *supra* note 67 at 248.

110 See *R v Lucas*, 2014 ONCA 561 at para 271. The Court of Appeal added that "[t]he closer the opinion evidence comes to the ultimate question the jury must answer, the more this risk may be heightened" [emphasis added].

111 See Law Commission, *supra* note 2at para 5.118.

112 Ronnie Mackay & Barry Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" (2017) Crim L Rev 18 at 35.

113 See Kennefick, *supra* note 27 at 757.

and cases where "any killer suffer[s] from depression;" the defence may have been narrowed too much to preclude its use by accused. [114]

While there are challenges inherent to the defence of diminished responsibility, these challenges do not diminish its attractiveness. Given the areas of contention identified, Parliament cannot simply import the United Kingdom's defence into Canadian law. Instead, Parliament must study, consult with stakeholders, and reflect on how the defence ought to take shape in the Canadian context in such a way that it aligns with our objectives and interests. Parliament ought to consider the following: whether diminished responsibility in Canada be limited to murder charges; whether it should apply to specific intent offences, lesser and included offences; [115] and should it apply to all cases where convictions attract mandatory minimums and/or mandatory life imprisonment.

B. Abolition of Mandatory Life Sentences

The second alternative to the defence of diminished responsibility is repealing mandatory life sentences. Given the current inflexible sentencing regime in both Canada and the United Kingdom, several academics and stakeholders have advocated for the removal of mandatory life sentences for murder. The abolition of mandatory life sentences would translate into greater flexibility in sentencing, thus resulting in fairer and more proportionate sentences having regard to the circumstances of the offence and those of the offender. As a result, it achieves the same goals as diminished responsibility, without engendering the challenges brought on by applying the partial defence. The Law Commission remarked that medical experts commonly suggest the defence of diminished responsibility should be abolished as a trial matter.[116] Instead, the Royal College of Psychiatrists recommended that discretion should rest with the sentencing judge to determine the appropriate sentence if they find the accused had diminished responsibility. This view aligns with other jurisdictions where

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114 Law Commission, *supra* note 2 at para 7.53.

115 See Robert C Topp, "Concept of Diminished Responsibility for Canadian Criminal Law" (1975) 33:2 UT Fac L Rev 205 at 205. Prior to the legislation of the defence of diminished responsibility into the *Homicide Act,* the defence had been previously applied to lesser crimes such as housebreaking.

116 Law Commission, *supra* note 2at para 5.94.

diminished responsibility is viewed purely as a sentencing matter.[117] As well, the abolition of mandatory life imprisonment would mean there would be no risk of a "benign conspiracy" wherein psychiatric evidence is manipulated to achieve a desired outcome. Similarly, repealing mandatory life sentences would also obviate the need for some problematic defences identified previously, such as provocation and infanticide. [118]

While the abolition of life imprisonment is appealing, there are two main weaknesses to this position. First, repealing mandatory life imprisonment does not address offence reduction but simply sentence reduction. Conversely, a more flexible sentencing regime would benefit a larger population of offenders than introducing the defence of diminished. Moreover, the abolition of mandatory life imprisonment arguably impacts offenders in a much more significant way than the type of offence registered as a conviction. [119] Any conviction, especially one involving the loss of life, is highly prejudicial and life altering to the offender. Consequently, proportionate sentencing, which accounts for the offender's degree of moral blameworthiness, may outweigh the need for "fair labelling." While fair labelling – reducing the offence from murder to manslaughter – is laudable, the Canadian justice system does not appear to be entirely concerned by it. For instance, the regime under the *Youth Criminal Justice Act* ("*YCJA*") recognizes that young persons' capacities and, therefore, responsibility are diminished.[120] This recognition translates into a separate sentencing scheme and other provisions protecting procedural fairness. This recognition of diminished moral blameworthiness does not preclude young persons from being convicted for murder. Under this lens, moral blameworthiness ought to remain under the ambit of sentencing.

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117 *Ibid* at paras 5.89-5.94. These jurisdictions include Germany and France.

118 See Fortson, *supra* note 59at 23. Fortson and other academics have noted that the problems associated with the defence of diminished responsibility could be avoided if the life sentences were abolished.

119 It may be entirely possible that "fair labelling" is a secondary issue to those who are charged with murder. I am unaware of any research identifying benefits of offence reduction from murder to manslaughter for reasons other than sentencing. Further research could focus on the perceptions and lived experience of those who have been convicted of murder and/or manslaughter.

120 *Youth Criminal Justice Act*, SC 2002, c 1. See also *R v DB,* [2008] 2 SCR 3 at para 41, 293 DLR (4th) 278: "young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability."

Second, absolute and unfettered judicial discretion in sentencing risks "trivializing some murders and treating them on par with attempted murder (in which no life is taken) and manslaughter in which a life is taken unintentionally."[121] The perception of the public as well is an important consideration at this stage. While it is unlikely that sentencing courts would abuse their absolute judicial discretion, the perception of such risk may endanger the public's confidence in the administration of justice.

C. The Compromise: Recognizing Diminished Responsibility as an Exception to Life Imprisonment

Both the abolition of mandatory life imprisonment and the implementation of diminished responsibility as a partial defence to murder appear unlikely. Cognizant that Parliament is constrained by several competing interests including public opinion, Isabel Grant proposed a compelling compromise: a life sentence would be the "starting point" in which the sentencing judge is empowered to reduce the sentence in cases where the presumptive penalty "would constitute a miscarriage of justice."[122] This compromise bears resemblance to other sentencing provisions in other jurisdictions. For instance, per the Northern Territory *Sentencing Act* of Australia, there is a presumptive parole ineligibility period of 20 years. However, s. 53A(6) of the *Sentencing Act* provides that the court may fix a shorter "non-parole period" if the Court is satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.[123] Exceptional circumstances arise when the Court is satisfied of the following matters: (a) the offender is otherwise a person of good character, unlikely to re-offend; and (b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender. While it is beyond the scope of this essay to examine and argue that the exceptional circumstances as set out in s. 53A(6) ought to be imported into the Canadian context, it highlights the possibilities and permutations of sentencing in homicide cases.

Building upon Grant's proposed alternative, the defence of diminished responsibility could be subsumed as an exception to the presumptive life sentence for homicide convictions. This exception should be codified into

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121 Grant, *supra* note 35 at 697.

122 *Ibid* at 695.

123 *Sentencing Act 1995* (NT), 1995, s 53A(6)

the *Criminal Code* to assist the court in determining whether the presumption of life imprisonment amounts to a miscarriage of justice or exceptional circumstances. Drawing from the United Kingdom's defence of diminished responsibility, the statutory defence could be drafted as follows:

> - whether the offender's capacity to understand the nature of their conduct; form a rational judgement; and/or exercise self-control was substantially impaired by a medical condition at the time of the commission of the offence.

While this compromise does not achieve "fair-labelling," it mitigates the risks and challenges associated to diminished responsibility as a partial defence to murder all while achieving proportionate sentencing.

V. CONCLUSION

Guided by the fundamental principle of proportionality, the current state of homicide laws, including its partial defences and inflexible sentencing regime, cannot properly and proportionately convict and sentence offenders.

As a potential remedy, legislators should draw inspiration from the United Kingdom's defence of diminished responsibility. This defence ensures both proportionate convictions and sentences in homicide cases. First, it offers offence reduction, which reduces the stigma associated with a murder conviction and recognizes diminished moral blameworthiness in the appropriate circumstances. Second, it translates into a wider range of sentencing options, including hospital orders. Granted, the defence is not immune to criticism. For instance, there are concerns associated with the defence's application and scope, including its overreliance on expert evidence. Alternatively, the abolition of mandatory life sentences arguably achieves more proportionate sentencing. Yet, the abolition of mandatory life sentences is unlikely. Consequently, the defence of diminished responsibility could be subsumed as a statutory exception of mandatory life sentences as it is both desirable and achievable.

While no single proposal is a panacea in ensuring proportionate convictions and sentencing, it is in the interests of justice that Parliament revisit homicide laws in Canada. The partial defences of infanticide and provocation are a testament to the fact that not all murderers resemble another, and thus, do not merit the same sanction. Recognizing the defence

of diminished responsibility, either as a partial defence or incorporation into a sentencing factor, would strengthen, not shake, the public's conscience and confidence in the administration of justice.