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CONTENTS

1 Mr. Big Operation Scripts Post-*Hart*
ANDREW EYER

39 Criminalizing Coercive Control in Canada: Learning from an International Comparative Analysis
JOEY CARRIER

86 Racializing Terror: Reassessing the Motive of the Motive Clause
PRABJOT SINGH

116 Establishing Police Accountability: How Do We Stop *Charter* Violations from Happening
LAUREN GOWLER

138 To Serve and Protect the Mental Cost of Policing
NIKKI BOGGS

169 Body Worn Cameras (BWCS): Privacy vs Solid Evidence
STANISLAVA ZGUROVA

210 Les femmes autochtones victimes de violence sexuelle – leur réalité et les obstacles dont elles doivent faire face
CLAUDIA GUERTIN

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Manitoba Law Journal – Robson Crim, Special Issue

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 46(4), 46(5), and 46(6) are the most recent Robsoncrim volumes published by the Manitoba Law Journal, and we have published papers from leading academics in criminal law, criminology, law and psychology, and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

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

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

- Criminal law, popular culture, and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

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

- Reflections on Indigenous traditions in evidence law (including possibilities)
- New developments in digital evidence and crimes
- 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
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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 2, 2024. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and, if possible, conform with the Canadian Guide to Uniform Legal Citation, 10th ed. (Toronto: Thomson Carswell, 2023) – the "McGill Guide". Submissions must be in Word or Word compatible formats and contain a 250-word or less abstract and a list of 10–15 keywords.

Submissions are due April 2, 2024 and should be sent to info@robsoncrim.com. For queries, please contact Professors Richard Jochelson or Brandon Trask, at this email address.

THE JOURNAL

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Mr. Big Operation Scripts Post-*Hart*

ANDREW EYER *

ABSTRACT

Mr. Big operations ("MBOs") are a Canadian invention, a version of which dates back over 120 years, with its modern use beginning in the 1990s. However, it was not until 2014, with the *Hart* decision, that the Supreme Court of Canada found occasion to subject MBOs to regulation. The question this paper endeavours to undertake is whether the court's new analytical framework, which treats MBO confessions as presumptively inadmissible, has affected the scripting of MBOs – or if there remains a proliferation of the same basic plot points across multiple scenarios. In analyzing the 14 cases in which the MBO took place post-*Hart*, four of which in-depth – *Buckley*, *Dauphinais*, *Rockey*, and *Caissie* – the author concludes that *Hart* has had no meaningful impact on MBO scripting, apart from superficial changes regarding the criminality of the fictional organization the suspect is recruited into, and the level of direct violence utilized. The coercive, manipulative tactics used by MBOs which can induce false confessions remain embedded within the technique. MBOs by their very nature remain problematic, and *Hart*'s legal tinkering has not defused their potential for wrongful convictions and abuse of process. However, despite the merits of MBO abolition, this is unlikely to occur anytime soon. As such, the author proposes several interim MBO reforms: (1) greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations.

Keywords: undercover policing; Mr. Big operations; false confessions; admissibility; reliability; prejudicial effect; abuse of process; *R v. Hart*, 2014 SCC 52; post-*Hart*; MBO scripts.

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I. INTRODUCTION

Mr. Big operations ("MBOs") are a Canadian invention, a version of which dates back over 120 years, with its modern use beginning in the 1990s.[1] However, it was not until 2014, with the *Hart* decision, that the Supreme Court of Canada ("SCC") found occasion to subject MBOs to regulation.[2] The question this paper endeavours to undertake is whether the court's new analytical framework, which treats MBO confessions as presumptively inadmissible, has affected the scripting of MBOs – or if there remains a proliferation of the same basic plot points across multiple scenarios. I will analyze MBOs since *Hart* to determine if any of the techniques or investigative "scripts" have evolved.

I will review the existing literature documenting MBOs as a backdrop, before analyzing four of the 14 cases in which the MBO took place post-*Hart* as of June 2022 – *Buckley*,[3] *Dauphinais*,[4] *Rockey*,[5] and *Caissie*[6] – to help answer this research question. While I draw on the work of Adelina Iftene and Vanessa Kinnear, who comprehensively examined court analyses, suspect profiles, and legal outcomes post-*Hart*, mine is a distinct inquiry. As Iftene and Kinnear note, their study did not assess the impact *Hart* has had on MBOs themselves, such as altering their structure.[7] It is this assessment I seek to undertake. The focus, then, is not on courts, but on MBOs themselves, at least those which have been the subject of litigation. Given their secretive nature, unprosecuted MBOs fall outside the bounds of my research.

Overall, I find that *Hart* has had no meaningful impact on MBO scripting, apart from superficial changes regarding the criminality of the fictional organization the suspect is recruited into, and the level of direct violence utilized. The coercive, manipulative tactics used by MBOs which can induce false confessions remain embedded within the technique. Simply put, MBOs are by their nature problematic, and no amount of legal tinkering can defuse their potential for wrongful convictions and abuse of process. However, despite the merits of MBO abolition, this is unlikely to occur anytime soon. As such, I propose several interim MBO reforms: (1)

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1 *R v Hart*, 2014 SCC 52 at para 56 [*Hart*].
2 *Ibid.*
3 *R v Buckley*, 2018 NSSC 1 [*Buckley*].
4 *R v Dauphinais*, 2021 ABQB 21 [*Dauphinais*].
5 *R v Rockey*, 2020 ABQB 289 [*Rockey*].
6 *R v Caissie*, 2018 SKQB 279, 2019 SKQB 3 aff'd 2022 SKCA 48.
7 Adelina Iftene & Vanessa Kinnear, "Mr. Big and the New Common Law Confessions Rule: Five Years in Review" (2020) 43:3 Man LJ 295 at 340 [Iftene & Kinnear].

greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations.

My analysis proceeds in four parts. In Part II, I explain what MBOs are, how they work, and what their general scripting has been before *Hart*. In Part III, I discuss the *Hart* decision, and how it has not markedly changed how MBOs have been legally analyzed. In Part IV, I outline the 14 post-*Hart* MBOs as of June 2022, analyzing four of them, to demonstrate *Hart*'s minimal impact on MBO scripting. In Part V, I set out three proposed MBO reforms.

II. A Brief MBO Backgrounder

A. The Typical MBO Set-up

An MBO is an undercover police investigation procedure, designed to elicit confessions from suspects in unsolved criminal cases. Police officers create a fictitious organization, often criminal, and then recruit the suspect into it. But, to join, the suspect is pressured to admit involvement in the crime. The technique contains at least four broad stages, including: (1) an intelligence probe; (2) a staged introduction; (3) world-building and gradual integration into the organization; and (4) the meeting with Mr. Big.[8]

During the intelligence probe, police officers conduct surveillance on the suspect to obtain information about their friends, family, work, lifestyle, etc. This information is used to create a tailor-made psychological approach to convince the suspect to go along with the scheme, with officer behaviour and attitude modified to suit the suspect.[9] There is then a staged "chance encounter" between the suspect and an undercover officer, usually asking the suspect for help with a low-level, typically criminal, task. Once the initial task is done, the officer insinuates that there is more work to be had with the fictional organization.[10] A relationship develops, and the suspect becomes involved in the organization. The suspect often takes part in several staged criminal activities, escalating in seriousness, for which they are well-

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8 Kirk Luther & Brent Snook, "Putting the Mr. Big Technique Back On Trial: A Re-Examination of Probative Value and Abuse of Process Through a Scientific Lens" (2016) 18:2 J Forensic Pract 131 at 133-134 [Luther & Snook].

9 Adelina Iftene, "Mr. Big: The Undercover Breach of the Rights Against Self-Incrimination" in Christopher Hunt, ed, *Perspectives on the Law of Privilege* (Toronto: Thomson Reuters, 2019) 23 at 39-40 [Iftene]; Iftene & Kinnear, *supra* note 7 at 333.

10 Timothy E Moore, Peter Copeland & Regina A Schuller, "Deceit, betrayal and the search for the truth: Legal and psychological perspectives on the 'Mr. Big' strategy" (2009) 55 Crim LQ 348 at 351 [Moore et al].

paid. There is usually a promise of further or more lucrative work if they become full members of the organization.

As the MBO progresses, operatives begin to pressure the suspect to reveal criminality, as a matter of trust and honesty, and to ensure the organization knows everything so they can deal with it accordingly.[11] The purported boss of the organization, Mr. Big, is portrayed as all-knowing, and capable of making legal problems go away.[12] In some cases, operatives will suggest that the suspect is under renewed investigation,[13] and even present fabricated police documents to this effect.[14] This investigation is portrayed as a potential problem for the organization and used to further pressure the suspect to confess.

The operation culminates in an interview with Mr. Big. The suspect is made to understand that if they come clean about their alleged crime, they will be accepted into the organization – with the money, lifestyle, and relationships that come with it – and that their legal issues will disappear.[15] The corollary implication, often expressly stated, is that if they do not confess there is no future for them in the organization. Suspects are made to believe there are no negative consequences to confessing, only upside: be it to secure a position in the organization,[16] please Mr. Big, make money and enjoy a luxurious lifestyle,[17] or some combination therein. However, for Mr. Big to help – say by having another person confess[18] or have police contacts interfere with the investigation[19] – they must know everything about the purported crime. Mr. Big may suggest that the suspect's arrest is imminent and/or emphasize the strength of the police evidence to further induce a confession.[20]

Per the Royal Canadian Mounted Police ("RCMP"), MBOs have been used more than 350 times across Canada as of 2008 with over 95% of prosecutions resulting in conviction.[21] Operations can take months, if not

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11 *Ibid.*

12 *Buckley*, *supra* note 3; *Rockey*, *supra* note 5.

13 Moore et al, *supra* note 10 at 352.

14 *R v Amin,* 2019 ONSC 3059 [*Amin*]; *Dauphinais*, *supra* note 4.

15 *Buckley*, *supra* note 3; *R v Knight*, 2018 ONSC 1846 [*Knight*]; *R v South*, 2018 ONSC 604 [*South*].

16 *R c Johnson*, 2016 QCCS 2093 [*Johnson*]; *R v Tingle*, 2016 SKQB 212 [*Tingle*]; *Caissie*, *supra* note 6.

17 *R v Balbar*, 2014 BCSC 2285 at para 202 [*Balbar*]; *Buckley*, *supra* note 3 at paras 35-36.

18 *Dix v Canada (Attorney General)*, 2002 ABQB 580 at para 124 [*Dix*]; *R v Mentuck*, 2000 MBQB 155 at para 90 [*Mentuck*].

19 *R v Handlen*, 2018 BCSC 1330 [*Handlen*]; *R v Bennett*, 2020 ABQB 728 [*Bennett*].

20 *Dauphinais*, *supra* note 4; *R v Darling*, 2018 BCSC 1327 [*Darling*].

21 RCMP, "Undercover Operations" (last modified 1 May 2015), online: *Government of*

years,[22] sometimes encompassing hundreds of scenarios, and employing dozens of operators (in one case, 50). The estimated costs are over $150,000 per operation, a figure that does not include the value of police resources used or labour costs.[23] MBOs are a significant intrusion into a suspect's life and pull the police away from other investigative tasks. A fundamental objection to MBOs is the use of such an elaborate ploy to ensnare a suspect based on mere suspicion of guilt. Proactively creating evidence of guilt through a confession induced by duplicitous means arguably distorts the traditional principles of law enforcement and criminal prosecution. MBOs differ from other undercover operations, and merit distinct analysis, in that they do not seek to catch a suspect in an act of criminality but to manipulatively connect them to a pre-existing crime they may or may not have committed.

B. The Psychological Backdrop of MBOs

MBOs produce a powerful incentive for fabrication. Mr. Big confessions are often the product of misleading police conduct, power imbalance, intimidation and/or coercion, all of which undermine voluntariness and reliability. There is a tangible benefit to confessing, with no apparent downsides, providing a motive to lie which can hamper reliability. The psychological mechanisms of MBOs can be understood by reference to various principles of social cognition: (1) positive reinforcement; (2) friendship and allegiance; (3) authority, expertise, and compliance; and (4) fear and intimidation as motivators.[24]

These soft pressure or social influence techniques are effective in getting individuals to alter their behaviour. MBOs employ at least six such tactics

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Canada <bc-cb.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6941> [perma.cc/985C-X23C].

22 45% of post-*Hart* cases lasted 3-5 months, 37% lasted 6-11 months, and the longest operation, *R v Ader* 2017 ONSC 4643, lasted 8 years: Iftene & Kinnear, *supra* note 7 at 319-320.

23 Kouri T Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (Halifax: Fernwood, 2010) at 23-24. Some operations cost much more. The *R v Skiffington*, 2004 BCCA 291 operation lasted two years and cost $1.6 million. *R v Ciancio*, 2010 BCSC 1847 cost $4 million. *Hart*, *supra* note 1 at para 38, costs $413,268.

24 Timothy E Moore & Kouri Keenan, "What is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations" (2013) 5:1 Int'l Investigative Interviewing Research Group 46 at 48-50 [Moore & Kennan].

to achieve this goal: reciprocity;[25] consistency;[26] liking;[27] social validation;[28] authority;[29] and scarcity.[30] Isolation, attacking denials of innocence, minimization of consequences, rationalization of the alleged crime, threats of harm, and quid pro quo offers – all techniques used by MBOs[31] – have each been established to have causal links to false confessions. In one study, minimization tactics tripled the rate of false confessions, offers of leniency more than doubled it, and when the tactics were combined, false confessions increased to over seven times the base rate.[32] False confessions, in turn, are linked to wrongful convictions.[33]

The pressure on MBO suspects to confess is substantial, and the enticements are both explicit and significant. The suspect is manipulated to perceive their new friends as "skilled, knowledgeable, powerful, well-connected and successful" – influential social agents to be respected and feared – and the key to their continued social and financial good fortune.[34] The combination of enticement and fear "constitutes an almost irresistible degree of psychological influence and control".[35] As Iftene notes,[36] the operators may offer a family-like environment and friends where the individual has none,[37] financial stability to impoverished people,[38] alcohol and drugs to addicts,[39] respect and trust to socially marginalized individuals,[40] a stable residence for under-housed people,[41] or the prospect of love.[42] As suspects are often unemployed or of low socio-economic status, financial offers can be very enticing. Suspects are often socially isolated and

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25 Luther & Snook, *supra* note 8 at 8-9.

26 *Ibid* at 9-10.

27 *Ibid* at 11-12.

28 *Ibid* at 13-14.

29 *Ibid* at 15-16.

30 *Ibid* at 16-18.

31 Steven M Smith, Veronica Stinson & Marc W Patry, "Using the "Mr. Big" technique to elicit confessions: Successful innovation or dangerous development in the Canadian legal system?" (2009) 15:3 Psychol Pub Pol'y & L 168 at 182-183.

32 *Ibid.*

33 *Hart*, *supra* note 1 at para 70.

34 Moore et al, *supra* note 10 at 381, 400.

35 *Ibid.*

36 Iftene, *supra* note 9 at 38.

37 *Buckley, supra* note 3; *R v Lee*, 2018 ONSC 308 [*Lee*]; *R v SM*, 2015 ONCJ 537 [*SM*]; *R v Nuttall*, 2016 BCSC 1404 aff'd 2018 BCCA 479 [*Nuttall*]; *R v Shyback*, 2017 ABQB 332 [*Shyback*].

38 *Buckley, ibid; R v Streiling,* 2015 BCSC 1044; *Rockey*, *supra* note 5 [*Streiling*].

39 *R v Perreault,* 2015 QCCA 694 [*Perreault*]; *Balbar*, *supra* note 17.

40 *Amin, supra* note 14; *Lee*, *supra* note 37.

41 *Buckley, supra* note 3; *Rockey, supra* note 5; *R v Magoon*, 2018 SCC 14 [*Magoon*].

42 *R v Subramaniam*, 2015 QCCS 6366, aff'd 2019 QCCA 1744 [*Subramaniam*].

alienated from those around them. Sometimes they are even encouraged to reduce or eliminate contact with friends and family to better immerse themselves in the organization.[43]

Overall, MBOs work best if the suspect is vulnerable to influence, due to factors such as youth, low IQ, psychological disorder, poverty, racial discrimination, and/or social stigma/isolation.[44] The overrepresentation of vulnerable persons among MBO suspects is especially disconcerting given these vulnerabilities are targeted by police.[45] Despite court caution that special attention must be paid to certain factors which increase vulnerability to persuasion in the custodial interrogation context,[46] addiction,[47] intellectual deficits,[48] youths[49]/youthfulness,[50] financial or psychological stress,[51] and health issues[52] are often uncritically present in MBO suspects.[53]

III. *HART* CHANGE, BUT NO CHANGE OF HEART, FOR MBO LEGAL ANALYSES

No court before *Hart* found that MBO conduct amounted to an abuse of process, and only two decisions, *Creek*[54] and *Mentuck*[55], excluded a confession due to prejudicial effect outweighing probative value. This is despite highly questionable conduct by the police, including:

- undermining the suspect's relationship with his fiancée, which was seen as interfering with the operation;[56]

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43 *Hart, supra* note 1; *Dauphinais, supra* note 4.
44 Iftene & Kinnear, *supra* note 7 at 301-302. Smith et al, *supra* note 31 at 187-188.
45 Iftene & Kinnear, *ibid* at 332.
46 *R c Otis* (2000), 37 CR (5th) 320 (QCCA) at para 54, leave to appeal ref'd [2001] 1 SCR xvii; *R v Lafrance*, 2022 SCC 32 at paras 79, 87 [*Lafrance*].
47 *Subramaniam, supra* note 42 at para 30 [*Subramaniam*]; *Balbar, supra* note 17 at para 270; *R c Johnson*, 2016 QCCS 2093 at para 76 [*Johnson*].
48 *Balbar, ibid* at paras 381-383; *Nuttall, supra* note 37 at paras 224, 226, 260, 412; *Hart, supra* note 1 at paras 117, 232.
49 *R v M(TC)*, 2007 BCSC 1778 at para 9; *R v ONE*, 2000 BCSC 1200; *SM, supra* note 37 at para 7.
50 *Subramaniam, supra* note 42 at paras 34-40; *R v MM*, 2015 ABQB 692 at paras 169-170; *R v Omar*, 2016 ONSC 4065 at para 23 [*Omar*].
51 *R v Laflamme*, 2015 QCCA 1517 at para 31 [*Laflamme*]; *Lee, supra* note 37 at para 115, *Nuttall, supra* note 37 at para 792.
52 *Johnson, supra* note 47 at paras 156, 158.
53 Iftene, *supra* note 9 at 38; Iftene & Kinnear, *supra* note 7 at 333.
54 *R v Creek*, [1998] BCJ No. 3189 (SC) at paras 30, 35.
55 *Supra* note 18 at paras 93, 100-101.
56 *R v Proulx*, 2005 BCSC 184 at paras 13, 44.

- conveying to the suspect that he could be killed for displeasing Mr. Big;[57]
- a feigned "bloody" assault on a female, who was then forcibly thrown into a car trunk;[58]
- the male suspect being directed to lure an operator posing as a gay male into a motel room under the pretenses of engaging in sexual activity so they could be severely beaten due to an outstanding debt;[59]
- the suspect assisting in kidnapping someone who, after receiving simulated oral sex by a prostitute (each played by operators), was tied up, blindfolded, taken to another location, and tortured. The next day the victim was portrayed as having been shackled, severely tortured, and sodomized;[60] and
- a staged murder after a botched drug deal.[61]

It was increasingly clear that MBOs needed greater judicial regulation. And in 2014, for the first time, the SCC provided it in *Hart*. In recognizing the inherent dangers of MBOs, the court held that MBO admissions are presumptively inadmissible, establishing a two-pronged admissibility test: (1) the statement's probative value outweighs its prejudicial effect; and (2) there is no abuse of process.[62]

The first prong is about the reliability of the Mr. Big confession.[63] Circumstances that may undermine reliability should be examined, including: the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including their age, sophistication, and mental health.[64] The court must also analyze the confession for markers of reliability such as: the level of detail, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public, whether it accurately describes mundane details of the crime the accused would not likely have known had they not committed it, and whether there is confirmatory evidence.[65]

Regarding the second prong, abuse of process is "almost certainly" established if police conduct "approximates coercion", "overcomes the will of the accused", involves physical violence or threats of violence, preys on

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57 *Burns v USA* (1997), 117 CCC (3d) 454 (BCCA) at para 4.
58 *R v Hathway*, 2007 SKQB 48 at para 19.
59 Moore et al, *supra* note 10 at 397.
60 *Ibid*.
61 *Dix*, *supra* note 18 at paras 126-131.
62 *Hart*, *supra* note 1 at paras 10-11.
63 *Ibid* at para 99.
64 *Ibid* at para 102.
65 *Ibid* at para 105.

an accused's vulnerabilities – such as mental health problems, substance addiction, or youthfulness – or otherwise "offends the community's sense of fair play and decency".[66] *Hart* leaves open the possibility that MBOs can become abusive in other ways too, per the discretion of the trial judge.[67]

A. *Hart* Has Failed to Change Court Analyses

In a 2020 article, Iftene and Kinnear reviewed the 61 cases that have applied *Hart* between August 2014 and August 2019 and found its framework has been inconsistently applied, with a negligible impact on the number of confessions that are admitted even in circumstances in which its reliability is questionable.[68] In the 56 non-guilty plea MBO cases in which the *Hart* test was applied,[69] only three cases excluded the confession due to a lack of reliability: *Smith*;[70] *South*;[71] and *Buckley*.[72] The *Smith* confession was excluded in June 2014, so predates *Hart*. *South* is anomalous as the MBO targeted an eyewitness, not the suspect. This leaves *Buckley,* which I will return to below. In any event, in all three cases, not only was there no confirmatory evidence, but the confessions contradicted other evidence that the police had.[73] That is, none of the confessions had any solid probative value. Iftene and Kinnear found that only four cases excluded the confession based on abuse of process.[74] However, two of these cases – *Derbyshire*[75] and *SM*[76] – are arguably not MBOs. A third, *Nuttall*,[77] is not a traditional MBO given the suspects were induced to commit a crime, not confess to one. In the fourth case, *Laflamme,* the abuse of process was due to the repeated use of simulated violence.[78]

Overall, in only two classic MBOs – *Buckley* and *Laflamme* – was the confession excluded in the first five years after *Hart*. *Laflamme* has subsequently been distinguished to support a narrow interpretation of the level of violence that gives rise to an abuse of process, primarily by holding

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66 *Ibid* at paras 115-117.
67 *Ibid* at para 118.
68 Iftene & Kinnear, *supra* note 7 at 340.
69 *Ibid* at 307.
70 *Smith v Ontario*, 2016 ONSC 7222 at para 31.
71 *South*, *supra* note 15 at para 75.
72 *Buckley, supra* note 3 at paras 100–01.
73 Iftene & Kinnear, *supra* note 7 at 310.
74 *Nuttall*, *supra* note 37 at paras 2, 7; *SM*, *supra* note 37 at paras 71–73; *Laflamme*, *supra* note 51 at paras 87–88; *R v Derbyshire*, 2016 NSCA 67 at para 153 [*Derbyshire*].
75 *Derbyshire*, *ibid*, at paras 3-4, 99, 104.
76 *Supra* note 37 at paras 8-9, 64.
77 *Supra* note 37 at paras 593-594.
78 *Laflamme*, *supra* note 51 at paras 9, 65, 69-71.

that because the violence was not specifically directed towards somebody within the fictional criminal organization, the accused was not at risk of being coerced.[79] The post-*Hart* cases of *West*,[80] *Randle*,[81] and *Johnston*,[82] all held that violence directed at individuals outside of the organization did not amount to an abuse of process. Courts have found that the use of fake violence is a necessary way to convey realistic crime and to broach the topic of the suspect's own crimes.[83] Indeed, violence or threats of violence in the accused's presence was used in 13 of the post-*Hart* cases, with none of the following conduct found to be an abuse of process:[84]

- putting an ostensibly loaded handgun into the mouth of an officer as part of a robbery;[85]
- assaulting and threatening to kill a female officer;[86]
- an officer threatening a debtor with burning his house down with his family in it if he failed to make payments;[87]
- a kidnapping scenario involving the use of "extreme violence";[88] and
- placing a dead pig into a hockey bag, then telling the accused it was a human body that he had to dispose of.[89]

This is all despite *Hart* categorically stating that "[a] confession derived from physical violence or threats of violence against an accused will not be admissible — no matter how reliable — because this, quite simply, is something the community will not tolerate."[90] No distinction is made between violence that directly threatens the accused and violence that is used in their presence. As such, the drawing of any such distinction is, arguably, legally erroneous. The fact that the suspect was not personally threatened is irrelevant; implied threats are threats all the same.[91] As Christopher Lutes notes, the undue focus on extra-organizational violence "is troubling because it assumes that accused persons who are exposed to violence that they believe to be real will neatly separate violence against

79 Christopher Lutes, "Hart failure: Assessing the Mr. Big confessions framework five years later" (2020) 43:4 Man LJ 209 at 238 [Lutes].
80 *R v West*, 2015 BCCA 379 at paras 98-100 [*West*].
81 *R v Randle*, 2016 BCCA 125 at paras 87-89 [*Randle*].
82 *R v Johnston*, 2016 BCCA 3 at paras 50-61.
83 Lutes, *supra* note 79 at 240.
84 *Ibid* at 240.
85 *Balbar*, *supra* note 17 at para 379.
86 *West*, *supra* note 80 at paras 18, 99.
87 *Handlen*, *supra* note 19 at para 124.
88 *MM*, *supra* note 50 at para 171.
89 *R v Potter*, 2019 NLSC 8 at paras 54-55, aff'd 2021 NLCA 11 [*Potter*].
90 *Hart*, *supra* note 1 at para 116.
91 Iftene & Kinnear, *supra* note 7 at 326.

people external to the organization from violence that could be directed at them."[92]

Beyond violence, MBOs employ soft pressure tactics that can be just as effective at coercing a confession – tactics it does not appear courts are particularly sensitive to as being highly manipulative, despite *Hart* explicitly cautioning that offering attractive incentives to confess, or taking advantage of vulnerable individuals, can amount to an abuse of process.[93] It appears that absent hard pressure tactics, courts will not find an abuse of process. This is problematic, as noted by Kirk Luther and Brent Snook, given that soft pressure tactics can be equally effective in overcoming the will of the accused and functioning as an abuse of process.[94] In *Subramaniam*, for example, operators provided money and alcohol to an impoverished 19-year-old suspect with an alcohol problem (and who was in love with one of the undercover officers).[95] This was not considered an abuse of process because the court deemed that Subramaniam had "street smarts"[96] and no violence was involved.[97] As Iftene notes, such an analysis "constitutes a failure to understand the psychological impact of manipulation and its relation to coercion and choice that is 'free, informed and voluntary'."[98]

In 75% of post-*Hart* cases at least one persuasive incentive was used, breaking down as follows: money/attractive lifestyle (66%); meaningful friendships/family-like relationships (44%); good employment (5%); and promises that their legal issues will disappear (20%).[99] However, these incentives, and their potential effect on reliability, do not appear to have affected the admissibility of confessions in any discernible way.[100] In fact, the admission rate of Mr. Big confessions has increased since the framework was implemented, from 88-91.5% pre-*Hart* to 93.6% in the first five post-*Hart* years.[101] In all but two cases where the confession was admitted, the accused was found guilty.[102] It seems courts simply do not, or cannot, see how the presence of incentives can induce a false confession.[103] Nor has

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92 Lutes, *supra* note 79 at 238-239.

93 *Hart, supra* note 1 at paras 112-117.

94 Luther & Snook, *supra* note 8 at 18.

95 *Supra* note 42 at paras 27, 30-33.

96 *Ibid* at para 36.

97 *Ibid* at paras 41-45.

98 Iftene, *supra* note 9 at 42.

99 Iftene & Kinnear, *supra* note 7 at 316-317.

100 *Ibid* at 317-318.

101 Lutes, *supra* note 79 at 214, 218, 242.

102 Iftene & Kinnear, *supra* note 7 at 307: *Streiling, supra* note 38 at para 73; *Tingle, supra* note 16 at paras 404-405.

103 The promise to solve the target's legal issue is one that is often discussed by a judge but

Hart slowed the use of MBOs, going from 14 cases on average per year pre-*Hart* (including both those that made it and did not make it to trial) to 11 cases per year post-*Hart* (only counting those making it to trial).[104]

B. MBOs Continue to Have a Disproportionate Effect on Vulnerable Populations

In a 2010 survey, Kouri Keenan and Joan Brockman determined that from the 89 MBOs they reviewed, 11 suspects were Indigenous and 29 were from "very poor" social backgrounds. Others had poor education or reduced cognitive capacity, although exact numbers were not available.[105] Iftene and Kinnear's research shows that in 67% of the post-*Hart* cases and 54% of those where the evidence was admitted, the trial judge identified the presence of at least one vulnerability, as follows: history of abuse (8%); unstable housing (8%); lack of sophistication (20%); mental health illnesses other than addiction (15%); addiction (20%); youth (under 25) (23%); no family or social ties (26%); and significant financial difficulties (31%).[106]

Certain types of vulnerabilities, such as poverty, youthfulness, addiction, and mental illness, seem to be given less consideration than others if considered at all as a vulnerability.[107] Where vulnerabilities are found and analyzed, the typical conclusion is that the police did not prey on the vulnerabilities, despite being aware of them.[108] Overall, courts continue to "struggle with understanding the impact of the presence of vulnerabilities on the reliability of confessions".[109] In 18% of the post-*Hart* cases, the confession was admitted despite the target having at least one identifiable vulnerability and no confirmatory evidence.[110] In at least 6 of these cases, the target had a vulnerability, at least one incentive was used, there was no confirmatory evidence, and the target was under 25 years

dismissed as creating any prejudicial effect: *Ibid* at 319.

104 *Ibid* at 308.

105 Keenan & Brockman, *supra* note 23 at 50-51.

106 Iftene & Kinnear, *supra* note 7 at 312-313.

107 *Ibid* at 313-315, 328-329. Where youthfulness is analyzed, this factor is often downplayed as a vulnerability factor, with qualifiers such as the person having 'street smarts,' appearing mature, or having a criminal record. Where mental illness is discussed, it is often subject to the overriding consideration that the target was not someone that could be "easily manipulated."

108 See e.g., *Amin, supra* note 14 at paras 39, 44-45; *Balbar, supra* note 17 at para 337; *Perreault, supra* note 39 at paras 87–89.

109 Iftene & Kinnear, *supra* note 7 at 316.

110 *Ibid* at 323.

old.[111] In two of these cases, threats were also used, and the target was involved in violent scenarios.[112]

Overall, there is no indication that targets who are especially vulnerable due to factors such as race, poverty, social isolation, or limited education are being screened out post-*Hart*. As Iftene and Kinnear conclude, "an investigative tool that has historically been built overwhelmingly on [vulnerabilities] should raise heightened concerns…Not only is there no evidence that the *Hart* framework has led to more culturally sensitive approaches as some hoped, but it may have also provided legitimacy to an under-scrutinized investigative tool that may have disproportionate effects on marginalized groups."[113] If *Hart*'s caution that the police should avoid taking undue advantage of vulnerability was heeded, leading as it may to unreliable confessions and/or abuses of process, MBOs would almost certainly be less successful given non-vulnerable people are "less likely to fall for what is now a widely publicized undercover technique, rooted in the manipulation of vulnerabilities."[114] Less success, in turn, could lead to fewer MBOs – perhaps to the point of being phased out. However, that has not proven to be the case.

IV. Has *Hart* Changed the MBO Script? A Review of Post-*Hart* MBOs

Iftene and Kinnear's research shows that *Hart* has not changed much in terms of legal analyses, court outcomes, or the targeting of vulnerable suspects. However, the question remains as to whether MBOs themselves have become less coercive due to *Hart*'s guidance. That is, has *Hart,* for all its various failures, nonetheless had a positive impact in terms of modifying MBO scripts? Or, conversely, are MBOs continuing as they did before, demonstrating resistance to change?

There have now been 14 court cases as of June 2022 – 13 reported,[115] one unreported[116] – in which the MBO took place in whole or in part after

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111 *R v Worme*, 2016 ABCA 174; *R v RK*, 2016 BCSC 552 [*RK*]; *R v Charlie*, 2017 BCSC 218; *Randle, supra* note 81; *Magoon, supra* note 41; *Omar, supra* note 50.

112 *RK, ibid* at paras 705-738, *Randle*, *ibid* at para 4.

113 Iftene & Kinnear, *supra* note 7 at 334.

114 *Ibid* at 333.

115 *Buckley, supra* note 3; *Dauphinais, supra* note 4; *Rockey, supra* note 5; *Caissie*, *supra* note 6; *Amin*, *supra* note 14; *Knight*, *supra* note 15; *Handlen, Bennett, supra* note 19; *Lee, Shyback supra* note 37; *Potter*, *supra* note 89; *R c Habib*, 2017 QCCQ 1581 aff'd 2019 QCCA 2043 [*Habib*], and *R v Wingert,* 2020 ABCA 304 [*Wingert*].

116 *R v Sneesby*: Jonny Wakefield, "Ex-trucker found guilty of manslaughter — not murder

the *Hart* decision.[117] That is, MBOs which were scripted, at least in part, with the benefit of *Hart*'s reasons. This case count does not include failed MBOs, unprosecuted MBOs, guilty pleas, or unreported decisions not otherwise commented on publicly. From the 14 cases for which a public record is available, three confessions were excluded: *Buckley* (on the first *Hart* prong); *Handlen* (one of two confessions on the first prong); and *Dauphinais* (on both prongs). Six of these cases are in addition to those discussed by Iftene and Kinnear.[118]

To summarize the findings, there is a lack of uniformity as to how post-*Hart* MBOs are scripted. Some are indistinguishable from pre-*Hart* cases.[119] In others there has been a marked shift away from portraying the criminal organization as directly violent, to one engaged in activities such as credit card fraud, "fencing" stolen items, passport forgery, etc.[120] Still others portray the organization as non-criminal, albeit with criminal, policing, or other connections that can make a suspect's legal problems go away, and/or a propensity to use violence if necessary.[121] The lessons taken from *Hart* appear to be that there are two chief problematic narrative elements to avoid: (1) the use of violence and/or portraying the organization as violent; and (2) creating an explicit fear of reprisal should the suspect leave the organization. That is, to equate abuse of process and prejudicial effect with induced criminality and violence. However, this fails to account for the fact that violence and fear are not the only coercive psychological techniques.

Overall, MBOs continue to employ the same soft pressure techniques as before – financial pressure, friendship, and promise of a stable future –

— in death of Alberta Indigenous woman missing almost three years" (1 June 2022), online: *Edmonton Journal* <edmontonjournal.com/news/local-news/ex-trucker-found-guilty-of-manslaughter-not-murder-in-death-of-alberta-indigenous-woman-missing-almost-three-years>.

117 *R v Burkhard*, 2019 ONSC 1218 may be seen as a 15th case, but in my view, it is not an MBO. Rather, it involved undercover operators trying to extort a confession by falsely stating there was incriminating video evidence that they could get rid of. There is also *Darling* in which a stay of proceedings was entered due to inadequate disclosure: see e.g., *Darling, supra* note 20 at para 11; Paul Willcocks, "A Botched Murder Case and Secrecy at the Top" (14 November 2018), online: *The Tyee* <thetyee.ca/Opinion/2018/11/14/Botched-Murder-Case-Secrecy/> [perma.cc/9G2P-4MRX]. As the MBO was never properly analyzed by the court, I have excluded it from the count.

118 *Habib*, *Rockey*, *Dauphinais*, *Wingert*, *Bennett*, *supra* note 115; and *Sneesby*, *supra* note 116.

119 In this category, I put *Shyback*, *Handlen*, *Dauphinais*, *Buckley*, *Potter*, and *Rockey*, *supra* note 115.

120 In this category, I put *Knight*, *Lee*, *Bennett*, and *Habib*, *supra* note 115.

121 In this category, I put *Amin*, *Caissie*, *supra* note 115 and *Sneesby*, *supra* note 116. *Wingert*, *supra* note 115 also fits best here, although the suspect confessed before the full details of the scenario could be laid out.

so remain coercive, albeit in a more subtle way.[122] MBO scripters have seemingly found that people can be induced to confess as much by soft pressure tactics than by threats and violence, with such methods – often overlooked as coercive – having a better chance of standing up in court.[123] Less stick, more carrot, still the same trickery, deceit, and psychological manipulation. The same results are achieved by leveraging greed as opposed to fear, and triers of fact seem to have far less sympathy for the former.

While the sample size is too small to make any definitive pronouncements, *Hart* has so far failed to meaningfully change how MBOs are scripted. To draw this point out, I will focus on four of the 14 post-*Hart* MBOs in particular – *Buckley*, *Dauphinais*, *Rockey*, and *Caissie* – as they best represent ongoing problems with MBOs and the *Hart* analysis, including dubious convictions and confessions being tossed out in court.

A. *Buckley*

In *Buckley*, the confession elicited after a $300,000, 77-scenario operation running from October 2015 to April 2016 was found inadmissible.[124] Overall, the court concluded that the prejudicial effect of admitting the confession far outweighed any "nominal" probative value.[125]

When the police first contacted John Buckley he was on social assistance, with no fixed address. He was in his early 20s with limited education, without many friends, orphaned with a strained relationship with his only sibling, and not involved in any extracurricular activities.[126] Buckley was intercepted where he cashed his welfare cheque and was eventually offered a job with a fictitious company at a starting rate of $20/hour.[127] In time, it was revealed that this company was a criminal organization involved in, *inter alia*, insurance fraud and illegal sales.[128] Part of the ruse was to show Buckley that the organization had various connections to fix any given criminal issue, including corrupt police officers who could subvert investigations.[129]

Buckley quickly moved up in the organization – transporting gold nuggets, counting $240,000 in cash – and began travelling around Canada.

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122 *Iftene, supra* note 9 at 42.
123 Iftene & Kinnear, *supra* note 7 at 336.
124 *Supra* note 3 at para 3.
125 *Ibid* at para 99. As abuse of process argument was not argued, no analysis was undertaken.
126 *Ibid* at paras 14, 73.
127 *Ibid* at para 16.
128 *Ibid* at paras 21-22.
129 *Ibid* at paras 23, 25-27.

He stayed in hotels, was taken to a high-end Yukon getaway, went to a Montreal Canadiens game, and continuously dined in restaurants, all at the organization's expense. He was bought clothes, after repeatedly wearing the same outfit, and lent money when short on rent.[130] As the judge noted, this was a "far cry" from living on welfare. In total, he received pay and benefits of $31,000 over the six-month operation and worked 622.5 hours for the organization.[131] Buckley also became friends with various members of the organization, especially "M.L." who became his best friend and with whom he spent approximately 700 hours (or about 4 hours/day).[132]

Eventually, the subject of Buckley's involvement in his mother's death began to come up. He initially proclaimed his innocence. Nonetheless, the organization discussed the possibility of offering some sort of assistance and began pressuring him to confess. A Mr. Big interview was scheduled. Just before that was to happen, Buckley was told that the organization's police contacts gave them a tip that he was about to be arrested and charged for his mother's murder.[133] Buckley said that if he went back to jail, he would kill himself. A solution was offered. There was a biker in prison that owed the organization a favour who would falsely confess, but Buckley would need to give them every possible detail to make it believable.[134]

Buckley continued to deny he killed his mother but offered to provide all necessary details from the disclosure he received in 2012 to the biker. Undercover operators said this was not good enough. They would need an actual confession. If Buckley did not confess, the organization would have no choice but to sever all ties with him. If he did confess, his name would be cleared, he could continue to work for the organization, and he could collect the insurance money from his mother's death. The overall impression was that there were only positives to confessing, and only downsides not to.[135]

During the Mr. Big interview, Buckley continued to deny any involvement in his mother's death, but, after some further pressure – including an implication that Mr. Big himself had committed a murder – he eventually relented and said he killed her with a hammer. The description of the hammer varied during the interview.[136] There were other internal inconsistencies, such as what happened to the clothes he was wearing at the time of his mother's death, and whether he was wearing

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130 *Ibid* at para 35.
131 *Ibid* at paras 33-35.
132 *Ibid* at paras 17-18.
133 *Ibid* at para 38.
134 *Ibid* at para 39.
135 *Ibid* at para 40.
136 *Ibid* at paras 41-42.

shoes.[137] His confession recited details from the disclosure materials he received, however when asked to go beyond this material, he contradicted himself.[138] He provided no mundane details that would have only been known if he committed the crime.[139] No additional evidence was discovered as a result of the confession.[140]

1. Commentary

Buckley is an example of how by the time the MBO is run, it can be too late to address significant weaknesses and problems with the case other than the confession being deemed inadmissible. From the outset, there should have been major red flags. Buckley was young, destitute, transient, largely unemployed, with no meaningful friends, family, or social circle to speak of. Nor was there any holdback evidence.[141] Buckley had been provided with disclosure and would have been fully familiar with the location of his mother's body, the details of the crime scene, and the details of the investigation whether he was the perpetrator or not.[142]

Pre-*Hart*, this may have been more understandable given the lack of judicial guidance regarding MBOs. But the *Buckley* operation began approximately 15 months after *Hart*, leaving plenty of time to adjust the operation, or even to consider not running the operation at all. It seems to point to a continued pattern of running MBOs without more structured advanced planning to prevent especially hazardous operations from going forward. *Hart* had no appreciable effect on how Buckley was selected as a target, or how this operation was scripted, apart from the decision to portray the criminal organization as non-violent. As it was nonetheless portrayed as having connections to other violent criminal organizations such as "bikers" and "Italians", with members who had "done very bad things" including assaulting a police officer, and engaging in blackmail and obstruction of justice, this may be a distinction without a difference. Indeed, the judge noted as much.[143] While there were no threats of violence to Buckley or other feigned violence during the scenarios, there were nonetheless explicit implications that things would go wrong for him if he refused to confess.

Despite superficial modifications, *Buckley* is virtually indistinguishable from pre-*Hart* cases. This is troubling as it demonstrates *Hart*'s guidance is

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[137] *Ibid* at paras 46, 49-50.
[138] *Ibid* at paras 51-55.
[139] *Ibid* at para 90.
[140] *Ibid* at para 84.
[141] *Ibid* at paras 51, 87.
[142] *Ibid* at para 51.
[143] *Ibid* at para 73.

being ignored. If this were an isolated case, it could be said to be an anomaly. But there are other, later MBOs which follow the same pattern of being scripted as if *Hart* never happened. The worry that *Hart* failed to create substantial and uniform changes to MBOs is further borne out in *Dauphinais* and *Rockey*.

B. *Dauphinais*

The 39-scenario *Dauphinais* MBO took place from January 16 to May 21, 2018.[144] Kenneth Dauphinais was recruited into a fictitious organization involved in criminal ventures such as credit card fraud and illegal gun purchases.[145] Eventually the subject of Dauphinais' involvement in his ex-spouse's murder came up. A staged call came in, with Dauphinais present, indicating the police were looking to arrest and charge him for the murder. Mr. Dauphinais' demeanour changed significantly, becoming stressed out, irritable, and concerned for himself and the negative repercussions for the organization should he be arrested.[146] Dauphinais was offered support to make this problem go away but needed to give any information he had to Mr. Big.[147] Several members portrayed themselves as having criminal charges go away due to disclosing their situation to Mr. Big; others said they ended up in prison because they failed to do so.[148] The message was that there were only positives to confessing, and only downsides otherwise. Meanwhile, two police officers went to Dauphinais' house and told his teenage sons that he was wanted for the murder of their deceased mother. Other members told Dauphinais his impending arrest was bringing unwanted police attention to the organization, and that there was a "manhunt" for him with the police "swarming" the hotel room he had just left.[149]

With the pressure mounting on Dauphinais, the Mr. Big interrogation took place over four days, with Dauphinais moving between different hotels, and different cities, effectively isolated from anyone outside the organization. False incriminating evidence was put to him, including that his best friend had ratted him out. The organization offered to discredit this information if they knew the whole story. They also offered to give Dauphinais a false identity and smuggle him across the US border. These tactics failed to yield a confession.[150] It did, however, lead to Dauphinais

144 *Supra* note 4 at para 16.
145 *Ibid* at para 9.
146 *Ibid* at para 32.
147 *Ibid* at para 14.
148 *Ibid* at para 15.
149 *Ibid* at para 33.
150 *Ibid* at paras 33-35.

making several suicidal statements, telling operators he would rather die than be arrested or go to prison. At one point Dauphinais outlined his options as: (1) self-harm; (2) giving himself up; or (3) talking to Mr. Big. An operator who was close to him, "X", steered Dauphinais away from suicide, and encouraged him to seek assistance from Mr. Big. The operator, playing on their friendship, said he did not want to lose Dauphinais to "jail or otherwise."[151]

Despite this assurance, Dauphinais' stress and paranoia continued to increase. He shaved his head and beard to change his appearance – disposing of the clippings at another location to cover up the evidence – and complained of increasing blood pressure and back pain due to the stress. While driving, he was sure someone was following him. When he noticed a police car parked outside his hotel room, he pinned the curtains together. He expressed concern that his phone was bugged and did not want to use it to contact anyone, including his two sons.[152]

Dauphinais never did provide a full confession or much detail about his ex-spouse's murder. Whenever he stated that he had limited or no memory of events due to a pre-existing head injury, he was persistently challenged. His loyalty to the organization and his friendship with "X" were brought up as reasons he should be more forthcoming.[153] Yet no further credible details emerged, nor did Dauphinais identify any of the holdback evidence.[154] The court excluded the confession on both the first and second prongs of *Hart*. The confession was deeply prejudicial – with the court concluding that the "police showed no concept of restraint in the pressure they were willing to put on the accused"[155] – and its probative value was "weak" given the lack of any markers of reliability and Dauphinais' statements being "very contradictory."[156]

The MBOs subjective impact on Dauphinais also represented an abuse of process,[157] for two main reasons.

First, it was set up so that the only way to avoid arrest and prevent the organization from taking "heat" was to confess and let Mr. Big take care of the problem. Keeping Dauphinais isolated for four days, insinuating that his best friend had deeply betrayed him, and continuously disbelieving his version of events, was all highly coercive. Dauphinais was made to feel as if

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151 *Ibid* at para 38.
152 *Ibid* at paras 41, 86.
153 *Ibid* at para 40, 43.
154 *Ibid* at para 44.
155 *Ibid* at para 42.
156 *Ibid* at paras 44, 49, 57.
157 *Ibid* at para 66.

he was not free to leave until he gave officers the statement they wanted to hear. Dauphinais' erratic, paranoid behaviour should have been a red flag, but the effect of these high-pressure tactics was "disregarded, or at least minimized." The officers did "nothing to dispel the accused's increasing paranoia" and even reinforced his perception of imminent arrest as it was useful to pressure Dauphinais and have him believe only the organization could help him.[158] Continually fabricating information during four days of physical and psychological detention which left Dauphinais "captive" – with a complete personality change and increased paranoia due to the induced belief "that the full power of the state was being employed to track him down and arrest him" – constituted an abuse of process.[159]

Second, the exploitation of Dauphinais' relationship with his children was "offensive", especially as the police knew the two teenagers, one of whom was a minor, would be alone without parental supervision when they told them their father was wanted for arrest. The police showed a "shocking lack of care" regarding their vulnerability, and the effect this message might have had on them. The police also relayed this interaction to Dauphinais to further ramp up the pressure and validate their claim of an imminent arrest.[160]

1. Commentary

While the problems with *Dauphinais* are ably discussed in the judgment, it is telling as to just how many issues the MBO had that the court did not have to analyze the following factors to find a lack of reliability and an abuse of process:

- the frequent use of staged violence;[161]
- the access to, and willingness of members to use, firearms;[162]
- portraying certain members as having violent tempers (including beating someone so badly they wound up in a wheelchair);[163]
- Dauphinais' unemployment and precarious financial situation when the MBO began;[164]
- Dauphinais' lack of an extensive social network;[165] and

158 *Ibid* at paras 71, 73, 76, 86, 88.
159 *Ibid* at paras 77, 91, 93-94.
160 *Ibid* at paras 79-83, 90.
161 *Ibid* at paras 11-13, 24.
162 *Ibid* at para 25.
163 *Ibid* at para 27.
164 *Ibid* at para 21.
165 *Ibid* at para 28.

- Dauphinais' significant remuneration, including a job offer (after he said he needed a job, and to prevent him from pursuing a genuine job opportunity which would have compromised the operation).[166]

It is disturbing that such an array of tactics was used in an MBO taking place 3.5 years post-*Hart*. It displays a deep ignorance regarding conduct the SCC deemed inappropriate. And there is no indication that a *Dauphinais*-type operation could not happen again. With no external MBO oversight, there is no reason to believe any such tactics/scripting would necessarily be screened out. *Dauphinais* makes the case that MBOs require more external supervision.

C. *Rockey*

From January 10, 2018, to April 27, 2018, Richard Rockey was immersed in a 56-scenario MBO to determine his role in an unsolved murder. When the MBO began, Rockey was unemployed and lacked significant income. His net monthly income was $1,100 from a disability cheque.[167] The police knew he was using meth.[168] He had no birth certificate or government-issued photo identification.[169] He was living in a low-rent motel, in a tumultuous relationship with his girlfriend, and unhappy with where he was living.[170] Initially recruited into a fictitious organization under the guise of moving beer kegs, the MBO escalated to, *inter alia*, collecting and delivering guns and drugs, drug importation, debt collection, and the purchase and use of firearms.[171]

Eventually, it was conveyed to Rockey that he could be part of an imminent "big deal" with substantial compensation. But first, he needed to have an interview with Mr. Big, who alerted him that the police were actively investigating him for murder.[172] An arrest warrant was being considered. Mr. Big offered to help him by creating a false alibi, altering DNA, bribing police and witnesses, and/or finding another person to confess to the murder. If Rockey did not want help, however, he was welcome to leave without consequence.[173] Meanwhile, Mr. Big reiterated the benefits Rockey was to shortly receive through the organization, including: a good place to

[166] *Ibid* at paras 20, 22.
[167] *Supra* note 5 at paras 55-56.
[168] *Ibid* at para 92.
[169] *Ibid* at para 71.
[170] *Ibid* at paras 42-43.
[171] *Ibid* at paras 34-38.
[172] *Ibid* at paras 67-68.
[173] *Ibid* at paras 110-112, 128.

live; reasonable wages; "large pay days"; new driver's and boating licenses; and a whole new name and secondary life.[174] Rockey confirmed he wanted Mr. Big's help and confessed to the murder. Rockey initially provided a generalized account, then with more detail following Mr. Big's request to talk as if was telling this to someone "who's gonna go take the fall for you."[175]

The court admitted the confession, finding its probative value outweighed its prejudicial effect. No abuse of process was found. Despite the use of firearms, violence, threats of violence, and two staged deaths, the court downplayed this aspect as "not as immediate or graphic" as various other MBOs and "not problematic" given:[176]

- undercover operators did not routinely carry weapons for intimidation;
- victims were not murdered in Rockey's presence nor was he conscripted to administer threats;
- Rockey was not personally threatened with retributive violence; and
- any violence was directed at persons outside the organization.

The court accepted the police's explanation that the staged deaths and general aura of violence were not to intimidate Rockey but to show him the organization could and would assist members and build his comfort to disclose prior criminal conduct.[177] The court reasoned that as Rockey was not threatened or directly exposed to violence, and was assured that members would not be subjected to violence, he was not coerced by fear.[178] Rockey's testimony that he feared for his life on several occasions was deemed "inconsistent with his violent history and demonstrated comfort in employing violence as an organization member."[179]

Despite Rockey's precarious financial situation when the MBO began, the court found he had "the financial capacity to function on a daily basis". While he was paid $8,425 over the 3.5-month MBO, provided $9,700 in accommodation, and $635 in meal costs, the court found these financial benefits only offered "moderate lifestyle improvements" and "were not life altering".[180] The fact that Rockey participated in 3-4 scenarios a week, akin to a part-time job, and formed several friendships, including with one operator that he loved "like a sister", were not discussed as part of the *Hart*

[174] *Ibid* at para 125.
[175] *Ibid* at paras 113, 138.
[176] *Ibid* at paras 40, 76, 81, 85-86.
[177] *Ibid* at paras 81, 179.
[178] *Ibid* at para 180.
[179] *Ibid* at para 84.
[180] *Ibid* at paras 55, 60-62, 65, 71, 126.

analysis.[181] Nor was Rockey's drug use a factor. His testimony of using meth daily during the MBO was not believed, despite having a two-day supply on him when arrested. This amount was deemed consistent with a relapse and not evidence of continued use. The court accepted the operators' testimony that they did not suspect Rockey of using meth, and as such, even if he were addicted, "by definition, they could not, and did not, exploit" it.[182]

While Rockey's confession corroborated mundane details and was consistent with certain holdback evidence, it did not lead to any new inculpatory evidence and was otherwise inconsistent and/or directly contradicted other key details, such as the victim's injuries, where the victim was struck, and where the murder weapon was disposed of.[183] These issues – as well as Rockey's allegation that he was parroting murder details learned from the actual perpetrator – did not trouble the court, who saw its role as merely determining threshold reliability, not undertaking a full reliability analysis.[184]

1. Commentary

Rockey is a dispiriting example of a court downplaying several significant vulnerabilities and failing to properly exercise its gatekeeping role over a confession that had major reliability issues. It epitomizes the problem with the *Hart* analysis: if a court wants to admit a confession, it will find a way to do so. Implying that someone must be murdered or for the accused to administer the violence to effectively amount to an abuse of process is an impossibly high standard to meet – and legally incorrect. *Rockey* maintains that nearly any level of violence is acceptable if done to those outside the organization. As noted above, this is not only a false dichotomy but fails to account for the fact that if an accused does not confess, they risk being excluded from the organization, and hence subject to this violence. The fact one is only protected by being a member only strengthens the incentive to become a member, or maintain membership, and hence to confess, given it is portrayed as the only sure way to stay within the organization.

On this point, the court's narrow focus on the fact that Rockey was already treated as a member when the "big deal" was offered as a means of downplaying this incentive to confess completely misses the point that the incentive was not to join the organization at that point, but to participate in the "big deal", which represented a critical chance to move up in the

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[181] *Ibid* at paras 38, 49.

[182] *Ibid* at paras 92-93, 96, 100-101.

[183] *Ibid* at paras 142-147.

[184] *Ibid* at paras 148-150.

organization and make substantial money.[185] The court seems to think bare membership is all that matters, as opposed to significant advancement and remuneration. While an offer of membership is the classic MBO narrative device, there is no meaningful difference between this and a scenario where promotion is used as the reward instead. The *Rockey* script, and legal analysis, seem to have learned nothing substantial from *Hart*.

Further, the court's reasoning regarding Rockey's financial situation and drug use is questionable. He went from making $1,100/month to approximately $2,400/month, with $3,300 in other benefits, yet the court finds this was a modest increase that did not alter his life. However, a doubling of income, frequent hotel accommodation, and paid meals is far from a modest increase, and would significantly alter someone's life given $1,100/month is subsistence-level (especially in British Columbia, where Rockey lived). The court's analysis is insensitive to how that much money can be invaluable when impoverished.

As for his drug habit, the court concluded that Rockey's non-addiction and discontinuance of use were dispositive without grappling with how his meth consumption might have affected his mental and physical health or caused withdrawal symptoms. The court found that even if Rockey was addicted, the police could not exploit this addiction as they did not know about it. This logic is deeply flawed. Police ignorance regarding a particular vulnerability cannot be used as a shield. Otherwise, it would incentivize deliberately knowing less about a target. In any event, *Hart* does not require police to be aware of a vulnerability for it to be taken advantage of.[186] Here, the police knew Rockey was using meth at the onset of the MBO. His continued use, or withdrawal symptomatology, ought to have been within their reasonable contemplation.

Lastly, *Rockey* demonstrates why a more robust gatekeeping analysis must be built into the *Hart* framework. While the court was not necessarily wrong to find that threshold reliability is a relatively low standard, the fact that a confession of such a dubious value was allowed to go before a trier of fact is problematic given what is known about the propensity to take such confessions at face value, despite how it may have been coercively induced (especially as *Rockey* was a jury trial).[187] Put simply, the danger of an MBO confession being too tempting to disregard despite possible coercion ought to militate against a standard of admission that is akin to hearsay statements. I return to this point in more detail below.

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185 *Ibid* at paras 121-124.

186 *Hart*, *supra* note 1 at para 117.

187 *Supra* note 5 at para 149.

D. *Caissie*

During a 49-scenario MBO running from January 20, 2016, to July 19, 2016, Joseph David Caissie was immersed in the activities of a fictional criminal organization to determine if he killed his ex-partner. The "bump" was winning a fictional survey's grand prize of hockey tickets.[188] On the limousine ride to the game, he was introduced to officers posing as other winners. One of the officers, Smith – who attended with his boss, Mr. Big – commissioned Caissie to construct an ice fishing shack.[189] Smith later confided that he and Mr. Big were involved in criminality and began to involve Caissie in activities such as vehicle repossession, debt enforcement, and money laundering.[190] It was conveyed to Caissie that Smith was powerful and ready to use violence if necessary and that the organization worked with "bikers" and was able to intimidate them.[191] Caissie was also told Mr. Big had RCMP contacts who could sort out criminal issues.[192]

Eventually, the seed was planted that a membership spot in the organization was opening soon, with Smith asking Caissie if he would be prepared to take it. With Mr. Big providing gifts for his grandchildren, and his increased role in the organization, Caissie began to more assertively state his intention to join the organization full-time.[193] He also began to confess to the murder, but with inconsistent details. Caissie was fired from the organization for lying but stuck to his story. 13 days later, Mr. Big offered Caissie one last chance to come clean and prove he was telling the truth about the murder. Without 100% truthfulness, he would be out of the organization for good. Caissie confessed again, and despite certain details remaining inconsistent, he was arrested.[194]

The trial judge admitted the confession. The prejudicial effects were found to not be as acute as with other cases, mostly because there were:

- only "minimal" violence against people outside the organization;
- no violence against organization members; and
- no direct threats against Caissie (nor did Caissie participate in any violence).

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188 An identical scenario was used in *Sneesby, supra* note 116. Indeed, the two MBOs play out as if from the same script.

189 *Supra* note 6, *SKQB 2018* at paras 105-111.

190 *Ibid* at paras 112-114, 121.

191 *Ibid* at paras 115, 125-127.

192 *Ibid* at para 133.

193 *Ibid* at paras 119, 147.

194 *Ibid* at paras 161, 165, 177-186.

It was repeatedly stressed to Caissie that he was free to leave the organization at any time or decline participation in any activity he was uncomfortable with. The inducements were also found to be "modest", with Caissie being told he should maintain his legitimate employment and not rely on work from the organization. The court concluded that Caissie wanted in but was not so dependent that he needed into the organization.[195]

As for probative value, as the trial judge put it, the confessions were "reliable enough". Caissie confessed on six separate occasions, however, certain details were not only internally consistent but did not match up with the evidence, including the holdback evidence, on various key points such as the mode of killing. Nonetheless, it was determined Caissie accurately described mundane details of the crime which met the lower threshold reliability standard.[196] Counsel agreed that abuse of process was not engaged, so it was not argued at trial.[197] These findings were upheld on appeal, which concurred that Caissie was "not lifted out of poverty" – the $11,900 in wages and gifts provided to Caissie during the 6-month MBO notwithstanding – nor was he "friendless" or lacking family ties. Accordingly, he was neither "desperate nor destitute", nor "financially, socially, or emotionally vulnerable."[198]

1. Commentary

Caissie appears to be a conscious effort to remix the MBO plot, such that criminality and violence are ostensibly eliminated as narrative devices.[199] However, it is only <u>exclusive</u> criminality which is eliminated and <u>direct</u> violence which is minimized. *Caissie* continues to imply such aspects to the same effect, and the crucial quid pro quo offer of covering up the alleged crime and organizational membership in exchange for a confession remains in place. Replacing a violent criminal organization with one that is purportedly legitimate, but violence-adjacent and capable of obstructing justice for the suspect's benefit, is a distinction without a difference. As discussed, violence is unnecessary to psychologically manipulate a suspect.

Indeed, as scripted the *Caissie* MBO likely did not need violence or criminality at all, given Caissie was motivated primarily by greed, ambition, and a fervent desire to join the organization. As such, the court's reliance on Caissie being told there was no expectation to do anything criminal and being given a choice of criminal or noncriminal work as a marker of

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[195] *Ibid* at para 158; *supra* note 6, *SKCA* at paras 41-42, *SKQB 2019* at paras 132, 236.

[196] *Ibid* at paras 161-163, 210, 213, 227, 340; *SKCA* at paras 15-21, 35, 38-39; *SKQB 2019* at paras 129, 157-161.

[197] *SKCA*, *ibid* at para 43.

[198] *Ibid* at paras 74-79.

[199] *Supra* note 6, *SKQB 2018* at para 102.

reliability is misplaced.[200] It was the work that mattered to Caissie, not the criminality. Whether these factors make his coercion and manipulation any more palatable is dubious, but the court evidently thought so. However, *Caissie* is not markedly different for the classic MBO inducements of a financial windfall and stable employment – and if one considers the implication that a powerful organization with an ability to cover up crime and intimidate bikers could believably harm one's interests, then both the greed and fear motivators to confess are present. As for the confession itself, the idea that it was "reliable enough" to go before a trier of fact despite serious issues is problematic, as noted with *Rockey*.

E. Conclusion

As evidenced by *Buckley*, *Dauphinais*, *Rockey*, and *Caissie*, MBO scripts remain coercive and disproportionately target vulnerable populations post-*Hart*. They do so either in ignorance of *Hart*, by playing in *Hart*'s shadows, or by evolving MBOs beyond the type of classic technique *Hart* discusses. Coercion and targeting of vulnerability are not accidental features but are embedded in MBO design and purpose. In MBOs the risk of (inadvertently) overlooking prejudicial effects and abuse of process may be even higher than for other types of confessions because of the difficulties judges have in recognizing coercion when soft pressure techniques are used. Subtler forms of coercion can be as effective as violence and fear, and the lack of these factors cannot be taken as a shortcut to an admissible confession. More nuance is needed, especially given triers of fact post-*Hart* continue to not be especially aware or sympathetic to various suspect vulnerabilities (education, poverty, youth, drug use etc.) which can compound existing reliability problems. Put simply, a vicious cycle remains: MBOs are generally the same post-*Hart* and triers of fact continue to tolerate them. Meet the new (crime) boss. Same as the old boss.

V. Reforming MBOs

I agree with Iftene and Kinnear's conclusion that what makes MBOs efficient in obtaining confessions is also what makes them legally and ethically problematic: the exploitation of individual vulnerabilities through monitoring and tailor-made psychological techniques to induce a confession.[201] Consequently, MBOs pose an inherent risk of contributing

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200 *Ibid* at para 350.

201 Iftene & Kinnear, *supra* note 7 at 341.

to wrongful convictions.[202] This is further borne out by the analysis of post-*Hart* MBOs which have not changed this core tenet of exploiting vulnerability, notwithstanding the attenuated use of violence and the pretense of criminality in certain cases.

The state's monopoly on the legitimate use of force comes with a corresponding imperative to use it responsibly.[203] MBOs often represent an irresponsible use of state power. Legislative and intra-police oversight of MBOs continues to be lacking in Canada.[204] It is only the courts which provide a meaningful review mechanism. However, courts appear content with MBOs, save for the odd case. Judges tend to under-scrutinize suspect vulnerabilities, downplay reliability concerns, and not engage with the scientific literature on induced confessions. This has stripped *Hart* of its power to properly regulate MBOs. An overarching problem is court evaluation is purely *post facto*, and given the highly contextual nature of the exercise, somewhat arbitrary as to which confessions will be admitted and which will be excluded. If anything, *Hart* may have provided a degree of legitimacy to the technique – what courts permit they condone.

This lack of proper court oversight has, in turn, allowed MBOs to remain effectively subject to the same often problematic scripts as employed pre-*Hart*. *Hart*'s new framework, simply put, did not and perhaps could not have solved the structural coerciveness and calculated avoidance of legal rules that MBOs employ. As Steve Coughlan notes, MBOs follow "the letter of the rules while snubbing its nose at the spirit of them. Creating an additional specific rule is unlikely to solve that problem because that approach plays the game at which Mr. Big is already a master."[205] Indeed, MBOs remain "both acutely alive and completely adaptable" post-*Hart*.[206]

In Luther and Snook's view, a consideration of the social influence tactics used to elicit confessions, which "verge on abuse of process", should lead to all MBOs being prohibited.[207] Iftene and Kinnear draw a similar conclusion, questioning whether MBOs "could ever be fully brought under the rule of law."[208] With appropriate scrutiny one would expect confessions

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202 Moore & Keenan, *supra* note 24 at 54.

203 Max Weber, "Politics as a Vocation" in *From Max Weber: Essays in Sociology*, eds HH Gerth & C Wright Mills (London: Routledge, 1998) 77 at 78.

204 Iftene and Kinnear, *supra* note 7 at 340-341.

205 Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2017) 71 SCLR (2d) 415 at 438. See also Iftene, *supra* note 9 at 24-25.

206 Adriana Poloz, "Motive to Lie? A Critical Look at the "Mr. Big" Investigative Technique" (2015) 19:2 Can Crim L Rev 231 at 250 [Poloz].

207 Luther & Snook, *supra* note 8 at 2, 18.

208 Iftene & Kinnear, *supra* note 7 at 341.

to more routinely be deemed inadmissible, but this is not the case. This raises the question of whether a legislative solution might instead be sought. The overall costs of MBOs alone – which could be redistributed to victims of crime instead – would justify politically-induced abolition. The time and police resources spent on MBOs could also be more efficiently applied to other matters.

However, a degree of pessimism is warranted regarding any potential demise of MBOs. A counter to concerns of police impropriety is that MBOs are successful in bringing serious offenders to justice where conventional investigative methods have failed. As Justice Lamer (as he then was) stated in *Rothman*, "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules."[209] Surely, police must have *some* investigatory leeway and be able to offer *some* inducements given that few suspects will spontaneously confess.[210] Criminal ingenuity cannot go completely unmatched, especially where it is difficult to successfully employ traditional police techniques.[211] MBOs, it can be held, are a natural extension of these principles, and a necessary tool to effectively deal with serious, otherwise non-investigable crime.

There is no doubt that MBOs catch factually guilty individuals and are often a non-fungible tool for doing so. The issue is whether these successes and this innovation justify the risk of wrongful convictions, the toll it places on the administration of justice, and the significant use of police resources. The danger, as one commentator has stated, is that MBOs will continue to be tolerated and used because the technique works: "Of course it does. It relies on coercion, inducements, and threats".[212] I share Iftene's conclusion that as effective as MBOs may be in obtaining convictions, the "cost of those convictions may come at too great of a cost for individual rights and the integrity of the justice system. To cite Professor Kaiser, "if the Crown cannot prove its case without doing violence to so many principles 'then it's better that the case not be proven.'"[213] Abolishing MBOs is the only sure way to prevent the goal of solving crime from trumping fundamental rights and principles of justice. However, as this is not likely to occur any time soon,

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209 *Rothman v The Queen*, [1981] 1 SCR 640 at 697.

210 *R v Oickle*, 2000 SCC 38 at para 57 [*Oickle*].

211 *R v Mack*, [1988] 2 SCR 903 at 916-917; *R v Ramelson*, 2022 SCC 44 at paras 1, 33, 92.

212 Brian Hutchinson, "Of course Mr. Big confessions work. They rely on coercion, inducements and threats" (1 August 2014) online: *National Post* <nationalpost.com/opinion/brian-hutchinson-of-course-mr-big-confessions-work-they-rely-coercion-inducements-and-threats> [perma.cc/UU6M-937R].

213 Iftene. *supra* note 9 at 44-45, citing H Archibald Kaiser, "Hart: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 CR (7th) 304 at 307.

MBO reforms are a necessary interim measure. I set out three such proposals below: (1) greater external oversight of MBOs; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-custody interrogations.

A. Greater External Oversight of MBOs

First, there is a need for MBOs to be subject to clear guidelines and greater external oversight. James Stribopoulos emphasizes the fact that, unlike Parliament, the courts cannot comprehensively address the wide array of issues that surround police investigations; rather they are bound to the issues in the specific case before them. This fact constrains the court from addressing relevant social facts that may alter their decision, such as research pertaining to racial bias.[214] Other than through courts, there appears to be minimal accountability and oversight over MBOs, and little interest among state or quasi-state actors to provide it.[215] Nor do police have to disclose whether the operations yield successful convictions, or how much they cost.[216] Kate Puddister and Troy Riddell argue for more independent control over and review of MBOs by way of legislative guidelines. They also recommend:

- Creating a board of management at the national level to provide management oversight of human and financial resources regarding MBOs, strategic planning and risk assessment, and the effects on the administration of justice. That is, national rules for how MBOs should be governed; and
- Providing provincial governments with reports that evaluate the costs and benefits of MBOs and how they contribute to the province's policy goals – including the possibility of wrongful convictions and the erosion of criminal justice values.[217]

To the first point, I would add that there should be some sort of screening process regarding the selection of Mr. Big targets that is not solely determined by police agencies. This process would, at a minimum, evaluate

214 James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31:1 Queen's LJ 1 at 22.

215 Kate Puddister & Troy Riddell "The RCMP's 'Mr. Big' sting operation: A case study in police independence, accountability and oversight" (2012) 55 Can Publ Adm 385 at 396-398.

216 Tracey Lindeman, "'Disgusting' behaviour at Canadian police undercover training course sparks inquiry" (3 June 2022), online: The Guardian <theguardian.com/world/2022/jun/03/canada-british-columbia-police-undercover-training-program> [perma.cc/G4FH-8DN6].

217 While the RCMP is a federal policing entity there are often agreements between federal and provincial governments for the RCMP to provide provincial policing services making RCMP policing a concern for both levels of government.

potential targets based on their vulnerability factors and not target those who are especially prone to false confessions, based on the factors set out in the psychological literature. To this end, the process should include those with psychological expertise such that the science of false confessions can be front-loaded into the process. Crown counsel could also be involved in an advisory role, either acting independently or as part of a suspect screening committee.[218] It is to everyone's benefit to prevent specious convictions, including the police. These operations are lengthy, costly, and labour-intensive – to say nothing about their prosecution. If they are to be run, they should only be run against those who it can safely be said would not be unduly influenced by the tactics necessarily involved in MBOs.

Buckley is exactly the type of case that would have benefitted from such a screening process. In hindsight, it seems obvious that Buckley was overly inducible and prone to false confessions. The goal is to convert hindsight into foresight. A national-level review process could also consider which crimes MBOs can be used to investigate. The use of the technique for non-murder and/or *mens rea*-driven offences, as in the post-*Hart* case of *Habib*,[219] deserves a review. Otherwise, police may be encouraged to improvise, expand, and apply MBOs beyond the most serious of crimes. Given that MBOs remain free of meaningful oversight, with evidence that many operations have failed to properly onboard *Hart*, such potential developments are cause for concern.

There also needs to be better training of MBO operatives, particularly regarding suspect vulnerabilities. Recent reports detail troubling behaviour in MBO training programs – such as penetrating a colleague using a vegetable, defecating on another, and exposing genitalia.[220] As Kent Roach notes: "If these allegations are correct, then obviously some of these officers' thought things were appropriate that are manifestly inappropriate". If this type of behaviour was deemed acceptable in a training context, it cannot come as much of a surprise when problematic behaviour is used towards suspects.

Lastly, questions of when, why, and how the police use MBOs deserve more transparent and accountable answers. MBOs, and their value relative

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[218] The notion of a committee to determine issues of legal importance to a suspect/accused is not without precedent. See, for example, Manitoba's In-Custody Informer Assessment Committee which evaluates if in-custody informer evidence should be called against an accused: Manitoba Department of Justice, "2:INF:1 - In-Custody Informer Policy" (5 Nov 2001), online (pdf): *Manitoba Prosecution Service* <gov.mb.ca/justice/crown/prosecutions/pubs/in_custody_informer.pdf>.

[219] *Supra* note 115, QCCQ at paras 1, 39.

[220] *Lindeman*, *supra* note 216.

to other policing priorities, should be subject to some form of public evaluation and comment. The current regime is unacceptably opaque and free of meaningful review. MBOs, and their acceptability to the public – be it based on morality, cost, or other considerations – merit greater scrutiny.

B. Re-invigorating the Abuse of Process Analysis

A court's abuse of process analysis should come before the confession is discussed, and ought to be more rigorous and sensitive to a suspect's vulnerabilities beyond the mere use of violence. Soft pressure techniques must be considered and given their due weight. Promisingly, all this occurred in *Johnson,*[221] where the confession was excluded on both prongs of *Hart.* Starting with abuse of process can invite a more nuanced and informed analysis of the confession. Conversely, turning to the confession first may have the effect of lodging its probative value so firmly in the judge's mind that any abuse of process may be discounted to sustain a perceived finding of guilt. A confession can taint how other evidence is interpreted, sometimes referred to as confirmation bias,[222] a possibility none of the post-*Hart* cases indicates an awareness of.[223]

More broadly, the danger is that MBOs may be too entrenched in the legal culture to offend a judge's sense of fair play and decency, barring especially egregious facts. Judges may have a greater tolerance for MBOs by virtue of their familiarity with them, or knowledge that it has generally been legally accepted.[224] Indeed, the more MBOs are legally accepted, the more it becomes legally entrenched. The more MBOs become legally entrenched, the less chance there is of an abuse of process argument gaining traction. Wherever it is placed in the analytical order, courts must adopt a more robust conception of abuse of process than they typically have to date, as forcefully exhorted by the Ontario Court of Appeal ("ONCA") in *Quinton:*[225]

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221 *Johnson c R*, 2021 QCCS 5369 at paras 868-980, 995.

222 See e.g., Steve D Charman, "Forensic Confirmation of Bias: A Problem of Evidence Integration, Not Just Evidence Evaluation" (2013) 2:1 J Applied Research in Memory & Cognition 56 at 56; Jeff Kukucha & Saul M Kassin, "Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation of Bias" (2014) 38:3 L & Human Behavior 256.

223 Iftene & Kinnear, *supra* note 7 at 338-339.

224 Whether a judge is an appropriate community representative, given they tend to be older, white, upper-class, and male, is also open to question: Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 46. As recognized in *R v Labaye*, 2005 SCC 80 at para 18, the community shock test has "tended to function as a proxy for ... personal views".

225 *R v Quinton*, 2021 ONCA 44.

> [93] A search of the post-*Hart* case law indicates that very few Mr. Big confessions have been excluded because the police conduct amounted to an abuse of process, despite Moldaver J.'s comments that the doctrine must be reinvigorated to guard against abusive police conduct. It appears that the doctrine of abuse of process might still "be somewhat of a paper tiger", especially in cases like the case at bar, where the accused was not threatened with overt or implied violence: *Hart*, at para. 79. This is despite Moldaver J.'s comments, at paras. 78, 114, that police conduct must be carefully scrutinized in light of the obvious "risk that the police will go too far".
> [94] The promise of a "reinvigorated" abuse of process doctrine must not be an empty one.

Quinton and *Johnson*, released in December 2021 and January 2021 respectively and both involving pre-*Hart* MBOs, provide some measure of hope that courts are becoming more aware of the subtle abuses of MBOs, and are not simply looking at violence, or the absence thereof, as dispositive. However, the jury remains out as to whether these cases will be more of an exception than the rule. If followed, they may be able to re-invigorate the abuse of process analysis, which in turn could lead to MBO scripting changes. That said, such an admonition was also offered by *Hart* to marginal effect. If courts and MBOs have largely ignored the SCC on this point, they may also ignore the ONCA and the Superior Court of Québec.

Overall, there should be more robust gatekeeping at the admissibility stage. Cases such as *Rockey* demonstrate that questionable confessions are being put before triers of fact, on the grounds that threshold admissibility is not a particularly stringent standard. The issue, primarily with juries, is that once the confession is tendered into evidence it can be difficult to ignore, no matter the various prejudicial effects and/or abuses of process in play. The scientific and legal literature is clear that MBO confessions are especially prejudicial, such that a higher degree of care is needed regarding their admissibility than is applied to hearsay evidence. One way to implement more stringent gatekeeping is to treat MBOs as akin to in-custody interrogations.

C. Treating MBOs as Akin to In-custody Interrogations

As noted above, offers of leniency, offers of benefits, threats of harm, and quid pro quo offers have all been established to have causal links to false confessions. False confessions, in turn, are a predominant cause of wrongful convictions.[226] As MBOs employ these coercive psychological techniques, they risk generating not only false confessions, but wrongful convictions. However, because MBOs are designed to elicit inculpatory

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[226] Moore et al, *supra* note 10 at 384-385.

statements regarding an event that occurred before the operation started and not for criminal activity during the undercover operation, MBOs typically fall outside of the Canadian definition of entrapment.[227] Given these dangers and gaps in the law, the Crown should be required to prove beyond a reasonable doubt that MBO statements are reliable and voluntary. This would raise the threshold of admissibility in line with the Canadian common law confessions rule and provide for greater protection against the admission of false confessions.[228] As Chris Hunt and Micah Rankin put it: "If the problem of false confessions is a central concern…then it is difficult to understand why, as a matter of principle, the Crown is not held to the same stringent standard when seeking to tender a Mr. Big confession," which is admissible even where there is a reasonable doubt that it was voluntary.[229]

Given that the police can exercise significant power when interrogating suspects, treating MBOs as akin to in-custody interrogations would not be a sea change. Per *Singh*, the police can continue to question a suspect notwithstanding their refusal to engage or stated intention for the interrogation to end.[230] Per *Sinclair*, once a suspect is provided with an opportunity to obtain legal advice, they cannot end an interrogation for further legal consultation, and the police can continue to question them without the presence of legal counsel (barring certain limited circumstances).[231] Under *Singh* and *Sinclair*, for better or worse, MBO operatives would retain wide investigatory latitude. They would still be able to seek a confession even if the suspect indicates they do not wish to speak about the alleged crime, and even if they retain legal counsel. What such a modification would do is allow for a greater focus on the voluntariness of the confession, an analysis which, as the SCC recently stressed in *Lafrance*, "must be alive" to an individual's vulnerabilities "which may relate to

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227 *R v Ahmad*, 2020 SCC 11 at paras 15-19. That said, a finding of entrapment in an MBO is not without precedent. In *R v Evans* [1996] 2 CR (5th) 106 (BCSC), the court found that due to Evans' limited mental capacity (brain damage and severe learning disabilities), he was manipulated and exploited by the police due to their persistence to involve him in criminal activity and their exploitation of his belief that the undercover officers were his friends: paras 33, 36.

228 Nathan Phelan, "Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to Mr. Big" (2019) 42:3 Man LJ 38 at 423-424. This approach has also been taken in England: Chris Hunt & Micah Rankin, "R v Hart: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCLJ 321 at 322, 335.

229 Hunt & Rankin, *ibid* at 335.

230 *R v Singh*, 2007 SCC 48 at paras 28, 45-47.

231 *R v Sinclair*, 2010 SCC 35 at para 2; *Lafrance*, *supra* note 46 at paras 68-79; *R v Dussault*, 2022 SCC 16 at paras 30-45.

gender, youth, age, race, mental health, language comprehension, cognitive capacity or other considerations."[232] It would also elevate the Crown's burden of proof in admitting the confession to beyond a reasonable doubt, a standard in line with police interrogations in other contexts.[233]

However, despite MBOs engaging several rationales for the protection against self-incrimination – reliability, abuse of power, normative concerns regarding personal autonomy and dignity[234] – these protections do not apply as the suspect is deemed to not be under state control, and hence not detained.[235] Another related reform, then, is to modify the existing common law confession rule by removing the threshold 'person in authority' requirement. This "modest recalibration"[236] is endorsed by Justice Karakatsanis, dissenting in *Hart*, who argued that MBO targets should be deemed to be detained such that their s. 7 *Charter* rights apply. Doing so recognizes that generating a confession can impermissibly come "at a cost to human dignity, personal autonomy and the administration of justice."[237] The police using their powers to create a fictitious world equates to virtual control – for months if not years on end – and a breach of the suspect's right to silence. This "affects not only the reliability of the evidence obtained, but also the suspect's autonomy and raises issues regarding the state's abuse of power."[238] State agents are "not rendered impotent simply because they are pretending *not* to be state agents."[239]

The rights to silence and against self-incrimination are breached, and "the fairness of the trial is affected," whenever "there are concerns regarding autonomy, reliability, and police conduct."[240] Indeed, threats and inducements employed by MBOs may greatly exceed those which, if employed by a traditional person in authority, would render a statement involuntary.[241] The risk of a false confession may be even greater with MBOs "because the suspect does not appreciate the adverse consequences of [their] admissions."[242] Steven Smith, Veronica Stinson, and Marc Patry compiled

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232 *Lafrance*, *ibid* at para 79.
233 *Oickle*, *supra* note 210 at paras 65-71.
234 Iftene, *supra* note 9 at 37, 39-40.
235 *Ibid* at 37.
236 Hunt & Rankin, *supra* note 228 at 334.
237 *Hart*, *supra* note 1 at para 167.
238 *Ibid* at para 173.
239 Moore et al, *supra* note 10 at 378.
240 Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016) 63 Crim LQ 178 at 187.
241 Moore et al, *supra* note 10 at 359.
242 *Ibid* at 378.

a helpful chart comparing standard in-custody versus non-custodial Mr. Big interrogation tactics, reproduced below:[243]

Interrogation Strategy	*Standard interrogation*	*Mr. Big interrogation*
Situation is clearly a police interrogation	Yes	No
Suspect knows interrogator is a person of authority	Yes	No
Suspect given explicit/direct inducement to confess	No	Yes
Suspect warned of their right to remain silent	Yes	No
Suspect given option to contact lawyer	Yes	No
Suspect is explicitly threatened by interrogators	No	Yes
Interrogators use minimization tactics	Yes	Yes
Interrogators use confrontation tactics	Yes	Yes
Interrogators use isolation tactics	Yes	Yes
Interrogators deceive suspect about evidence	Yes	Yes
Interrogators explicitly offer lenient legal treatment	No	Yes
Interrogators offer quid pro quo to suspect	No	Yes
There is disclosure of holdback evidence	No	Yes
Police involve suspect in illegal activity	No	Yes

The lack of s. 10(b) right to counsel protections is especially troubling. Operatives can effectively dissuade suspects from seeking legal advice, as they did in *Knight*,[244] without consequence. It is a modest step to ask for s. 10(b) to apply in the MBO context such that the state is precluded from interfering with a suspect's right to understand their legal jeopardy.

The right to silence should also be applicable to MBOs and MBO operatives should be considered "persons in authority", triggering a requirement that the voluntariness of MBO admissions be proven beyond a reasonable doubt.[245] Determining who is a person in authority should also change from a subjective to an objective standard.[246] This approach would better protect s. 7 principles of fundamental justice, including prohibiting

[243] Smith et al, *supra* note 31 at 182.
[244] *Supra* note 15 at paras 106-110, 126-127.
[245] See e.g., Moore & Keenan, *supra* note 24 at 98.
[246] Lutes, *supra* note 78 at 243.

the use of self-incriminating evidence obtained by coercive methods.[247] MBOs are unlike other undercover operations and more akin to in-person interrogations. The purpose is to elicit a confession, and significant power and influence are used to that end. The police – and by extension the state – retain control of the target throughout the MBO, a "legal loophole" prone to exploitation.[248] Functional detention should be assumed given that substantial state control is at the "heart of such operations," and without it MBOs cannot succeed.[249] Timothy Moore, Peter Copeland, and Regina Schuller aptly summarize this point:

> While the target of a Mr. Big investigation may not perceive [themselves] to be subject to the coercive power of the state, the fact remains that the state is engaging in highly invasive behaviour and exercising a significant degree of control over the suspect through the creation and manipulation of the scenarios. With respect to issues of reliability, it is not persuasive that the interrogation context provides a unique or exclusive opportunity for the creation of false confessions through coercive techniques. The threats and inducements employed in the latter stages of Mr. Big operations may greatly exceed those which, if employed by a traditional person in authority, would render any subsequent statement involuntary…The significant exercise of state control over the suspect, coupled with the use of substantial inducements to elicit information, justifies a degree of judicial supervision of the technique to ensure that the goals of fairness and reliability underlying the confessions rule are achieved…From a psychological perspective, the custodial bright line can be illusory in terms of the exercise of control.[250]

VI. CONCLUSION

Nearly a decade on, *Hart* has failed to meaningfully alter either court analyses or the actual scripting of MBOs. The operational changes appear limited to making the organization's criminality an optional detail and implying violence more so than outright demonstrating it. As the suspect is still induced by the money, prestige, stable employment, and friendships of quasi-criminal and legitimate organizations, criminality is a red herring regarding prejudicial effect and abuse of process. As for violence, the line between witnessing it and knowing it has occurred, or that the organization is capable of it, is illusory. Each conveys a threat of danger and induces fear. Until the spectre of reprisal for non-acquiescence with Mr. Big and/or the organization is removed, suspects will continue to be unduly influenced to confess if only to avoid the possible negative consequences of not doing so.

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247 Poloz, *supra* note 206 at 238.
248 *Ibid* at 241.
249 Iftene, *supra* note 240 at 201-204.
250 Moore et al, *supra* note 10 at 359-360, 378.

Focusing on criminality and violence as the problematic elements of MBOs misses the bigger point: MBOs are excessively coercive mainly because of their highly effective soft pressure techniques, not their hard ones.

As these soft pressure techniques continue to be used post-*Hart*, with no indication of removal from standard MBO scripting, there may be no way to regulate MBOs as *Hart* suggested they could. The recent cases of *Johnson* and *Quinton* provide some measure of hope, but it may be that the only way to prevent false confessions, wrongful convictions, and abuses of process which flow from MBOs is to abolish the technique altogether. The continued tolerance of MBOs without significant legal or policy reform is, simply put, untenable. Such reforms could include (1) greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations. Meanwhile, developments in how MBOs are legally analyzed and scripted should continue to be tracked to see if there is indeed any cause for optimism or, as has appeared to date, that MBOs are beyond repair and in need of abolition.

Criminalizing Coercive Control in Canada: Learning from an International Comparative Analysis

JOEY CARRIER *

ABSTRACT

While coercive control and its role in family and intimate partner violence is not new, there has recently been an emerging movement toward its criminalization in various jurisdictions. This article does not argue that Canada should criminalize coercive control. Instead, given the recent interest in its criminalization, it simply examines how coercive control could be criminalized in Canada. This article begins by reviewing proposed theories and definitions of family violence, intimate partner violence, and coercive control. However, despite extensive literature on these topics, broad conclusions that can be drawn are limited, given the use of varying definitions and theoretical frameworks. Nevertheless, emerging empirical research has attempted to identify and measure coercive control's key underlying constructs to standardize the operationalization of the term. This article examines this literature alongside legislation against coercive control from other jurisdictions to understand how coercive control could be better addressed legislatively in Canada. However, this article cautions against the likelihood that adding a new criminal offence on its own will have a meaningful effect in helping address the larger issues of family and intimate partner violence. Thus, this article concludes by offering three recommendations to ensure that a coercive control offence has its desired effect.

***Key Words*:** Coercive control, family violence, intimate partner violence, criminal legislation.

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I. INTRODUCTION

Both family violence ("FV") and intimate partner violence ("IPV")[1] are serious public health concerns in Canada.[2] In 2021, there were 127,082 victims of police-reported FV, which marked an increase for the fifth consecutive year.[3] Of these victims, women and girls represented more than two-thirds (69%), and the rate of FV was more than two times higher for women and girls than for men and boys. As for IPV, 114,132 victims reported IPV to the police, which marked the seventh consecutive year of a gradual increase in abuse by an intimate or former partner.[4] Of these victims, 79% were women and girls, with the victimization rate being nearly four times higher for women and girls than for men and boys. Moreover, in a 2019 Canadian self-report survey, nearly 13% of "spousal violence"[5] victims experienced two incidents of abuse, 28% experienced three to ten incidents, and 17% experienced more than ten incidents.[6] More incidents were also associated with more severe violence. As for the prevalence of the most extreme form of FV, FV-related homicide, there were 154 victims in Canada in 2021, with 60% being women and girls.[7] FV-related homicides in 2021 increased from 153 victims in 2020 and 145 victims in 2019. For IPV-related homicides, there were 77 victims in 2019, 84 in 2020, and 90

1 Though not without their limitations, this article will use the terms "family violence" and "intimate partner violence" as currently adopted by Canadian legislation to ensure consistency unless specified otherwise. "IPV" is interpreted as offences committed by an 'intimate partner' as defined under section 2 of the *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*]. "FV" is used as a broader term that encompasses abuse against 'family members,' including children, as defined under section 2(1) of the *Divorce Act,* RSC 1985, c 3 (2nd Supp) [*Divorce Act*]. See Part II for more details about why these terms should not be used interchangeably.

2 Gregory Taylor, "The chief public health officer's report on the state of public health in Canada, 2016: A focus on family violence in Canada" (2016) at 3, online (pdf): *Government of Canada* <www.canada.ca/content/dam/canada/public-health/migration/publications/department-ministere/state-public-health-family-violence-2016-etat-sante-publique-violence-familiale/alt/pdf-eng.pdf> [perma.cc/NMS9-MBEJ].

3 "Victims of police-reported family and intimate partner violence in Canada, 2021" (19 October 2022), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm> [perma.cc/2DTU-ENQZ] [Statistics Canada].

4 *Ibid.*

5 'Spousal violence' was defined as violence occurring in current or former intimate partner or spousal relationships.

6 Shana Conroy, "Spousal violence in Canada, 2019" (6 October 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00016-eng.htm> [perma.cc/9ZJ2-BTJ4] [Conroy].

7 Statistics Canada, *supra* note 3.

in 2021, with 76% of victims being women and girls in 2021.[8] Furthermore, the Department of Justice Canada revealed that the estimated cost of "spousal violence"[9] in 2009 was approximately $7.4 billion, with nearly 81% of costs being borne by victims (e.g., medical care).[10] What is most concerning is that many FV and IPV cases are unrecognized and underreported for a myriad of reasons (e.g., a belief that victimization will not be taken seriously).[11] A 2019 Canadian self-report survey determined that nearly 80% of spousal victims have not reported the abuse they experienced to the police, with two-thirds having sought informal support, such as speaking to a family member.[12]

Given the seriousness and prevalence of FV and IPV, scholars, activists, and survivors have all struggled to find the best way to address the issue, with many relying on the law for answers. However, addressing FV and IPV through the law continues to be contentious. It first assumes that the law is an effective and desirable method for tackling FV and IPV.[13] Yet, despite several legal reforms in Canada, with one of the most recent in 2019 under Bill C-75,[14] reported FV and IPV cases continue to rise. Nonetheless, legal recourse remains central to policy responses to address FV and IPV, likely because legal reformists continue to see an incongruity between what many victims experience and the current criminal law's approach to addressing the problem.[15] Canada's current policy in criminal law remains incident-led, meaning abusive "incidents" are investigated and prosecuted independently of the other and removed from the larger relationship

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8 *Ibid.*

9 'Spousal violence' was defined as violence committed by married, common-law, separated, or divorced partners of at least 15 years of age.

10 Ting Zhang et al, "An Estimation of the Economic Impact of Spousal Violence in Canada, 2009" (2013), online: *Government of Canada* <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_7/p6.html#sec61> [perma.cc/RVH2-6D5T].

11 See James W Davis et al, "Victims of Domestic Violence on the Trauma Service: Unrecognized and Underreported" (2003) 54:2 J Trauma 352 at 352; Ruth E Fleury et al, "Why Don't They Just Call the Cops?": Reasons for Differential Police Contact Among Women with Abusive Partners" (1998) 13:4 Violence Vict 333 at 343.

12 Conroy, *supra* at note 6.

13 Courtney K Cross, "Coercive Control and the Limits of Criminal Law" (2002) 56 UC Davis L Rev 195 at 199 [Cross].

14 *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25.

15 Sandra Walklate, Kate Fitz-Gibbon & Jude McCulloch, "Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence Through the Reform of Legal Categories" (2018) 18:1 Criminol Crim Justice 115 at 116 [Walklate, Fitz-Gibbon & McCulloch].

context in which they arose.[16] This incident-led approach has been argued to "decontextualize" FV and IPV and "conceal the reality of an ongoing pattern of conduct occurring within a relationship characterized by power and control."[17] Recognizing "coercive control" as a form of abuse thus elicits a fundamental shift in understanding FV and IPV by acknowledging that abuse can be a continuous pattern not limited to isolated occurrences.[18] Although there is no universally accepted definition, coercive control is generally understood as the practice of using threatened consequences for failure to comply with demands (i.e., coercion) and achieving the demanded behaviours (i.e., control).[19]

Since coercive control is not currently captured by criminal law in most jurisdictions, proponents for its criminalization argue that criminal law must expand to reconcile it with the lived experiences of survivors.[20] However, the criminalization of coercive control has faced significant opposition.[21] Nevertheless, several jurisdictions have enacted (or are in the process of enacting) criminal legislation against coercive control. However, given the limited empirical research examining criminal legislation against coercive control in practice, it is difficult to draw conclusive inferences about the effectiveness of such legislation. Therefore, this article does not

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[16] Andrea Silverstone, "Coercive Control Brief" (n.d.) at 2, online (pdf): <www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11112021/br-external/SagesseDomesticViolencePreventionSociety-e.pdf> [Silverstone]; Jennifer Koshan, Janet Mosher & Wanda Wiegers "COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence" (2021) 57:3 Osgoode Hall LJ 739 at 743-44 [Koshan, Mosher & Wiegers].

[17] Deborah Tuerkheimer, "Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence" (2004) 94:4 J Crim Law Criminol 959 at 960-61.

[18] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York: Oxford University Press, 2007) at 5 [Stark].

[19] L Kevin Hamberger, Sadie E Larsen & Amy Lehrner "Coercive Control in Intimate Partner Violence" (2017) 37 Aggress Violent Behav 1 at 1-3 [Hamberger, Larsen & Lehrner].

[20] Stark, *supra* note 18 at 4; McMahon, Marilyn, & Paul McGorrery eds, Criminalising Coercive Control: Family Violence and the Criminal Law (Singapore: Springer Nature, 2020) at 219-239 [McMahon, & McGorrery].

[21] *Cross, supra* note 13; Walklate, Fitz-Gibbon, & McCulloch, *supra* note 15 ; Julia R Tolmie, "Coercive Control: To Criminalize or Not to Criminalize?" (2017) 18:1 Criminol Crim Justice 50; Michele Burman & Oona Brooks-Hay, "Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control" (2018) 18:1 Criminol Crim Justice 67; Sandra Walklate & Kate Fitz-Gibbon, "The Criminalisation of Coercive Control: The Power of Law?" (2019) 8:4 IJCJ&SD 94; Battered Women's Justice Project, "Coercive Control Codification: A Brief Guide for Advocates and Coalitions" (November 2021) at 4, online (pdf): www.bwjp.org/assets/documents/pdfs/cc-codificationbrief.pdf.

argue that Canada should criminalize coercive control or that it is the most desirable and effective method to address the larger issues of FV and IPV. Instead, given the recent interest in its criminalization, the article simply examines how coercive control could be criminalized in Canada.

Part II examines how FV, IPV, and coercive control are currently defined and theoretically conceptualized in the current literature and Canadian law. Part III examines how Canada has historically addressed FV, IPV, and coercive control and how it does presently in criminal and family law. Part III then surveys criminal legislation against coercive control in other jurisdictions. Part IV conducts a critical legal comparative analysis between the current Canadian legislative framework against coercive control and other jurisdictions examined in Part III to determine how coercive control could be better addressed legislatively in Canada. Finally, while more research is needed to establish its efficacy in practice, Part V cautions against the likelihood that adding a new criminal offence on its own will have a meaningful effect in helping address the broader issue of FV and IPV in Canada. Thus, Part V concludes by offering three recommendations to ensure a coercive control offence has its desired effects.

II. Understanding Family Violence, Intimate Partner Violence, and Coercive Control

A. Defining Family Violence and Intimate Partner Violence

The debate over the etiology of FV and IPV has yet to be settled, with many scholars offering differing causal theories. While examining these various theories is beyond the scope of this article, some commonly proposed causes include gendered inequality[22] and a broader multifaceted socio-legal problem of intersectionality.[23] For instance, while women continue to disproportionately report as victims of FV and IPV in Canada,[24] not all women are equally at risk.[25]

The disagreement over the etiology of FV and IPV results partly from inconsistent definitions used across the current literature and law. Scholars, legislators, and activists have used various terms interchangeably to describe

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22 See e.g., Stark, *supra* note 18 at 5.

23 See e.g., Kimberlé W Crenshaw, "From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control" (2012) 59:6 UCLA L Rev 1418 at 1452–57.

24 Statistics Canada, *supra* note 3.

25 Conroy, *supra* note 6.

the complex phenomenon of FV and IPV, including 'domestic violence,' 'conjugal violence,' 'domestic abuse,' and 'spousal violence,' to name a few. However, using these terms interchangeably is problematic as growing research suggests that several types of abuse within the context of personal relationships may exist, which directly affects what behaviours are being captured and who the perpetrators and victims are.[26] For example, in 2008, Kelly and Johnson proposed five types of abuse within intimate partner relationships: (1) coercive controlling violence, (2) violent resistance, (3) situational couple violence, (4) separation-instigated violence, and (5) mutual violent control.[27] Coercive controlling violence, labelled initially as "patriarchal terrorism"[28] and "intimate terrorism,"[29] involves a "pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence."[30] Violent resistance is described as violence used by victims to resist coercive controlling violence.[31] Situational couple violence, initially labelled "common couple violence,"[32] involves violence triggered by a particular conflict or situation rather than control.[33] Separation-instigated violence is violence that first occurs at separation, which is distinct from other forms of violence that start within the context of a relationship but continue post-separation.[34] Finally, mutual violent control involves both partners attempting to exert coercive controlling violence.[35] This growing body of research has led Johnson to conclude that "it is no longer scientifically or ethically acceptable to speak of domestic violence without specifying, loudly and clearly, the type of violence to which we refer." [36]

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26 Jane Wangmann, "Different Types of Intimate Partner Violence: An Exploration of the Literature" (2011) at 2, online (pdf): <opus.lib.uts.edu.au/bitstream/10453/19466/1/2010006199OK.pdf> [perma.cc/8MAL-CUXR] [Wangmann].

27 Joan B Kelly & Michael P Johnson, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions" (2008) 46:3 Fam Court Rev 476 at 477 [Kelly & Johnson].

28 Michael P Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women" (1995) 57:2 J Marriage Fam 283 at 284 [Johnson].

29 Michael P Johnson, A Typology of Domestic Violence, Intimate Terrorism, Violent Resistance, And Situational Couple Violence (Boston: Northeastern University Press, 2008).

30 Kelly & Johnson, *supra* note 27 at 478.

31 *Ibid* at 479.

32 Johnson, *supra* note 28 at 285.

33 Kelly & Johnson, *supra* note 27 at 479.

34 *Ibid* at 479-480.

35 *Ibid* at 477.

36 Michael P Johnson, "Domestic Violence: It's Not About Gender – or is it" (2005), 67:5 J Marriage Fam 1126 at 1126.

The problem of using inconsistent terminology is also evident in Canadian law. Under criminal law, the *Criminal Code* has no specific FV or IPV offence or definition, but they are implicitly understood as committing offences that already exist in the *Criminal Code* against an intimate partner or the victim's or offender's family.[37] While "intimate partner" is defined under section 2 of the *Criminal Code* as "a current or former spouse, common-law partner, and dating partner," members of a victim's or offender's family is not. Although Crown counsel manuals are intended to provide additional guidance for prosecutors, they offer inconsistent definitions and terminology. For instance, the Public Prosecution Service of Canada defines "domestic violence" as "physical or sexual assault, or threat of such violence, against an intimate partner."[38] Conversely, British Columbia's Crown Counsel Policy Manual uses the term "IPV" and defines it much more broadly:

> An offence involving physical or sexual assault, or the threat of physical or sexual assault, against an intimate partner. An offence other than physical or sexual assault, such as criminal harassment, threatening, publication of intimate images without consent, or mischief, where there are reasonable grounds to believe the offence was carried out in order to cause or did in fact cause fear, trauma, suffering, or loss to an intimate partner. An offence where the intimate partner is the target though not the direct victim of the criminal action of the accused, for example, where the accused has committed an offence against someone or something important to the intimate partner such as an assault on the intimate partner's child or new partner. Circumstances relating to the above which warrant an application for a section 810 recognizance. An offence for a breach of the following court orders relating to the above circumstances: bail, probation, or conditional sentence orders made on "K" files, restraining orders made under the former *Family Relations Act,* protection orders made under the *Family Law Act,* recognizances made under section 810.[39]

In contrast, under family law, a broader "family violence" term is used at the federal level in the *Divorce Act*, which it defines under section 2(1) as:

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[37] See e.g., *Criminal Code*, *supra* note 1 at s. 718.2(a)(ii) (several of these offences include assaults (ss. 265-268), sexual assaults (ss. 271-273), criminal harassment (s. 264), kidnapping and forcible confinement (s. 279), uttering threats (s. 264.1), and homicide (s. 231-235), to name a few).

[38] "Domestic Violence: Guideline of the Director issued under Section 3(3)(C) of the Director of Public Prosecutions Act" (31 January 2022) at 477, online (pdf): *Public Prosecution Service of Canada* <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch05.html> [perma.cc/3L6L-WL68].

[39] "Crown Counsel Policy Manual" (2022) at 2, online (pdf): *British Columbia Prosecution Service* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/ipv-1.pdf> [perma.cc/U5X5-AQMP].

> Any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct.

FV extends to "family members" under this Act, which it describes under section 2(1) as "a member of the household of a child of the marriage or a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household."

Moreover, seven provinces and all three territories have specific civil legislation addressing FV or IPV, but they use various terms to describe them.[40] Only a few provinces brought their legislation in line with the new federal *Divorce Act* FV definition.[41]

In sum, while meaningful gains have occurred in our overall understanding of FV and IPV, there is a lack of consistent definitions in the current literature and Canadian law. The inconsistency in defining these constructs must be resolved to properly understand what behaviours are being captured and who the perpetrators and victims are. Ensuring proper diligence when operationalizing these terms will also allow for a better understanding of how coercive control fits within them to ensure criminal legislation against it has its desired effect.

B. Defining Coercive Control

The concept of coercive control as a form of abuse has only recently been recognized. One of the first proposed mechanisms to explain how IPV transpires was in 1979 by Lenore Walker and her "cycle of violence," which involves cycling patterns in intimate partner relationships consisting of

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40 Alberta: *Protection Against Family Violence Act*, RSA 2000, c P-27; Manitoba: *Domestic Violence and Stalking Act*, CCSM, c D93; New Brunswick: *Intimate Partner Violence Intervention Act*, SNB 2017, c 5; Newfoundland and Labrador: *Family Violence Protection Act*, SNL 2005, c F-3.1; Northwest Territories: *Protection Against Family Violence Act*, SNWT 2003, c 24; Nova Scotia: *Domestic Violence Intervention Act,* SNS 2001, c 29; Nunavut: *Family Abuse Intervention Act*, SNu 2006, c 18; Prince Edward Island: *Victims of Family Violence Act*, RSPEI 1988, c V-3.2; Saskatchewan: *Victims of Interpersonal Violence Act,* SS 1994, c V-6.02; Yukon: *Family Violence Prevention Act,* RSY 2002, c 84. See also Jennifer Koshan, Janet E Mosher & Wanda A Wiegers, "Domestic Violence and Access to Justice: A Mapping of Relevant Laws, Policies and Justice System Components Across Canada, 2020 CanLIIDocs 3160" (2022), online (pdf): *Canadian Legal Information Institute* <canlii.ca/t/szxl> [perma.cc/C2BT-YKTX] (provides a detailed "survey of legislation, key government policies, and justice system components that apply to 'domestic violence' across Canada" at 1).

41 See e.g., Saskatchewan: *Children's Law Act,* SS 2020, c 2 and Ontario: *Children's Law Reform Act,* RSO 1990, c C.12; New Brunswick: *Family Law Act,* SNB 2020, c 23.

three distinct phases: (1) calm, (2) tension building/incident, and (3) honeymoon/reconciliation.[42] Walker argued that a period of a close relationship eventually transforms into tension resulting from daily life stressors. Once sufficient tension builds up, the abusive incident occurs. The honeymoon phase follows when the perpetrator attempts to reunite with the abused partner as the tension decreases over time. However, the tension inevitably builds up again, and the cycle repeats. Walker's theory has been criticized for its oversimplification,[43] including for being victim blaming by using terms like "battered women syndrome" and "learned helplessness" to explain a victim's decision not to leave an abusive partner.[44]

It was not until the late twentieth century that other proposed models of IPV shifted instead toward examining perpetrators' behaviours, particularly the use of coercive control.[45] Evan Stark, a prominent researcher in the field, posits that perpetrators engage in abuse through coercive control by controlling victims' freedom and autonomy and instilling fear of punishment through coercion if they do not comply with the perpetrator's demands.[46] He defines coercion as "the use of force or threats to compel or dispel a particular response."[47] Conversely, control is described as "structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolizing vital resources, dictating preferred choices, microregulating a partner's behaviour, limiting her options, and depriving her of supports needed to exercise independent judgment."[48] According to Stark, coercive control results in a state of "entrapment"[49] because "its key dynamic involves an objective state of subordination and

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42 Bonnie S Fisher & Steven P Lab, *Encyclopedia of Victimology and Crime Prevention* (SAGE Publications, 2010) at 257 [Fisher & Lab].

43 See e.g., Rebecca Hoffmann Frances, "The Cycle of Violence: Why It Is No Longer Widely Used to Understand Domestic Violence" (2021) at 2, online (pdf): *Futures Without Violence* <promising.futureswithoutviolence.org/wp-content/uploads/2022/10/Cycle-of-Violence-Fact-Sheet10-4.pdf> [Hoffmann Frances].

44 Fisher & Lab, *supra* note 42 at 258.

45 Hoffmann Frances, *supra* note 43 at 3-4; Evan Stark, "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" (1995) 58:4 Alb L Rev 973 at 975-6; Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (New York: Springer, 1993). See also Stark, *supra* note 18 at 200–03 (Stark provides a brief history of the evolution of the understanding of coercive control as a form of abuse from the 1950s onward).

46 Stark, *supra* note 18 at 5.

47 *Ibid* at 228.

48 *Ibid* at 229.

49 *Ibid*.

the resistance women mount to free themselves from domination."[50] Thus, according to Stark's theory, coercive control is an ongoing form of abuse that makes leaving abusers difficult because the offender is controlling the victim's everyday behaviours and threatens to use force if the commands are not followed by the victim.

While Stark's interpretation of coercive control has been widely recognized,[51] there is still inconsistency in the literature regarding coercive control's definition and how it should be conceptualized.[52] For example, crucial to Stark's original conceptualization of coercive control is its use by men against their female partners to maintain gender inequality and restore patriarchy in the relationship.[53] As such, some have questioned whether women and members of the LGBTQ+ community can also exert coercive control.[54] Conversely, others have maintained that "not all coercive control [is] rooted in patriarchal structures and attitudes, nor perpetrated exclusively by men."[55] Moreover, Johnson and colleagues' conceptualization of "coercive controlling violence" discussed above is said to occur alongside

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50 *Ibid* at 5.

51 See Tamara L Kuennen "Analyzing the Impact of Coercion on Domestic Violence Victims" (2007) 22:1 Berkeley J Gender, L, & Just 2; Gretchen Arnold, "A Battered Women's Movement Perspective of Coercive Control" (2009) 15:12 Violence Against Women 1432; Kristin L Anderson, "Gendering Coercive Control" (2009) 15:12 Violence Against Women 1444; Cheryl Hanna, "The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine For Abused Women" (2009) 15:12 Violence Against Women 1458; Connie J A Beck & Chitra Raghavan "Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control" (2010) 48:3 Family Court Review 555; Marieh Tanha et al, "Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence" (2010) 25:10 J Interpers Violence 1836; Kimberly A Crossman, Jennifer L Hardesty, & Marcela Raffaelli, "He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation" (2016) 22:4 Violence Against Women 454; Jennifer L Hardesty et al, "Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types" (2015) 77:4 J Marriage Fam 833; Marianne Hester et al, "Is it Coercive Controlling Violence? A Cross-Sectional Domestic Violence and Abuse Survey of Men Attending General Practice in England" (2017) 7:3 Psychology of Violence 417; Tolmie, *supra* note 21; Erin Sheley, "Criminalizing Coercive Control Within the Limits of Due Process" (2021) 70 Duke LJ 1321; Cross *Supra* note 13 at 207.

52 Hamberger, Larsen & Lehrner, *supra* note 19 at 1-3.

53 Stark, *supra* note 18 at 5.

54 Evan Stark & Marianne Hester, "Coercive Control: Update and Review" (2019) 25:1 Violence against Women 81 at 91-94 [Stark & Hester].

55 Kelly & Johnson, *supra* note 27 at 478-479. See also Michael P Johnson, "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence" (2006) 12:11 Violence Against Women 1003 at 1015.

physical violence,[56] whereas Stark has emphasized that its use can and does occur without physical violence.[57] Others have also questioned the use of the term "coercive control" itself and instead argue for reconceptualizing the concept as a "domestic violent crime."[58] Dutton and Goodman have also proposed their own theoretical "model of coercion,"[59] which involves six key elements, with an emphasis on coercion's role in fostering abuse: (1) social ecology; (2) setting the stage; (3) coercion involving a demand and a credible threat for noncompliance; (4) surveillance; (5) delivery of threatened consequences; and (6) the victim's behavioural and emotional response to coercion. They argue that coercion begins with the perpetrator "setting the stage" for coercion in four ways: (1) creating the expectancy for negative consequences, (2) creating or exploiting the partner's vulnerabilities, (3) wearing down the partner's resistance, and (4) facilitating dependency.[60] This process is said to create vulnerability in the victim, which in turn allows coercion to occur by linking a demand with a credible threatened negative consequence for non-compliance and controlling various aspects of a victim's life.[61] Dutton and Goodman assert that these elements transpire into "spiralling and overlapping sequences to establish an overall situation of coercive control."[62]

With differing definitions and theoretical conceptualizations, researchers have attempted to develop measuring tools to identify coercive control's key constructs and standardize the operationalization of the term. However, a 2017 comprehensive literature review examining such tools revealed that there is currently no agreement on how to define and measure coercive control.[63] Nonetheless, the authors' review revealed at least three common facets of coercive control: (1) intentionality or goal orientation in the abuser, (2) a negative perception of the controlling behaviour by the victim, and (3) the ability of the abuser to obtain control through the deployment of a credible threat.[64] Though the authors recognize that this multifaceted definition is not without its challenges, they assert that it at

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56 Kelly & Johnson, *ibid* at 478.

57 Stark, *supra* note 18 at 4; Stark & Hester, *supra* note 53 at 89-91. See also Wangmann, *supra* note 26 at 13.

58 Sylvia Walby & Jude Towers, "Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime" (2018) 18:1 Criminol Crim Justice 7.

59 Mary Ann Dutton & Lisa A Goodman, "Coercion in Intimate Partner Violence: Toward a New Conceptualization" (2005) 52:11 Sex Roles 743 at 746.

60 *Ibid* at 748.

61 *Ibid* at 747.

62 *Ibid* at 743.

63 Hamberger, Larsen & Lehrner, *supra* note 19 at 3-9.

64 *Ibid* at 9.

least provides the opportunity for consensus and consistency. Thus, the authors argue that "the accurate assessment of coercive control should include an evaluation of threatened consequences of failure to comply with demands (i.e., coercion), and the achievement of the demanded behaviors (i.e., control)."[65] Furthermore, they suggest that a more precise understanding requires examining "not only the presence but also the chronicity and pervasiveness of coercive control" in addition to "the context in which potentially coercive behaviors take place, and ideally that take a relationship history perspective."[66]

In sum, since the late twentieth century, there has been growing interest in understanding perpetrators' behaviours to explain IPV, particularly the use of coercive control. Research on coercive control highlights the importance of examining the larger relationship context in which the abuse occurs to recognize an often-ongoing pattern of abuse rather than simply looking at abusive incidents in isolation. However, despite the extensive literature on coercive control, broad conclusions that can be drawn are limited, given the use of varying definitions and theoretical frameworks. Fortunately, recent developments have attempted to identify coercive control's key constructs to standardize the operationalization of the term. Legislators should rely on this emerging empirical literature to ensure they know how to properly define the offence and what behaviours should be captured by it.

III. THE CRIMINALIZATION OF COERCIVE CONTROL

A. Canadian Legislation Against Coercive Control

1. Historical Approach

Historically, Canada's legal system hesitated to intervene in what was considered a private matter in FV and IPV cases.[67] As such, courts were reluctant to find ways to address the issue, and judges would impose lenient sentences to ensure the offender's conviction would not violate the "sanctity of the family."[68] However, by the late twentieth century, a significant shift

65 *Ibid at 10.*

66 *Ibid.*

67 "Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation" (last modified 8 December 2012) at 1, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf> [perma.cc/97T9-TLNW] [Department of Justice Canada].

68 Isabel Grant, "Sentencing for Intimate Partner Violence in Canada: Has s.718.2(a)(ii) Made a Difference?" (2017) at 8, online (pdf): *Department of Justice Canada* <www.publications.gc.ca/collections/collection_2018/jus/J4-50-2017-eng.pdf>

in attitude towards FV and IPV occurred following the rise of feminist complaints about the legal system's failure to address what had arguably been a gendered form of abuse.[69] The increased awareness of the seriousness of FV and IPV became more prominent when pro-charging and prosecution policies were implemented in all provinces and territories in Canada in the mid-1980s.[70] Moreover, Parliament began legislating amendments to the *Criminal Code*, such as making sexual assault against one's spouse a criminal offence[71] and making violence against an "intimate partner" an aggravating factor during sentencing.[72] Consequently, by the late twentieth century, FV and IPV became firmly established legal matters in Canada.

2. Current Criminal Law Approach

As mentioned in Part II, the Canadian *Criminal Code* does not have a specific FV or IPV offence. Rather, the current criminal law approach to addressing them involves supplementing existing criminal offences with bail and sentencing provisions specific to these cases[73] and a *Criminal Code* section 2 definition of an "intimate partner." Canada also does not have criminal legislation against coercive control, but Parliament is not foreign to the concept. Bill C-247 was proposed in the House of Commons in 2020 to make "controlling or coercive conduct" a criminal offence under section 264.01(1):

> Everyone commits an offence who repeatedly or continuously engages in controlling or coercive conduct towards a person with whom they are connected that they know or ought to know could, in all the circumstances, reasonably be expected to have a significant impact on that person and that has such an impact on that person [emphasis added].[74]

Under subsection (1), two persons are "connected" if they are:

> (a) current spouses, common-law partners or dating partners, or have agreed to marry each other; or
> (b) they are members of the same household, and
>   (i) are former spouses, common-law partners or dating partners,

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[Grant].

69 *Ibid*.

70 Department of Justice Canada, *supra* note 67 at 9-10.

71 Melanie Randall, "Sexual Assault in Spousal Relationships, Continuous Consent, and the Law: Honest but Mistaken Judicial Beliefs" (2008) 32:2 Man LJ 144 at 147.

72 Grant, *supra* note 68 at 9.

73 See e.g., *Criminal Code*, *supra* note 1 at s 718.2(a)(ii) and s 515(3)(a).

74 Bill C-247, *An Act to Amend the Criminal Code (Controlling or Coercive Conduct)*, 2nd Sess, 43rd Parl, 2020 (first reading 5 October 2020).

(ii) have agreed to marry each other, whether or not the agreement has been terminated,
(iii) are relatives, or
(iv) carry out, or have carried out, parental responsibilities in respect of the same child, that child being under the age of 18 years.

As for the conduct's effect, a "significant impact" on a person is present if:

(a) it causes the person to fear, on reasonable grounds, on more than one occasion, that violence will be used against them;
(b) it causes the person's physical or mental health to decline; or
(c) it causes the person alarm or distress that has a substantial adverse effect on their day-to-day activities, including:
   (i) limits on their ability to safeguard their well-being or that of their children,
   (ii) changes in or restrictions on their social activities or their communication with others,
   (iii) absences from work or from education or training programs or changes in their routines or status in relation to their employment or education, and
   (iv) changes of address.

The offence was designed as a hybrid offence punishable by summary conviction or a term of imprisonment not exceeding five years upon indictment. However, the bill never reached its second reading, as the federal government called an election in 2021. After the election, the offence was re-introduced as Bill C-202[75] and underwent its first reading in the House of Commons in November 2021. The offence was then re-introduced a third time in May 2023 as Bill C-332[76] when it underwent its first reading in the House of Commons. As of this writing, coercive control has yet to be officially criminalized in Canada.

While Parliament's recognition of coercive control in Canadian criminal law can be seen as monumental, some have highlighted important shortcomings with the criminal bills, including the following to name a few: (1) the offence is limited to present partners living together, (2) the offence is not explicitly addressing children living in a home with coercive control as victims, (3) "controlling or coercive conduct" is defined so vaguely, thus rendering it unhelpful, (4) the offence does not include coercive control by electronic means, (5) the offence might be misused and have a greater negative effect on victims and already vulnerable groups, and (6) the offence does not address the mistrust that victims have with regards to how the legal

[75] Bill C-202, *An Act to Amend the Criminal Code (Controlling or Coercive Conduct)*, 1st Sess, 44th Parl, 2021 (first reading 25 November 2021).
[76] Bill C-332, *An Act to Amend the Criminal Code (Controlling or Coercive Conduct)*, 1st Sess, 44th Parl, 2021 (first reading 18 May 2023).

system handles cases involving FV, IPV, and sexual violence, given that it does not come with corresponding training of legal practitioners.[77]

3. Current Family Law Approach

Although criminal law in Canada has yet to address coercive control, Parliament has recognized it as a form of abuse at a national level in family law. The *Divorce Act* was amended in 2019 to include a definition of "family violence," which is defined under section 2(1) as:

> Any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct. [emphasis added].

However, the *Divorce Act* does not define what "coercive and controlling behaviour" actually is. Nevertheless, the FV definition acknowledges that FV can take many forms and provides a non-exhaustive list of behaviours that would fall within it, including:

> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
> (b) sexual abuse;
> (c) threats to kill or cause bodily harm to any person;
> (d) harassment, including stalking;
> (e) the failure to provide the necessaries of life;
> (f) psychological abuse;
> (g) financial abuse;
> (h) threats to kill or harm an animal or damage property; and
> (i) the killing or harming of an animal or the damaging of property.

[77] See generally Allana Haist, "Criminalizing Coercive Control in Canada: The Implications for Family Law" (2021) at 60-71, online (pdf): Luke's Place <lukesplace.ca/wp-content/uploads/2022/03/Stopping-Coercive-Control-by-Criminalization-Lukes-Place.pdf> [Haist].

B. Criminal Legislation Against Coercive Control in Other Jurisdictions

1. Stand-Alone Coercive Control Offences

England and Wales

In 2015, the *Serious Crime Act 2015*[78] was enacted, and England and Wales became the first jurisdictions to officially criminalize "coercive or controlling behaviour" under section 76:

> (1) A person (A) commits an offence if –
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
> (b) at the time of the behaviour, A and B are personally connected,
> (c) the behaviour has a serious effect on B, and
> (d) A knows or ought to know that the behaviour will have a serious effect on B.
> (2) A and B are "personally connected" if—
> (a) A is in an intimate personal relationship with B, or
> (b) A and B live together and—
> (i) they are members of the same family, or
> (ii) they have previously been in an intimate personal relationship with each other.
> (3) But A does not commit an offence under this section if at the time of the behaviour in question—
> (a) A has responsibility for B, for the purposes of Part 1 of the Children and Young Persons Act 1933 (see section 17 of that Act), and
> (b) B is under 16.
> (4) A's behaviour has a "serious effect" on B if—
> (a) it causes B to fear, on at least two occasions, that violence will be used against B, or
> (b) it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities [emphasis added].

Section 76 was enacted as a hybrid offence. Upon indictment, a person found guilty is sentenced to imprisonment not exceeding five years and/or a fine, or on summary conviction, to imprisonment for a term not exceeding 12 months and/or a fine.[79]

Although the offence applies to both intimate partners and family members, a concern raised when the law was first enacted was that it did not apply to those not living together.[80] With growing criticism, England

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[78] *Serious Crime Act 2015* (England and Wales), 2015.

[79] *Ibid*, s. 76(11).

[80] Carmen Gill & Mary Aspinall, "Submission to the House of Commons Standing Committee on Justice and Human Rights: Study on Bill C-247 An Act to amend the

and Wales replaced the section 76(2) definition of "personally connected" with the definition in Part 1 of the *Domestic Abuse Act 2021*.[81] This new definition removed the cohabitation requirement, thus "ensuring that post-separation abuse and familial domestic abuse is provided for when the victim and perpetrator do not live together."[82] Furthermore, section 1 of the *Domestic Abuse Act 2021* provides a new "domestic abuse" definition in law to complement the coercive control offence and help clarify that coercive control is a form of abuse that falls within the umbrella term of "domestic abuse" used in the U.K.

While section 76 does not define behaviour that is "controlling or coercive," the U.K. Home Office provides statutory guidance containing a list of behaviours that fall within the offence, including controlling or monitoring the victim's daily activities, using acts of coercion or force to persuade the victim to do something that they are unwilling to do, and isolating the victim from friends and family, to name a few.[83]

The U.K. Office for National Statistics has been tracking rates of coercive control since England and Wales first criminalized it in 2015. For example, in 2016-2017, 4,246 cases of coercive control were recorded by the police.[84] In 2021-2022, the number increased nearly tenfold to 41,626.[85] As for prosecutions, the number increased from 309 cases in 2016-2017 to 1,208 cases in 2019-2020.[86] The increase in coercive control offences has

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Criminal Code (controlling or coercive conduct)" (2021) at 6, online (pdf): *House of Commons* <www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11085796/br-external/Jointly1-e.pdf> [perma.cc/6B98-H759] [Gill & Aspinall].

81 *Domestic Abuse Act 2021* (England and Wales), 2021, s 2.

82 Home Office, "Amendment to the controlling or coercive behaviour offence" (11 July 2022), online: *UK Government* <www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/amendment-to-the-controlling-or-coercive-behaviour-offence> [Home Office].

83 Controlling or Coercive Behaviour Statutory Guidance Framework (5 April 2023), online (pdf) at 15-16 : *Home Office* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148945/Controlling_or_Coercive_Behaviour_Statutory_Guidance_-_final.pdf>.

84 "Review of the controlling or coercive behaviour offence" (10 May 2021), online: *Office for National Statistics* <www.gov.uk/government/publications/review-of-the-controlling-or-coercive-behaviour-offence/review-of-the-controlling-or-coercive-behaviour-offence> [Office for National Statistics].

85 Meghan Elkin, "Domestic abuse prevalence and trends, England and Wales: year ending March 2022" (25 November 2022), online: *Office for National Statistics* <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2022> [Elkin].

86 Home Office, *supra* note 82.

been attributed not to a higher prevalence over time but improvements made by the police to recognize coercive controlling behaviours and amendments to the coercive control offence.[87] However, only a small portion of these cases still come to the attention of the criminal justice system or are recorded as cases involving coercive and controlling behaviour.[88] Moreover, there are policing and prosecutorial challenges that need to be addressed. The U.K. Office for National Statistics noted that in 2018-2019, 85% of cases had failed due to evidential difficulties.[89] For example, of the 24,856 police-recorded cases of coercive control in 2019-2020,[90] only 1,208 cases were prosecuted.[91] Furthermore, in 2019, of the 584 defendants being prosecuted, only 293 were convicted and sentenced where coercive control was the principal offence.[92] These governmental findings are consistent with academic research. One study found that of the 5,230 recorded crimes of "domestic abuse"[93] by one police department in the South of England in 2017, only 93 (1.8%) of cases were recorded as coercive control.[94] The authors found that police especially missed evidence of coercive and controlling behaviours in recorded cases involving bodily harm. Similarly, another study found that police in England were not enforcing the coercive control offence frequently and found it challenging to collect evidence of coercion and control.[95] These findings led the authors to conclude that "coercive control crimes face greater procedural challenges

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87 Elkin, *supra* note 85.

88 Office for National Statistics, *supra* note 84.

89 *Ibid.*

90 Meghan Elkin, "Domestic abuse prevalence and trends, England and Wales: year ending March 2021" (24 November 2021), online: *Office for National Statistics* <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2021> [perma.cc/5WQA-MV8V].

91 Home Office, *supra* note 82.

92 Nick Stripe, "Domestic abuse and the criminal justice system, England and Wales: November 2020" (25 November 2020), online: *Office for National Statistics* <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020> [perma.cc/8WF7-HKYT] [Stripe].

93 'Domestic abuse' was not defined and used interchangeably with 'IPV.'

94 Charlotte Barlow & Sandra Walklate, "Gender, Risk Assessment and Coercive Control: Contradictions in Terms?" (2021) 61:4 Brit J of Crim 887 at 893 [Barlow & Walklate].

95 Iain Brennan & Andy Myhill, "Coercive Control: Patterns in Crimes, Arrests and Outcomes for a New Domestic Abuse Offence" (2022) 62:2 Brit J Crim 468 at 479 [Brennan & Myhill].

and are far less likely to result in prosecution than domestic abuse crimes in general."[96]

Another commonly cited shortcoming of section 76 is its gender-neutral wording.[97] Of the 584 defendants prosecuted for coercive control in 2019 in England and Wales, 97% were male, where the gender was known.[98] Similarly, an analysis conducted with Merseyside Police in England in 2017 found that of the 156 coercive control cases examined, 95% of victims were women, and 74% of perpetrators were men.[99] Yet another study found that of the 93 recorded coercive control cases by a police department in South England in 2017, 89 (96%) of the victims were women, and 86 (92.5%) of the perpetrators were men.[100]

Republic of Ireland

In 2018, the Republic of Ireland also introduced criminal legislation against coercive control under section 1 of the *Domestic Violence Act 2018:*[101]

> (1) A person commits an offence where he or she knowingly and persistently engages in behaviour that—
> (a) is controlling or coercive,
> (b) has a serious effect on a relevant person, and
> (c) a reasonable person would consider likely to have a serious effect on a relevant person.
> (2) For the purposes of subsection (1), a person's behaviour has a serious effect on a relevant person if the behaviour causes the relevant person—
> (a) to fear that violence will be used against him or her, or
> (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities [emphasis added].

While the maximum penalty is similar to that of the England and Wales offence, there are important distinctions to the offence itself. Unlike the England and Wales offence, section 1(c) of the Republic of Ireland offence focuses on what a "reasonable person" would consider likely to seriously affect a person. Moreover, subsection 4 defines a "relevant person" as only a current or former partner and does not extend to family members. The

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96 *Ibid* at 468.
97 Barlow & Walklate *supra* note 94 at 887.
98 Stripe, *supra* note 92.
99 Charlotte Barlow et al, "Police Responses to Coercive Control" (2018) at 3, online (pdf): *N8 Policing Research Partnership* <documents.manchester.ac.uk/display.aspx?DocID=56477> [perma.cc/8DLK-59L2].
100 Barlow & Walklate, *supra* note 94 at 893.
101 *Domestic Violence Act 2018* (Ireland), 2018.

offence also does not require the behaviour to be "repeated or continuous" but rather be "persistent."

One significant disadvantage to the offence is that it does not provide a detailed definition of "controlling or coercive" behaviour. Nevertheless, by December 2022, Ireland's national police department recorded over 49,257 "domestic abuse"[102] reports, with 481 recorded incidents of coercive control.[103]

Australia: New South Wales

New South Wales became the first state in Australia to specifically criminalize coercive control under the *Crimes Legislation Amendment (Coercive Control) Act 2022*,[104] and Queensland announced plans to introduce a stand-alone offence against coercive control in 2023.[105] The *Crimes Legislation Amendment (Coercive Control) Act 2022* makes several amendments to existing Acts. Under section 54D of the *Crimes Act 1900 No 40*, coercive control has a maximum penalty of seven years imprisonment and is defined as:

> (1) An adult commits an offence if—
> (a) the adult engages in a course of conduct against another person that consists of abusive behaviour, and
> (b) the adult and other person are or were intimate partners, and
> (c) the adult intends the course of conduct to coerce or control the other person, and
> (d) a reasonable person would consider the course of conduct would be likely, in all the circumstances, to cause any or all of the following, whether or not the fear or impact is in fact caused—
> (i) fear that violence will be used against the other person or another person, or
> (ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.
> (2) For subsection (1)(a)—
> (a) the course of conduct may be constituted by any combination of abusive behaviours, and

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102 'Domestic abuse' was left undefined.

103 "An Garda Síochána continues to see an increase in Domestic, Sexual and Gender Based Violence Incidents" (9 December 2022), online: *An Garda Síochána* <www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2022/december/an-garda-siochana-continues-to-see-an-increase-in-domestic-sexual-and-gender-based-violence-incidents-9th-december-2022.html> [perma.cc/ML8P-TTTN].

104 *Crimes Legislation Amendment (Coercive Control) Act 2022*, (NSW), 2022.

105 "New laws target coercive control" (16 May 2023), online: *Queensland Government* <www.qld.gov.au/law/law-week/new-laws>.

(b) whether the course of conduct consists of abusive behaviour must be assessed by considering the totality of the behaviours [emphasis added].

Section 54F elaborates on what "abusive behaviour" means:

(1) In this Division, abusive behaviour means behaviour that consists of or involves—
  (a) violence or threats against, or intimidation of, a person, or
  (b) coercion or control of the person against whom the behaviour is directed.

(2) Without limiting subsection (1), engaging in, or threatening to engage in, the following behaviour may constitute abusive behaviour—
  (a) behaviour that causes harm to a child if a person fails to comply with demands made of the person,
  (b) behaviour that causes harm to the person against whom the behaviour is directed, or another adult, if the person fails to comply with demands made of the person,
  (c) behaviour that is economically or financially abusive,
  Examples for paragraph (c)—
  - withholding financial support necessary for meeting the reasonable living expenses of a person, or another person living with or dependent on the person, in circumstances in which the person is dependent on the financial support to meet the person's living expenses
  - preventing, or unreasonably restricting or regulating, a person seeking or keeping employment or having access to or control of the person's income or financial assets, including financial assets held jointly with another person

  (d) behaviour that shames, degrades or humiliates,
  (e) behaviour that directly or indirectly harasses a person, or monitors or tracks a person's activities, communications or movements, whether by physically following the person, using technology or in another way,
  (f) behaviour that causes damage to or destruction of property,
  (g) behaviour that prevents the person from doing any of the following or otherwise isolates the person—
    (i) making or keeping connections with the person's family, friends or culture,
    (ii) participating in cultural or spiritual ceremonies or practice,
    (iii) expressing the person's cultural identity,
  (h) behaviour that causes injury or death to an animal, or otherwise makes use of an animal to threaten a person,
  (i) behaviour that deprives a person of liberty, restricts a person's liberty or otherwise unreasonably controls or regulates person's day-to-day activities.
  Examples for paragraph (i)—

- making unreasonable demands about how a person exercises the person's personal, social or sexual autonomy and making threats of negative consequences for failing to comply with the demands
- denying a person access to basic necessities including food, clothing or sleep
- withholding necessary medical or other care, support, aids, equipment or essential support services from a person or compelling the person to take medication or undertake medical procedures [emphasis added].

Section 54G also expands on what "course of conduct" means:

> (1) In this Division, a course of conduct means engaging in behaviour—
> (a) either repeatedly or continuously, or
> (b) both repeatedly and continuously.
> (2) For subsection (1), behaviour does not have to be engaged in—
> (a) as an unbroken series of incidents, or
> (b) in immediate succession.
> (3) For subsection (1), a course of conduct includes behaviour engaged in—
> (a) in this State, and
> (b) in this State and another jurisdiction [emphasis added].

Notably, under section 54H, the prosecution must prove beyond reasonable doubt that "abusive behaviour" formed part of the "course of conduct" but does not have to demonstrate the particulars that would be necessary if the incidents were charged as separate offences. Moreover, like the England and Wales *Domestic Abuse Act 2021*, the *Crimes (Domestic and Personal Violence) Act 2007*[106] was also amended to provide a new definition of "domestic abuse" in law to complement the coercive control offence, which includes coercive control as a form of "domestic abuse" under section 6A.

United States

Several U.S. states have enacted legislation against coercive control (or are in the process of doing so). Since 2020, various states, including Hawaii, Connecticut, Washington, and California, have been introducing civil legislation relating to coercive control to allow the obtainment of civil protection orders on the grounds of coercive control and permitting its consideration in child custody proceedings.[107] Similar bills are pending in other states, including Florida and Massachusetts. Others have proposed

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[106] *Crimes (Domestic and Personal Violence) Act 2007*, (NSW), 2007.

[107] See Cross, *supra note* 13 at 222-24.

bills specifically criminalizing coercive control, including New York, South Carolina, and Washington.[108]

2. FV or IPV Offences that Address Coercive Control

Scotland

Rather than creating specific criminal legislation against coercive control, in 2018, Scotland enacted a more general "domestic abuse" offence under the *Domestic Abuse Act 2018*.[109] Given its broad approach, the hybrid offence has a penalty of up to 14 years imprisonment.[110] The offence is described under sections 1 and 2 of the Act as:

> 1. Abusive behaviour towards a partner or ex-partner
>   (1) A person commits an offence if—
>   (a) the person ("A") engages in a course of behaviour which is abusive of A's partner or ex-partner ("B"), and
>   (b) both of the further conditions are met.
>   (2) The further conditions are—
>   (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
>   (b) that either—
>   (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
>   (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
>   (3) In the further conditions, the references to psychological harm include fear, alarm and distress.
> 2. What constitutes abusive behaviour
>   (1) Subsections (2) to (4) elaborate on section 1(1) as to A's behaviour.
>   (2) Behaviour which is abusive of B includes (in particular)—
>   (a) behaviour directed at B that is violent, threatening or intimidating,
>   (b) behaviour directed at B, at a child of B or at another person that either—
>   (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
>   (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
>   (3) The relevant effects are of—
>   (a) making B dependent on, or subordinate to, A,
>   (b) isolating B from friends, relatives or other sources of support,
>   (c) controlling, regulating or monitoring B's day-to-day activities,
>   (d) depriving B of, or restricting B's, freedom of action,

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108 *Ibid* at 224-26.

109 *Domestic Abuse (Scot) Act 2018* ASP 5.

110 *Ibid*, s 9.

(e) frightening, humiliating, degrading or punishing B.

(4) In subsection (2)—

(a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,

(b) in paragraph (b), the reference to a child is to a person who is under 18 years of age [emphasis added].

What is unique about the offence is that it focuses on the entire abusive context, which helps address the fragmentation that commonly occurs in criminal law.[111] Therefore, the law targets all forms of abuse, including coercive control, captured under section 2(3) of the Act.[112] The law also significantly changed criminal procedure, evidence, and sentencing, including preventing the perpetrator from using the justice system to further exert coercive control.[113] Also noteworthy is that the offence has maintained Scotland's early 2000 deliberate policy decision to use the term "abuse" rather than "violence" to better reflect the reality that not all forms of abuse will involve physical or sexual violence.[114] Under section 1, the offence also relies on a "course of behaviour," which section 10(4) defines as behaviour occurring on at least two occasions.

Like the Republic of Ireland offence, the Scottish offence applies only to current or former intimate partners to acknowledge that IPV dynamics may differ from abuse committed against other family members. Nevertheless, the Scottish offence provides for an associated statutory aggravation whereby the behaviour committed by the perpetrator extends to children involved or affected by the offence.[115] However, Cairns and Callander have raised concerns about this statutory aggravation.[116] The issue raised is that the harm experienced by children in intimate partner coercive control is not considered <u>together with</u> their abused parent or caregiver.[117] As such, they argue that an amendment should be made by introducing a parallel offence that reconceptualizes children as "adjoined victims"[118] of coercive control together with the parent or caregiver who shares the

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[111] Ilona Cairns & Isla Callander, "'Gold Standard' Legislation for Adults Only: Reconceptualising Children as 'Adjoined Victims' Under the Domestic Abuse (Scotland) Act 2018" (2022) 31:6 Soc & Leg Stud 914 at 915 [Cairns & Callander].

[112] "Domestic Abuse (Scotland) Bill" (2017) at 3, online (pdf): *The Scottish Parliament* <www.parliament.scot/-/media/files/legislation/bills/previous-bills/domestic-abuse-bill/introduced/policy-memorandum-domestic-abuse-scotland-bill.pdf> [Scottish Parliament].

[113] *Ibid* at 2.

[114] *Ibid*; Burman & Brooks-Hay, *supra* note 21 at 68.

[115] Scottish Parliament, *supra* note 112 at 18.

[116] Cairns & Callander, *supra* note 111 at 914.

[117] *Ibid* at 920.

[118] *Ibid* at 921.

experience of coercive control. By doing so, the amendment will not position children as "collateral damage outside of the direct context of the core offence."[119] Therefore, while some have praised the innovative "domestic abuse" offence as a new "gold standard,"[120] Cairns and Callander caution against adopting the Scottish approach elsewhere as "it remains deeply flawed in its treatment of children."[121]

Following the enactment of the domestic abuse offence in 2019, of the 64,807 incidents of "domestic abuse" recorded in 2021-2022, 39% involved at least one crime or offence.[122] Where gender information was recorded, 81% of the "domestic abuse" incidents in 2021-2022 had a female victim and a male suspected perpetrator.[123]

Northern Ireland

In 2021, Northern Ireland enacted a similar "domestic abuse" offence to Scotland with an analogous definition under section 1 of the *Domestic Abuse and Civil Proceedings Act 2021*.[124] Though the offence is not specific to coercive control, it "closes a gap in the law by criminalising a course of abusive behaviour, that is behaviour that occurs on two or more occasions, against an intimate partner, former partner or family member."[125] Northern Ireland's Department of Justice also issued statutory guidance describing the various "abusive behaviours" that form part of the offence, which includes coercive control.[126]

Like the Scottish offence, the Northern Ireland crime is a hybrid offence with up to 14 years imprisonment.[127] According to the Police

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119 *Ibid* at 935.

120 See e.g., Marsha Scott, "The Making of the New 'Gold Standard': The Domestic Abuse (Scotland) Act 2018" in Marilyn McMahon & Paul McGorrery, eds, *Criminalizing Coercive Control: Family Violence and the Criminal Law* (Singapore: Springer Nature, 2020).

121 Cairns & Callander, *supra* note 111 at 935.

122 "Domestic abuse recorded by the police in Scotland, 2021-22" (29 November 2022), online: Scottish Government <www.gov.scot/news/domestic-abuse-recorded-by-the-police-in-scotland-2021-22/> [perma.cc/E29K-GQ88].

123 *Ibid*.

124 *Domestic Abuse and Civil Proceedings Act 2021* (NI), 2021.

125 "Abusive Behaviour in an intimate or family relationship: Domestic Abuse Offence" (2022) at 1, online (pdf): *Department of Justice* <www.justice-ni.gov.uk/sites/default/files/publications/justice/domestic%20abuse%20offence%20guidance%20-%20march%202022.pdf> [perma.cc/VN4V-L68K].

126 *Ibid* at 5.

127 *Ibid* at 36.

Service of Northern Ireland, in the 12 months from July 2021 to the end of June 2022, 22,142 "domestic abuse" crimes were recorded by the police.[128]

3. Other Legislation Relating to Coercive Control

Many other jurisdictions have also implemented measures to combat FV or IPV by criminalizing various forms of abuse against intimate partners or family members, including specific FV or IPV offences.[129] However, most jurisdictions do not capture coercive control, though some do address certain coercive or controlling behaviours. Like Canada, where there is no specific criminal offence against FV or IPV, they are often considered an aggravating factor during sentencing. The following are a few examples of jurisdictions that have enacted criminal legislation relating to coercive control.[130]

Australia: Tasmania

In 2004, the Australian island state of Tasmania enacted the *Family Violence Act 2004*[131], broadening the definition of "family violence" under section 7. While the Act does not explicitly make FV, IPV, or coercive control criminal offences, it introduced two new related criminal offences: (1) economic abuse and (2) emotional abuse or intimidation. Under section 8 of the Act, committing <u>economic abuse</u> is to "intentionally and unreasonably control or intimidate their partner or cause their partner mental harm, apprehension or fear" by pursuing a course of conduct through several behaviours related to economic abuse.[132] Under section 9, <u>emotional abuse or intimidation</u> is defined as a person seeking "a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her partner," which includes restricting

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128 "Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland" (25 August 2022), online (pdf): *Police Service of Northern Ireland* <www.psni.police.uk/sites/default/files/2022-09/domestic-abuse-bulletin-jun_-22_0.pdf> [perma.cc/5JAF-CDND].

129 See e.g., "Beijing Platform for Action: Combating coercive control and psychological violence against women in the EU Member States" (2022), online (pdf) at 46-53: *European Institute for Gender Equality* <eige.europa.eu/sites/default/files/documents/combating_coercive_control_and_psychological_violence_against_women_in_the_eu_member_states.pdf> [European Institute for Gender Equality].

130 See *ibid* at 123-146 for more examples of criminal legislation relating to FV, IPV, and coercive control in European countries.

131 *Family Violence Act 2004* (TAS), 2004.

132 *Ibid*, s 8.

freedom of movement by threats or intimidation.[133] Both offences have a maximum penalty of two years imprisonment or a fine.

Despite being one of the first jurisdictions to address certain coercive and controlling behaviours in 2004, by 2015, only eight people had been convicted of emotional abuse or intimidation, and no one had been convicted of economic abuse.[134] The few convictions have been attributed to the offences' built-in limitations, including a short statutory limitation period of 12 months, and requiring specific intent to control or intimidate unreasonably. The latter creates difficulties in prosecuting the offences because it leaves the possibility of the accused arguing that the behaviour was reasonably controlling or intimidating.[135]

France

Although France has not explicitly legislated against FV, IPV, or coercive control, it adopted *Loi n° 2010-769* in 2010.[136] The law created Title XIV in the French *Civil Code* and established new measures to protect individuals against abuse in various family settings. In a criminal law context, the law ensured that several abuse-related offences could be psychological in nature. For example, "moral harassment" under section 222-33-2 of the criminal code is "to harass others by words or repetitive behaviours that have the purpose or effect of degrading another person's working conditions, likely to affect this person's rights and dignity, to alter his/her physical or mental health or to jeopardise his professional future."[137] The offence is punishable by a maximum penalty of three years in prison and a fine when committed in an IPV context.

In 2020, France enacted *Loi n° 2020-936*[138] to further protect victims of FV and IPV in both civil and criminal contexts. Among several amendments, the new law introduced geolocation bracelets that alert victims if the wearer comes within a perimeter set by a judge. Moreover, the law prevents people from using geolocation devices to know a victim's location, to record or transmit another person's geolocation information

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133 *Ibid*, s 9.

134 Marilyn McMahon & Paul McGorrery, "Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience" (2016) 35:2 U Tasm L Rev 1 at 11.

135 *Ibid* at 8.

136 *LOI no 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants*, JO, 10 July 2010, no 2.

137 European Institute for Gender Equality, *supra* note 129 at 127.

138 *LOI n° 2020-936 du 30 juillet 2020 visant à protéger les victimes de violences conjugales*, JO, 31 July 2020, no 2.

without that person's consent, and the theft of a communication device by an intimate partner.[139]

Denmark

Although Denmark has not criminalized FV or IPV specifically, it has criminalized "psychological violence" under section 243 of the Danish Criminal Code in 2019, with "coercive control" and "abusive behaviour" being captured by the legislation:

> A person who belongs to or is closely connected with another's household or has previously had such an affiliation with the household, and who repeatedly over a period of time exposes the other to grossly degrading, insulting or abusive behaviour that can be considered improper control of the other, including the exercise of coercive control, is punishable for psychological violence [emphasis added]. [140]

Like most jurisdictions addressing coercive control, the offence includes a requirement that the behaviour occurs repeatedly over a period of time. Moreover, the offence relates to FV and IPV, referring to "a person who belongs to or is closely connected with another's household or has previously had such an affiliation with the household," which includes intimate partners who have never shared a residence.[141] The offence is punishable by a prison sentence of up to three years or a fine.

Spain

Spain criminalized several offences relating to IPV and coercive control, including a crime of "coercion," which is defined under section 172.2 of the criminal code as:

> Whoever lightly coerces his wife or former wife, or woman with whom he has been bound by a similar emotional relation even without cohabiting, shall be punished with a sentence of imprisonment of 6 months to 1 year, or community service from 31 to 80 days and, in all cases, deprivation of the right to own and carry weapons from a year and a day to 3 years, as well as, when the judge or court of law sees it fit in the interest of the minor or person with disability requiring special protection, special barring from exercise of parental authority, guardianship, care, safekeeping or fostering for up to 5 years. The same punishment shall be imposed on whoever lightly coerces an especially vulnerable person who lives with the offender [emphasis added].[142]

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[139] Nicholas Boring, "France: Parliament adopts law against domestic violence" (7 August 2020), online: *Library of Congress* <www.loc.gov/item/global-legal-monitor/2020-08-07/france-parliament-adopts-law-against-domestic-violence/>.

[140] European Institute for Gender Equality, *supra* note 129 at 123.

[141] *Ibid* a 47.

[142] *Ibid* at 123.

What is notable about this offence is that it pertains specifically to instances of coercion committed by men against women.

New Zealand

Although New Zealand does not have specific FV, IPV, or coercive control offences, the *Family Violence Act 2018*[143] provides a definition of "family violence" under section 9, which includes coercive control:

> 9. Meaning of family violence
> (1) In this Act, family violence, in relation to a person, means violence inflicted—
> (a) against that person; and
> (b) by any other person with whom that person is, or has been, in a family relationship.
> (2) In this section, violence means all or any of the following:
> (a) physical abuse;
> (b) sexual abuse;
> (c) psychological abuse.
> (3) Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse, and that may have 1 or both of the following features:
> (a) it is coercive or controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person):
> (b) it causes the person, or may cause the person, cumulative harm [emphasis added].

The Act works alongside criminal legislation, such as section 194A of the *Crimes Act 1961,*[144] which pertains to the crime of "assault on a person in a family relationship." The term "family relationship" is defined under section 12 of the *Family Violence Act 2018* as:

> For the purposes of this Act, a person (A) is in a family relationship with another person (B) if A—
> (a) is a spouse or partner of B; or
> (b) is a family member of B; or
> (c) ordinarily shares a household with B (see also section 13); or
> (d) has a close personal relationship with B (see also section 14).

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143 *Family Violence Act 2018* (NZ), 2018.
144 *Crimies Act 1961* (NZ), 1961.

IV. AN INTERNATIONAL COMPARATIVE ANALYSIS OF LEGISLATION AGAINST COERCIVE CONTROL

A careful examination of Canada's current legislative approach to addressing coercive control and that of other jurisdictions examined in Part III reveals several key legislative characteristics.[145]

First, it is evident from Part III that there is a noticeable absence of consistency in addressing coercive control via criminal law. Nonetheless, two common approaches have been used: (1) supplementing existing criminal offences with a stand-alone crime of coercive control, and (2) enacting an all-encompassing FV or IPV offence that captures coercive control. The actus reus differs in the two approaches, where "coercive and controlling behaviour" is usually targeted in the former and "abusive behaviour" in the latter.[146] England and Wales, the Republic of Ireland, and the Australian state of New South Wales have adopted the first approach. Canada has also proposed criminal legislation against coercive control using this method. Conversely, Scotland and Northern Ireland have adopted the second approach. Canadian federal family law under the *Divorce Act* has also favoured the second approach by enacting a broad FV definition that includes coercive control. However, others, like France, Spain, and the Australian state of Tasmania, have enacted legislation addressing some coercive and controlling behaviours but have not adopted legislation specifically addressing coercive control. Denmark is also noteworthy as it has captured coercive control through a unique "psychological violence" offence. While the various approaches used to address coercive control via criminal law are different in scope and practice, many of the currently proposed and enacted offences are based on the same conceptualization of coercive control discussed in the seminal works of Stark and Johnson mentioned in Part II.[147]

Second, some jurisdictions have entirely omitted a definition of coercive control in law. Although corresponding statutory guidance has been provided in some jurisdictions, others have only defined related terms such as "abusive behaviour." The three proposed Canadian criminal bills and the *Divorce Act* present the same issue of failing to define coercive and controlling behaviour. Moreover, some jurisdictions, including Canada,

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145 See McMahon & McGorrery, *supra* note 20 at 197-215 for a more thorough legal comparative analysis of the English and Welsh, Scottish, Irish, and Tasmanian offences.

146 *Ibid* at 202.

147 See generally Silverstone, *supra* note 16 at 2; Burman & Brooks-Hay, *supra* note 21 at 68.

separate coercion from control by using language such as "coercive or controlling conduct." Doing so makes it theoretically possible to be charged and convicted of one without the other. However, it is unclear how separating the two behaviours will capture the essence of what coercive control is understood to be doing, as much of the existing literature suggests that offenders rely on coercion to achieve the desired outcome of control.[148]

Third, there are differences in whom the laws target. Current and former partners, whether they live together or not, are captured in most jurisdictions with a coercive control offence. Canada's three proposed criminal bills are the exception. While they target current and former partners, they do not extend to partners not living together. Moreover, some offences, including the proposed Canadian criminal bills, extend to family members. Conversely, others, like the Scottish offence, only target current or former intimate partners. There is also considerable variation across jurisdictions in who is considered a "family member" and an "intimate partner."

Fourth, there are differences in the offences' mens rea. Some, like the Canadian proposed criminal bills, provide for either a subjective or objective standard of proof by using language such as "know or ought to know." In contrast, others, like Scotland, have focused on an objective and subjective standard by requiring a reasonable person test plus intention or recklessness to determine whether the behaviours have harmed the victim.[149] However, the Australian Psychological Society (APS) has raised concerns about using an objective standard to prove harm caused by coercive control. While it acknowledges that a reasonable person test places the focus of the offence on the perpetrator's behaviour, it argues that a reasonable person may not always be able to identify the link between a perpetrator's behaviour and the likely adverse impact that it would cause in every case.[150] The APS provides an illustrating example:

> [T]he giving of flowers by a perpetrator may be coercive if this is a reward for the victim-survivor cancelling social activities in a way that perpetuates their social isolation. Without considering the totality of behaviour in context, focusing on

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148 See especially Hamberger, Larsen & Lehrner, supra note 19 at 1-3; Stark, *supra* note 18 at 229; Kelly & Johnson, *supra* note 27 at 478; Dutton & Goodman, *supra* note 59 at 743.

149 McMahon & McGorrery, *supra* note 20 at 208-209.

150 Australian Psychological Society, "RE: Crimes Legislation Amendment (Coercive Control) Bill 2022" (31 August 2022) at 1-2, online (pdf): <psychology.org.au/getmedia/bd79ad05-67f6-42fa-ab6c-ca71c4708431/20220831-letter-z-burgess-aps-feedback-on-the-crimes-legislation-amendment-(coercive-control)-bill-2022-web.pdf> [Australian Psychological Society].

> isolated snapshots of behaviour in this instance may distract from underlying coercive actions as experienced by the victim-survivor.[151]

According to the APS, the objective test may also "deny victim-survivors a voice to be able to demonstrate the effect of the perpetrator's actions."[152] Therefore, it suggests implementing a subjective standard instead. However, it also recommends that laws against coercive control allow, but not require, evidence of actual harm to meet the criteria for the offence and to legislate "safeguards to avoid any potential adverse inferences that could be drawn if evidence of actual harm is not adduced."[153] The APS also proposes that evidence presented by mental health professionals be permitted if it could help explain the "significant and lasting effects of a perpetrator's actions within the context of the relationship."[154] However, others have argued that Scotland may have the most appropriate model, as relying on an objective standard "makes it much more difficult for a defendant to be acquitted on the basis that they did not appreciate that their behaviour would cause the prohibited harm."[155] Moreover, an objective standard protects victims against the re-victimization of having to recount their traumatizing experiences and against dismissing accounts of abuse for not showing signs of fear when recounting events. An objective standard also has no requirement that victims experience the behaviour as harmful themselves.

Fifth, while many jurisdictions have attempted to move away from an incident-led approach, there is disagreement over the frequency of behaviour required to constitute an offence. Though most jurisdictions require the behaviours to be "repeated or continuous," "persistent," or form a "course of conduct," there are concerns about what this entails as the terms are not defined in most offences. The APS argues that using such wording without defining them creates significant ambiguity as it is unclear how far apart in time coercive and controlling behaviours can be to form part of the offence.[156] However, the absence of a legislative definition of the word "repeatedly" in the criminal harassment offence under s.264(2) (a) and (b) of the Canadian *Criminal Code* does not seem to pose constitutional problems for its vagueness, although trial and appeal courts have interpreted the term differently.[157] While some jurisdictions are more descriptive by

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151 *Ibid* at 2.
152 *Ibid.*
153 *Ibid.*
154 *Ibid.*
155 McMahon & McGorrery, *supra* note 20 at 214.
156 Australian Psychological Society, *supra* note 150 at 2-3.
157 *R v Ohenhen*, 2005 CanLII 34564 (ONCA); *R v Belcher*, 1998 50 OTC 189 (Gen Div); *R v Lafreniere*, 1994 22 WCB (2d) 519 (CJ Prov Div); *R v Thélémaque*, 2008 QCCQ

requiring the behaviours to occur on least two occasions to constitute an offence, such referencing may bring the problem back towards an incident-led approach by having the behaviours occur on specific occasions in time rather than being considered ongoing. Moreover, referencing two occasions does not allow for a more contextual analysis of individual cases.[158] For example, while the perpetrator's behaviour may not be repeated or continuous, the adverse impact on the victim could be. Consequently, the APS suggests that the frequency of the offence should consider not only the temporal dimensions of the perpetrator's ongoing behaviour but also the temporal adverse impact on the victim.[159] This will ensure that the victim will not have to be subjected to the perpetrator's repeated or continuous behaviour before legal intervention can occur and will acknowledge that single acts can have lasting effects on victims.

Sixth, most jurisdictions have adopted a gender-neutral approach to legislation against FV, IPV, and coercive control, even if emerging data suggest they may be highly gendered.[160] Spain is a notable exception where its "coercion" offence pertains specifically to men against women, thus acknowledging the gendered asymmetry regarding abuse.

Finally, maximum penalties vary widely among jurisdictions. While most jurisdictions have adopted hybrid offences, penalties range from a mere fine or 2 years imprisonment in Tasmania to 14 years in Scotland and Northern Ireland. However, offences more specific to coercive control have ranged from 5 years imprisonment in England and Wales to 7 years in New South Wales.

V. RECOMMENDATIONS

While the criminalization of coercive control has been praised by many,[161] it certainly has not come without its critics.[162] Others embrace the idea but have raised concerns about how the proposed Canadian criminal bills went about doing so.[163] Given that few empirical studies have examined

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2308; *R v Saloio*, 2010 ONCJ 164, *R v Ryback*, 1996 105 CCC (3d) 240 (BCCA).

158 McMahon & McGorrery, *supra* note 20 at 170-171.

159 *Ibid* at 2.

160 See e.g., Stripe, *supra* note 92. See also Part I.

161 See e.g., Lori Chambers, "Submission for Bill C-247" (2021) at 6, online (pdf): *House of Commons of Canada* <www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11101619/br-external/ChambersLori-e.pdf> *[perma.cc/9APV-EEL9]*.

162 See e.g., Cross, *supra* note 13 at 243.

163 Haist, *supra* note 77; Iqra Khalid, "The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships: Report of the Standing Committee

coercive control offences in practice,[164] it is difficult to draw any conclusive inferences regarding the benefits or drawbacks of criminalizing coercive control. Moreover, the inferences that can be drawn are limited. For example, although some empirical evidence demonstrates significant limitations in the application of a coercive control offence primarily due to evidentiary challenges, much of the existing literature has only examined the viability of the England and Wales offence.[165] Given that coercive control offences vary widely among jurisdictions, this variation severely restricts the findings' generalizability. Whether these findings can be replicated in jurisdictions with different criminal legislation against coercive control remains to be seen. Furthermore, there is currently no accepted metric for measuring the effectiveness of coercive control legislation. Whether the desirable outcome of the legislation is to achieve higher arrest and conviction rates remains astonishingly understudied. As such, the currently available empirical evidence makes it impossible to either conclusively recommend or reject the implementation of criminal legislation against coercive control in Canada or predict its effectiveness in practice if implemented. This is especially true given that Canada has proposed different legislation than those studied.

However, some researchers have argued that "reservations cannot justify continued inaction by the criminal law towards the use of non-physical tactics that generate a psychological impact upon the victim, ultimately inhibiting their liberty and (for many) being more damaging than a single act of violence."[166] Thus, in light of Parliament's consideration of a coercive control offence, three recommendations are offered for Parliament if it decides to officially criminalize it in Canada to ensure its desired effect.[167]

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on Justice and Human Rights" (2021) at 29-30, online (pdf): *House of Commons Chambre des Communes Canada* <www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11257780/justrp09/justrp09-e.pdf> [perma.cc/4LZA-ACNY] [Khalid].

164 But see Charlotte Barlow et al, "Putting Coercive Control into Practice: Problems and Possibilities" (2020) 60:1 Brit J Crim 160 [Barlow]; Brennan & Myhill, *supra* note 95. See also Part III regarding the issues with the England and Wales offence.

165 See e.g., Barlow, *ibid* at 172-75.

166 McMahon & McGorrery, *supra* note 20 at 199.

167 See the following for other suggested legislative reforms surrounding coercive control in Canada: Khalid, *supra* note 163 at 1; Gill & Aspinall, *supra* note 80 at 9; Haist, *supra* note 77 at 71-77; Karen Vecchio, "Towards a Violence-Free Canada: Addressing and Eliminating Intimate Partner and Family Violence: Report of the Standing Committee on the Status of Women" (2022) at 51-82, online (pdf): *House of Commons Chambre des Communes Canada* <publications.gc.ca/collections/collection_2022/parl/xc71-1/XC71-1-1-441-4-eng.pdf>.

Since there is currently a lack of empirical evidence showing the superiority of either a stand-alone coercive control offence or a more general FV or IPV offence that captures coercive control, recommendations regarding both approaches will be discussed.

A. Recommendation 1: Have well-defined and consistent definitions of FV, IPV, and coercive control across all provincial, territorial, and federal legislative settings

Although some jurisdictions have narrowly focused their offences on current or former partners, the Canadian proposed criminal coercive control bills and section 718.2(a)(ii) of the *Criminal Code* suggest that Canadian criminal law extends to both FV and IPV contexts. However, the terms "IPV," "FV," "coercive control," and "family member" are currently undefined in the *Criminal Code.* Thus, one option could be implementing a *Criminal Code* section 2 definition of "family member" equivalent to that of the *Divorce Act* to create consistency in terminology alongside the existing *Criminal Code* "intimate partner" definition. Moreover, "IPV," "FV," and "coercive control" definitions could also be implemented under section 2 of the *Criminal Code*, with the FV definition matching that of the *Divorce Act*. Parliament could also define "IPV," "intimate partner," and "coercive control" in the *Divorce Act,* as it does not currently define the terms. The "IPV" definition in the *Divorce Act* should match that of the *Criminal Code.* Provincial and territorial FV and IPV legislation should also attempt to define these terms in the same way as federal legislation.

Alternatively, a new separate Act could be implemented, modelled after the *Family Violence Act 2018* in New Zealand. The objective of the Act would be to create definitions of "IPV," "FV," "coercive control," "family member," and "intimate partner," which could be applied across all areas of law in Canada. The proposed Act would close the discrepancy between criminal and family law by establishing uniform definitions that would operate in conjunction with criminal and family legislation.

In addition, the U.K. frequently produces statutory guidance together with its legislation to facilitate comprehension. Similar statutory guidance could be provided to assist legal professionals in understanding why the legislation was enacted and how to apply it effectively and uniformly across Canada. This statutory guidance can serve as a model to standardize Crown counsel manuals to address the current inconsistencies.

Regardless of the approach used, providing clear, uniform definitions in the law would greatly enhance the effectiveness of both a stand-alone coercive control offence and an all-encompassing FV or IPV offence. They

would help clarify who the victims and perpetrators are, explain what IPV and FV-related behaviours the law is trying to capture, and provide a greater understanding of how coercive control fits within the broader concepts of FV and IPV. Doing so would be especially beneficial for specialized courts such as the Integrated Domestic Violence Court in Toronto, where a single judge handles criminal and family proceedings concurrently in cases involving FV and IPV under the court's jurisdiction.[168] The court's objective is to help bridge the gap between criminal and family law processes, which otherwise work in silos.[169] Consistency in the treatment and language of FV, IPV, and coercive control in both criminal and family law would help integrate the two areas of law and assist the work done by such courts. Moreover, there are real concerns of vagueness and overbreadth if coercive control (or coercive and controlling behaviour) is not adequately defined.[170] A lack of concrete definitions will be left for courts to determine what such conduct entails, which may cause the coercive control offence to be applied too broadly and risk being constitutionally unviable.[171] Having well-defined definitions that clarify the coercive and controlling behaviours and individuals the law attempts to target will help address the nuances of the offence in a way that is more closely connected to the harm Parliament is trying to address. This will help ensure the law survives constitutional scrutiny.

B. Recommendation 2: Include the examination of criminalizing coercive control within the proposed national IPV prevention strategy

It is essential to have a comprehensive approach when addressing the issues of FV and IPV to ensure a sustained reduction in their prevalence, as several factors contribute to their occurrence. Therefore, the debate over whether to criminalize coercive control should be part of the national IPV prevention strategy currently debated in the Senate under Bill S-249[172]. The primary objective of the IPV prevention strategy is to ensure that the

[168] Rachel Birnbaum, Nicholas Bala, & Peter Jaffe, "Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned" (2014) 29:1 Can J Fam L 117 at 147.

[169] *Ibid* at 122-24.

[170] Sheley, *supra* note 51 at 1338-43.

[171] *R v Levkovic*, 2013 2 SCR 204 at para 10.

[172] Bill S-249, *An Act Respecting the Development of a National Strategy for the Prevention of Intimate Partner Violence*, 1st Sess, 44th Parl, 2021 (second reading 1 June 2023).

approach taken by the Minister for Women and Gender Equality and Youth is all-encompassing in addressing IPV:

> National strategy
> 3 (1) The Minister must develop a national strategy for the prevention of intimate partner violence.
> Consultations:
> (2) In developing the national strategy for the prevention of intimate partner violence, the Minister must consult with other federal ministers, representatives of provincial governments who are responsible for social development, families and public safety, and representatives of groups who provide services to or advocate on behalf of victims of intimate partner violence, with respect to:
> (a) the adequacy of current programs and strategies aimed at preventing intimate partner violence and at protecting and assisting victims of intimate partner violence;
> (b) partnerships between police services, health care facilities, advocacy groups and shelters in the prevention of intimate partner violence and the protection of victims of intimate partner violence;
> (c) the requirements for representatives of health care facilities, medical practitioners and nurse practitioners to provide information on access to legal assistance to patients who they suspect may be victims of intimate partner violence;
> (d) the requirements for health professionals to make a report to the police if they suspect that a patient is a victim of intimate partner violence;
> (e) the financial and other costs of implementing the national strategy; and
> (f) any constitutional, legal or jurisdictional implications of implementing the national strategy.

Given that there is no clear evidence as to whether criminalizing coercive control will effectively address the larger issues of FV and IPV, its criminalization should be considered part of the proposed national IPV prevention strategy. Doing so will help provide a more comprehensive understanding of whether criminalizing coercive control is the best approach to addressing FV and IPV, as the examination will be conducted within the context of potential counterarguments or alternative measures of addressing FV and IPV. Moreover, the debate surrounding the criminalization of coercive control, whether as a stand-alone offence or within a broader FV or IPV offence, will also be done with the extensive collaborations required under Bill S-249 instead of simply within Parliament. This will provide additional context and insights into the complexities of this issue and offer suggestions for further research or policy development to ensure lawmakers better understand the potential benefits and drawbacks of criminalizing coercive control and whether alternative measures should be considered.

Therefore, Bill S-249 should expand to require the following. First, the Minister should, in developing a national IPV prevention strategy, define and explain what is meant by "FV," "IPV," and "coercive control." Second, consideration should be given to the context of the proposed legislation against coercive control in Canada. This includes the current debate surrounding the criminalization of coercive control, the purported urgency of addressing it via criminal law, how the current criminal law fails to address it, the legislation's key objectives and potential impact on perpetrators and victims, and how Parliament intends to address the raised shortcomings of the current proposed coercive control bills. Third, specific examples should be provided to help understand the implications of the proposed legislation. This could involve describing real-life situations where coercive control has been used and explaining how the proposed legislation would address these situations. This will help in the understanding of the potential benefits of implementing criminal legislation against coercive control in Canada. Fourth, there should be consideration of the limitations of existing studies on coercive control legislation, including potential biases or confounding factors that may affect the validity of their findings and any conflicting results or areas of uncertainty. This will help in the evaluation of the strength of the evidence and provide a more nuanced understanding of the current state of research in this area. Fifth, the Minister should consider including examples or case studies of other jurisdictions that have implemented legislation against coercive control and their positive or negative outcomes, alongside the key factors contributing to their successes or failures. Sixth, an explanation is needed regarding why and how the proposed legislation in Canada differs from the legislation studied in the available empirical literature and that of other jurisdictions. This will help shed light as to whether a stand-alone coercive control offence or an all-encompassing FV or IPV offence that captures coercive control would be more appropriate. Finally, the Minister should describe the potential future research directions or policy implications based on the current state of knowledge and any remaining uncertainties. This would help in the comprehension of the broader implications of the current evidence and what further work needs to be done.

C. Recommendation 3: Have robust implementation and evaluation plans

If Parliament enacts criminal legislation against coercive control, the benefits of a new criminal offence will depend on the legislation's successful

operation.[173] When British Columbia enacted the *Family Law Act*[174] in 2011, there were high hopes that introducing a broad "family violence" definition under section 1 would assist judges in making better decisions regarding a child's best interest. However, a case law review revealed that the legislation did not necessarily impact judges' parental custody decisions.[175] These findings are consistent with a study conducted by the Rise Women's Legal Centre in British Columbia which found that women reported that police, lawyers, and judges did not appreciate the impacts or safety risks of non-physical violence, despite a broadened definition of FV in the provincial *Family Violence Act*.[176] The authors concluded that "the family law system may have changed its legislation, but it did not change its underlying attitudes and assumptions, which are frequently built upon a foundation of preconceived myths and stereotypes about the dynamics of interpersonal violence."[177] There is no reason to believe that adding a new coercive control offence will yield distinct results. A recent case law review in Canada revealed that commonly known coercive control tactics occurring post-separation, such as electronic surveillance by the perpetrator, were evident in the facts of the cases, but judges seldom drew their relation to coercive control.[178] This has led the author to conclude that coercive control is still "systematically minimized or ignored unless serious physical violence or threats have immediately preceded the application."[179]

To address this shortcoming, the recently enacted Bill C-233[180] in April 2023 amended the *Judges Act*[181] to make continuing education seminars on IPV and coercive control available to federally appointed judges. Bill C-233 builds on the recent enactment of Bill C-3[182] in 2021, which made continuing education available for federally appointed judges on sexual assault law and social context, including systemic racism and

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[173] Tolmie, *supra* note 21 at 53.

[174] *Family Law Act*, SBC 2011, c 25.

[175] Susan B Boyd & Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (2016) 35:2 Can J Fam L 1 at 45.

[176] Haley Hrymak & Kim Hawkins, "Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger" (2021) at 25, online (pdf): *Rise Women's Legal Centre* <womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf>.

[177] *Ibid* at 9.

[178] Koshan, Mosher, & Wiegers, *supra* note 16 at 768.

[179] *Ibid* at 779.

[180] *An Act to Amend the Criminal Code and the Judges Act (Violence Against an Intimate Partner)*, SC 2023, c 7.

[181] *Judges Act* RSC 1985, c J-1.

[182] An Act to amend the Judges Act and the Criminal Code, SC 2021, c 8.

discrimination. As such, Bill C-233 amended section 60(2)(b) of the *Judges Act* to the following:

> Establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination [emphasis added].

Similar training initiatives for provincially appointed judges should be considered.

Training for police officers on the dynamics of coercive control have also been proposed,[183] as a considerable volume of research demonstrates that police officers hold diverse understandings of FV and IPV.[184] For example, a recent study examined how a sample of 169 Canadian police officers in New Brunswick defined "IPV."[185] The study revealed that the majority (58.6%) defined IPV using legal conceptions based on existing criminal offences and relied on incidents of physical abuse as a primary

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183 Evan Stark, "Looking Beyond Domestic Violence: Policing Coercive Control" (2012) 12:2 Journal of Police Crisis Negotiations 199.

184 Celia Serrano-Montilla et al, "Understanding the Components and Determinants of Police Attitudes Toward Intervention in Intimate Partner Violence Against Women: A Systematic Review" (2023) 24:1 Trauma, Violence, & Abuse 245; Christina DeJong, Amanda Burgess-Proctor, & Lori Elis, "Police Officer Perceptions of Intimate Partner Violence: An Analysis of Observational Data" (2008) 23:6 Violence and Victims 683; Angela R Gover, Dagmar Pudrzynska Paul, & Mary Dodge, "Law Enforcement Officers' Attitudes About Domestic Violence" (2011) 17:5 Violence against Women 619; Samara McPhedran, Angela R Gover, & Paul Mazerolle, "A Cross-National Comparison of Police Attitudes About Domestic Violence: A Focus on Gender" (2017) 40:2 Policing: An International Journal of Police Strategies & Management 214; John Balenovich, Elizabeth Grossi, & Thomas Hughes, "Towards a Balanced Approach: Defining Police Roles in Responding to Domestic Violence" (2008) 33:1 American Journal of Criminal Justice 19; Paul C Friday, Scott Metzer, & David Walters, "Policing Domestic Violence: Perceptions, Experience, and Reality" (1991) 16:2 Criminal Justice Review 198; Daniel Lockwood & Ariane Prohaska, "Police Officer Gender and Attitudes Toward Intimate Partner Violence: How Policy Can Eliminate Stereotypes" (2015) 10:1 International Journal of Criminal Justice Sciences 77; Monica Perez Trujillo & Stuart Ross, "Police Response to Domestic Violence: Making Decisions About Risk and Risk Management" (2008) 23:4 Journal of Interpersonal Violence 454; Enrique Gracia, Fernando García & Marisol Lila, "Police Involvement in Cases of Intimate Partner Violence: The Influence of Perceived Severity and Personal Responsibility" (2008) 14:6 Violence Against Women 697; Enrique Gracia, Fernando García, & Marisol Lila, "Police Attitudes Toward Policing Partner Violence Against Women: Do they Correspond to Different Psychological Profiles?" (2011) 26:1 Journal of Interpersonal Violence 189.

185 Carmen Gill, Mary Ann Campbell, & Dale Ballucci, "Police Officers' Definitions and Understandings of Intimate Partner Violence in New Brunswick, Canada" (2021) 94:1 The Police Journal 20.

indicator. Only a minority of respondents (39.1%), particularly female officers, had a clearer understanding of the dynamics of power and control in cases involving IPV. These respondents utilized terms such as "oppression" and "coercion" to define IPV.[186] Despite the study's limited sample size, it suggests a lack of standardized training as officers have different understandings of IPV. A recent study supports this conclusion, as only 42% of a sample of 159 Canadian police officers had received some form of formal training on IPV.[187] These figures differ from other jurisdictions like the Republic of Ireland, where, as of December 2022, over 90% of police officers of its national police service received training on coercive control.[188]

Following the implementation of the coercive control offence in England and Wales, a study specifically examined the impact of training police officers on the dynamics of coercive control, including gathering and recording evidence in relation to coercive and controlling behaviour. The study found that the training resulted in a 41% increase in arrests for coercive control.[189] However, the training was only associated with an increased relative arrest rate for approximately eight months and began to decline thereafter, suggesting that the training only had short-term benefits. Nevertheless, the data at least suggest police training on FV, IPV, and coercive control may assist officers in the identification and enforcement of coercive control. As Walklate, Fitz- Gibbon, and McCulloch have argued:

> The implementation of the new offence is reliant on a police officer's ability to identify the potential presence of coercive and controlling behaviour, elicit information on a series of abusive events from the victim and correctly assess that behaviour, in terms of laying charges. This requires a reframing of an officer's typical approach from responding and taking stock of crime 'incidents' as isolated events towards looking to a series of interrelated events and the harm that flows from these.[190]

Another area of research that has received significant attention to assist police officers in making better decisions regarding victim safety, offender management, and identifying instances of FV and IPV is the use of risk

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186 *Ibid* at 8-10.

187 Mary Ann Campbell, Carmen Gill, & Dale Ballucci, "Informing Police Response to Intimate Partner Violence: Predictors of Perceived Usefulness of Risk Assessment Screening" (2017) 33 J Police Crim Psych 175 at 181 [Campbell, Gill, & Ballucci].

188 An Garda Síochána, *supra* note 103.

189 Iain Brennan, "Policing a New Domestic Abuse Crime: Effects of Force-Wide Training on Arrests for Coercive Control" (2021) 31:10 Policing and Society: An International Journal of Research and Policy 1153 at 1163.

190 Walklate, Fitz- Gibbon and, McCulloch, *supra* note 15 at 121.

assessment tools.[191] These tools provide police officers with a series of risk factors that help predict recidivism or prevent violence,[192] which have been shown to inform officers' perceptions of FV and IPV.[193] Examples of risk assessment tools used in Canada include the Ontario Domestic Assault Risk Assessment (ODARA), the Domestic Violence Risk Appraisal Guide (DVRAG), the Spousal Assault Risk Assessment Guide (SARA), the Domestic Violence Screening Inventory (DVSI), the Danger Assessment (DA), and the Brief Spousal Assault Form for the Evaluation of Risk (B-SAFER).

However, their use has important limitations. First, police officers who conduct assessments often lack the necessary qualifications and training to ensure accurate assessments.[194] There are currently "no professional standards for (a) the minimal qualifications of those conducting the assessments; (b) 'best practices' for applying the assessments; (c) training of the assessors; and (d) evaluation and monitoring of the assessments."[195] Second, an important factor to consider is influencing police officers' attitudes toward using these tools in their work.[196] For example, in a recent Canadian study, only 66% of a sample of 159 Canadian police officers reported having prior experience using some form of risk assessment tool to inform their IPV intervention,[197] though nearly 70% were open to using such tools.[198] However, nearly a third indicated they would not use IPV risk assessment tools even if trained to use them.[199] Third, despite many IPV risk assessment tools available, insufficient empirical evidence is available to conclude which tool is best.[200] Fourth, a systematic review of contemporary

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[191] See e.g., Melissa Northcott, "Intimate Partner Violence Risk Assessment Tools: A Review" (n.d.), online (pdf): *Department of Justice* <www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr12_8/rr12_8.pdf> [Northcott].

[192] *Ibid* at 5-6.

[193] Ballucci, Gill, & Campbell, "The Power of Attitude: The Role of Police Culture and Receptivity of Risk Assessment Tools in IPV Calls" (2017) 11:3 Policing: A Journal of Policy and Practice 242 [Ballucci, Gill, & Campbell]; Amanda L Robinson, Andy Myhill, & Julia Wire, "Practitioner (Mis) Understandings of Coercive Control in England and Wales" (2018) 18:1 Criminology & Criminal Justice 29; Amanda L Robinson, Gillian M Pinchevsky, & Jennifer A Guthrie, "A Small Constellation: Risk Factors Informing Police Perceptions of Domestic Abuse" 2016) 28:2 Policing and Society 189.

[194] Northcott, *supra* note 191 at 14; Campbell, Gill, & Ballucci, *supra* note 187 at 182.

[195] Randall Kropp, "Intimate Partner Violence Risk Assessment and Management" (2008) 23:2 Violence Vict 202 at 212.

[196] Ballucci, Gill, & Campbell, *supra* note 193.

[197] Campbell, Gill, & Ballucci, *supra* note 187 at 181.

[198] *Ibid* at 182.

[199] *Ibid.*

[200] Northcott, *supra* note 191 at 15.

risk assessment tools revealed that there is limited empirical evidence evaluating risk assessment tools in FV and IPV contexts.[201] Moreover, the review demonstrated only modest postdictive and predictive validity, with limited evidence for the superiority of IPV-specific risk assessment tools over general violence ones. Fifth, important yet often overlooked information in risk assessment tools is the victim's accuracy in predicting re-victimization risk.[202] Some evidence suggests that using risk assessments alongside victims' assessments may yield more accurate risk prediction than either approach alone.[203] Finally, it is questionable whether currently available risk assessment tools developed to predict the risk of physical violence can be reliably used to predict more subtle forms of abuse, like coercive control.[204] Most available risk assessment tools in Canada do not gather the necessary information relevant to coercive control.[205] Conversely, the U.K. has developed the Domestic Abuse, Stalking and Harassment, and Honour Based Violence (DASH) risk assessment, with research suggesting it may help in identifying coercive control.[206] However, applying the DASH risk assessment has been controversial, with some expressing serious concerns about its validity, reliability, and utility.

First, it has been argued that the DASH risk assessment tool was widely adopted in the U.K. without being subject to sufficient empirical research.[207] One study conducted after the DASH was adopted found that the DASH questions contributed nearly nothing to the predictive

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201 Tonia L Nicholls, "Risk Assessment in Intimate Partner Violence: A Systematic Review of Contemporary Approaches" (2013) 4:1 Partner Abuse 76 at 77.

202 Lauren Bennett Cattaneo et al, "Intimate Partner Violence Victims' Accuracy in Assessing their Risk of Re-abuse" (2007) 22 Journal of Family Violence 429.

203 Jennifer K Connor et al "Risk Assessments by Female Victims of Intimate Partner Violence: Predictors of Risk Perceptions and Comparison to an Actuarial Measure" (2001) 26:12 J Interpers Violence 2517.

204 Amanda L Robinson et al, "Risk-Led Policing of Domestic Abuse and the DASH Risk Model" (2016) at iii, online (pdf): *College of Policing* <library.college.police.uk/docs/college-of-policing/Risk-led-policing-2-2016.pdf> [Robinson]; Barlow & Walklate, *supra* note 95.

205 Carmen Gill & Mary Aspinall, "Understanding Coercive Control in the Context of Intimate Partner Violence in Canada: How to Address the Issue Through the Criminal Justice System" (2020) at 25-32, online (pdf): *Office of the Federal Ombudsman for Victims of Crime* <www.victimsfirst.gc.ca/res/cor/UCC-CCC/Research%20Paper%20on%20Coercive%20Control%20-%20April%2020.pdf>.

206 Andy Myhill & Katrin Hohl, "The 'Golden Thread': Coercive Control and Risk Assessment for Domestic Violence" (2019) 34:21-22 J Interpers Violence 4477.

207 Emily Turner, Gavin Brown, & Juanjo Medina-Ariza, "Predicting Domestic Abuse (Fairly) and Police Risk Assessment" (2022) 31:3 Psychosocial Intervention 145 at 146 [Turner, Brown & Medina-Ariza].

performance of identifying high-risk victims.[208] Similarly, another study assessing the performance of the DASH found that it performed poorly in assisting police officers in identifying victims and offenders at high risk of re-victimization and re-offending, respectively.[209] Model-based predictions based on machine learning of police administrative datasets have also outperformed the officer-administered DASH questionnaire in identifying victims at the highest risk of harm.[210] While another recent study did not assess the validity of the DASH tool itself, it found that only four individual risk factors contained in the DASH were significantly associated with increased risk of recidivism within a 12-month period: (1) criminal history, (2) problems with alcohol, (3) separation, and (4) being frightened.[211] Moreover, only "criminal history" and "separation" were significantly able to predict the recidivist group compared to the non-recidivist group. Therefore, only a limited number of individual risk factors contained within the DASH held predictive recidivism validity. Out of the risk factor items analyzed, 21 were found to be unable to differentiate between non-recidivist and recidivist perpetrators.[212] Second, some have raised concerns with the wording and structure of the DASH.[213] Third, there is inconsistency in how police officers apply the DASH.[214] It is still unclear whether the poor performance in the previously mentioned studies assessing the DASH found poor construct validity (i.e., the tool focuses on the wrong risk factors) or whether the problem is with data collection by police using the instrument. If the latter is the primary issue, there would still be issues regarding when and how police apply the tool, even if the DASH is shown to have appropriate construct validity, thus directly affecting its utility in practice.

Consequently, while extensive research has examined the use of risk assessment tools to assist frontline officers in intervening in cases involving FV and IPV, further research is required to create tools tailored to the latest understanding of coercive control that can be effectively put into practice.

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208 *Ibid* at 151-53.

209 Emily Turner, Juanjo Medina, & Gavin Brown, "Dashing Hopes? The Predictive Accuracy of Domestic Abuse Risk Assessment by Police" (2019) 59:5 Brit J Criminol 1013 at 1028.

210 Turner, Brown & Medina-Ariza, *supra* note 207 at 151.

211 Louise Almond et al, "Exploration of the Risk Factors Contained within the UK's Existing Domestic Abuse Risk Assessment Tool (DASH): Do these Risk Factors have Individual Predictive Validity Regarding Recidivism?" (2017) 9:1 Journal of Aggression, Conflict and Peace Research 58 at 58.

212 *Ibid* at 63-65.

213 Robinson, *supra* note 204 at 1-2; Turner, Brown & Medina-Ariza, *supra* note 207 at 146.

214 Robinson, i*bid.*

Similar attention should be given to lawyers, with possible amendments to the Federation of Law Societies of Canada's *Model Code of Professional Conduct*.[215] Currently, FV, IPV, and coercive control are not addressed in the *Model Code*, likely because law societies do not consider them a legal ethics issue. However, if the law is to be viewed as an acceptable avenue for addressing coercive control, lawyers ought to consider their role and professional obligation through its lens. 216 Therefore, amendments to the *Model Code* have been proposed to improve the handling of coercive control during legal proceedings.[217] These amendments include (1) providing a definition of coercive control within the *Model Code*, (2) ensuring that the harm caused by coercive control can extend to a victim's child who may be a secondary victim, (3) that a lawyer must not assist the perpetrator in continuing a pattern of coercive control through the use of the legal process, and (4) that coercive control that is either ongoing or increasing in severity can indicate serious psychological harm for the purpose of the "future harm exception" to disclose privilege information.[218] This will ensure that lawyers understand how coercive control operates and thus respond more effectively, whether within a civil or criminal context.

Finally, the federal government should begin tracking cases of coercive control through official police records and self-report data like the U.K. to better understand its prevalence in Canada and continuously evaluate its legislation with ongoing research regarding its effectiveness in practice.

VI. CONCLUSION

While the understanding of coercive control and its role in FV and IPV is not new, there has recently been an emerging movement toward its criminalization in various jurisdictions. Much of the current literature has debated the potential benefits and drawbacks of criminalizing coercive control. However, the current lack of strong empirical evidence supporting the viability of a coercive control offence makes it challenging to draw any conclusive inferences regarding its merits or shortcomings. As such, this article did not argue that Canada should enact criminal legislation against

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215 Federation of Law Societies of Canada, Model Code of Professional Conduct, Ottawa: Federation of Law Societies of Canada, 2022 [Model Code].

216 Deanne Sowter, "Looking at Legal Ethics Through the Lens of Family Violence" (2 March 2021), online: <www.slaw.ca/2021/03/02/looking-at-legal-ethics-through-the-lens-of-family-violence/>.

217 Deanne Sowter, "The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers' Ethics" (2021) 44:2 Dal LJ 1.

218 *Ibid* at 35-37.

it. Instead, it contributed to the discussion on coercive control by examining how coercive control has been addressed legislatively abroad to see how it could be better addressed legislatively in Canada.

A review of the current literature and Canadian law reveals that there are inconsistent definitions of FV, IPV, and coercive control. This inconsistency creates significant obstacles in developing uniform legal definitions across Canada and understanding how coercive control fits within the broader constructs of FV and IPV. Moreover, an international comparative analysis of legislation against coercive control demonstrates that there is no uniform approach to addressing it via criminal law. More importantly, limitations to the proposed Canadian criminal bills against coercive control have been raised. These findings create challenges in conceptualizing how a coercive control offence could be best legislated in Canada, including its definition, actus reus, mens rea, frequency of the behaviour required, punishment, and whom it should target. Nevertheless, three recommendations were proposed to ensure criminal legislation against coercive control in Canada has its desired effects.

First, having clear, well-defined, and consistent definitions of FV, IPV, and coercive control in law will help ensure that the legislation holds up to constitutional scrutiny and is applied uniformly across Canada. It will also ensure a greater understanding of what behaviours are being captured, who the perpetrators and victims are, and how coercive control fits within the broader constructs of FV and IPV.

Second, given Parliament's recent interest in criminalizing coercive control, the examination of the implementation of a coercive control offence or a broader FV or IPV offence should be included in the national IPV prevention strategy proposed under Bill S-249. This will ensure that Parliament can make better-informed decisions regarding the most effective approach to addressing coercive control and the broader issues of FV and IPV in Canada.

Third, there needs to be robust implementation and evaluation plans that come with any law addressing FV, IPV, and coercive control. As researchers eloquently noted:

> Put simply, the law does not exist in a vacuum. Laws require interpretation and implementation. Thus, when new offences are created, demands and expectations for the wider criminal justice process, from the front-line police officer, to the prosecutor, to the judge, are also created.[219]

Therefore, while more research is needed to establish its efficacy in practice, this article cautions against the likelihood that adding a new criminal

[219] Barlow, *supra* note 164 at 161.

offence on its own will have a meaningful effect in helping address the larger issues of FV and IPV. Other strategies addressing this hidden epidemic beyond adding a new criminal offence should be seriously considered. These include (1) ensuring adequate training of all police officers, lawyers, and judges, (2) developing better risk assessment tools to assist frontline officers in identifying coercive and controlling behaviours and in making better decisions regarding victim safety and offender management, and (3) making amendments to the *Model Code of Professional Conduct* and the current conceptualization of Canadian legal ethics.

Racializing Terror: Reassessing the Motive of the Motive Clause

P R A B J O T S I N G H *

ABSTRACT

This paper reviews the legislative history and application of the *Criminal Code*'s definition of terrorist activity to trace how the "motive clause" reinforces systemic racism within Canada's criminal justice system. By outlining this process, this paper argues that the motive clause contributes to a dynamic that racializes terror offences as a specific type of criminal offence committed by racialized individuals—marking terrorism as a unique social characteristic of racialized communities. This occurs mainly due to the legislative requirement to prosecute the ideas of accused persons, which, in practice, has increased the likelihood of courts admitting otherwise prejudicial evidence against the accused and the problematic ways in which expert evidence has (or has not) been used in terrorism trials. Although discrimination may not be an inevitable or intended outcome of the drafted legislation, it creates a framework that encourages discriminatory prosecutorial strategies, facilitates bias in the admission and treatment of some evidence, and potentially contributes to the exclusive use of the provisions against racialized communities specifically.

Keywords: Systemic Racism; Racialization; Terrorism; National Security; Cultural Competency; Bias; Motive; Prejudicial Evidence.

I. INTRODUCTION

In late 2001, legislative bodies around the world, from the United Nations Security Council (UNSC) to Canadian Parliament, scrambled to enact a number of measures to respond to the events of September 11,

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2001. These measures ranged from shifting military policy to adding domestic investigative powers and new criminal offences. In Canada, the *Anti-terrorism Act* ("ATA") was rushed in, receiving royal assent in December 2001.[1] With respect to the *Criminal Code*, the legislation created a series of terrorism-related offences with new definitions of "terrorist activity" and "terrorist group" at their core.[2] While these definitions did not become crimes unto themselves, they formed the essential elements of various offences. One particularly controversial addition has been the "motive clause" in the definition of terrorist activity.[3] The motive clause makes the accused's motive an essential element of the offence and has received significant academic commentary,[4] judicial consideration,[5] legislative debate,[6] and critique from civil liberties groups.[7]

Upon surveying the legislative framework and the impacts of this provision in practice, there are compelling grounds to conclude that the motive clause reinforces systemic racism within Canada's criminal justice system by racializing terrorism offences and thereby stigmatizing and discriminating against racialized communities. Systemic racism refers to the "social production of racial inequality in decisions about people and the treatment they receive" and is undergirded by the process of racialization: "the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life."[8] In this case,

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1 *Anti-terrorism Act*, SC 2001, c 41 [*ATA*].

2 *Criminal Code*, RSC 1985, c C-46, s 83.01 [*Criminal Code*].

3 *Ibid*, s 83.01(1)(b)(i)(A).

4 Ben Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?" in Andrew Lynch, Edwina MacDonald, George Williams, eds., *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007) at 28; Kent Roach, "The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive" in Andrew Lynch, Edwina MacDonald & George Williams, eds., *Law and Liberty in the War on Terror* (Sydney: The Federation Press, 2007) at 39 [Roach]; Maureen Webb, "Essential Liberty or a Little Temporary Safety — Review of the Canadian Anti-terrorism Act" (2005) 51:1 Crim LQ 53 [Webb]; Roger Douglas, "Must terrorists act for a cause? The motivational requirement in definitions of terrorism in the United Kingdom, Canada, New Zealand and Australia" (2010) 36:2 Commonwealth L Bull 295 [Douglas].

5 *R v Khawaja*, 2012 SCC 69 [*Khawaja III*]; *United States of America v Nadarajah*, [2010] 95 OR (3d) 514, 243 CCC (3d) 281 [*Nadarajah*].

6 Senate, Special Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (Ottawa: February 2007).

7 Groups that opposed the motive clause during the legislative process included Amnesty International, B'nai Brith Canada, Canadian Arab Federation, Canadian Council of Islamic-American relations, and the Canadian Muslim Lawyers Association.

8 *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 39-40.

terrorism offences are racialized as they are implicitly attributed to racialized groups as unique personality traits and behaviours. This occurs mainly due to the legislative requirement to prosecute the ideas of accused persons, which, in practice, has increased the likelihood of courts admitting otherwise prejudicial evidence against the accused and the problematic ways in which expert evidence has (or has not) been used in terrorism trials. This leads to impacted communities experiencing stigma, alienation, limited religious freedom, and a sense of diminished citizenship as a direct result of Canada's counter-terrorism practices.[9]

Although I sympathize with and draw upon past criticism of the motive clause, I review the legislative history and application of the motive clause to identify a unique issue altogether. While the prevalent critiques have focused on the "chilling effect" on fundamental freedoms, the risks of profiling by law enforcement agencies, or the politicization of criminal trials, I seek to move the debate outside the realm of previous critiques to articulate another problem more directly and holistically. In its current avatar, the motive clause contributes to the racialization of terror offences in the sense that terror offences are prosecuted as a specific type of criminal offence committed by racialized persons. This is further reinforced by the fact that the provision creates an evidentiary requirement due to which the religious, political, or ideological "cause" of the accused is prosecuted and litigated in the courtroom. This dynamic compounds with the pre-existing impacts of systemic racism by unreasonably and unnecessarily subjecting racialized (predominantly Muslim) accused persons to the bias and cultural incompetence exhibited in the courts and by some counsel. Examples of this can be seen in the way certain prejudicial evidence has been admitted and interpreted by the courts. Further, there is a strong argument that the motive clause contributes to the exclusive application of terrorism offences to racialized persons. This is evidenced by the fact that it has almost exclusively been Muslims that are prosecuted under these offences.[10]

This is not to say that the motive clause is the sole cause of stigmatization and any ensuing discrimination. As noted in the literature and case law, this stigmatization of racialized communities post-9/11 is symptomatic of broader social issues beyond the scope of the motive clause alone. However, there is evidence to suggest that the motive clause unnecessarily contributes to this racist dynamic without any justifiable

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9 Baljit Nagra & Jeffrey Monaghan, "Security Governance and Racialization in the 'War on Terror'" in Caorlyn Cote-Lussier, David Moffette & Justin Piche, eds, *Contemporary Criminological Issues: Moving Beyond Insecurity and Exclusion* (Ottawa: University of Ottawa Press, 2020) 167 at 181 [Nagra & Monaghan].

10 Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) 67 Crim LQ 95 at 120.

reason or merit. Even if the discrimination is not an inevitable or intended outcome of the drafted legislation, it creates a legislative framework that facilitates the stigmatization of racialized communities by unreasonably encouraging discriminatory prosecutorial strategies, facilitating bias in the admission and treatment of some evidence, and contributing to the limited use of the provisions against Muslim and other racialized accused persons.

Although a definition of terrorist activity without the motive clause would not universally address all the problems and critiques of Canada's counter-terrorism regime, this step would bring Canadian criminal law in line with a growing consensus within international institutions, harmonize the definitions of terrorism that appear in other areas of Canadian law,[11] and move closer towards turning terrorist offences into politically neutral provisions to some degree. This shift would make the definition of terrorist activity capable of flexibly capturing a specific kind of violent criminal activity without effectively restricting its application to racialized communities or certain ideas while ignoring other violent offenders altogether.

II. History and Evolution of the Legislative Framework: International Context

The international community has faced a significant challenge in developing a universally accepted definition of terrorism for many years. The question of whether political motives should form part of the definition, in particular, has plagued attempts to reach an agreement on this question.[12] This challenge came to the fore precisely as disagreements about the morality or legitimacy of certain forms of violence revolved around the perpetrator's motive and the role this played in influencing the definition and scope of "terrorism." This has been a persuasive argument in favour of defining terrorism <u>without</u> regard for the motive of the accused. Doing so seeks to ensure that the <u>act</u> rather than the motive is determinative and, thereby, that the <u>law</u> determines criminal culpability, <u>not politics</u>.[13]

The lack of consensus in comprehensively defining terrorism resulted in a compromise in this very direction. Rather than weighing the motive of perpetrators, international parties agreed to adopt a series of international conventions in a piecemeal fashion. These conventions defined specific <u>acts</u>

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11 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at 98.

12 Neil Boister, *An Introduction to Transnational Criminal Law,* 2nd ed (Oxford: Oxford University Press, 2012) at 63 [Boister].

13 Webb, *supra* note 4 at 59.

as terrorism without providing a comprehensive definition or probing the motive animating the act. The treaties focussed on identifying specific acts such as hijacking, bombing, and financing to generate consensus on the responsibilities of the international community to respond to these specific acts through extradition or prosecution.[14] Some experts have described the suppression treaties as an attempt to "avoid the offence being politicized" by conceptualizing the crime as a freestanding act undertaken by non-state actors against civilians.[15] A persistent problem was that these were limited only to specific contexts and particular methods of violence rather than the killing of civilians by any means or method.[16] The adoption of the *International Convention for the Suppression of the Financing of Terrorism* in 1999 broadened the scope. In this conception, terrorism is defined as a criminal act intended to cause death or bodily harm to individuals not participating in an armed conflict, with the purpose of intimidating a population or compelling a government body to do or abstain from doing any act.[17]

After the events of 9/11, the issue would be raised in international fora with renewed urgency. The UNSC passed Resolution 1373, calling on states to ensure that "terrorist acts" be established as serious criminal offences in domestic law and that punishment duly reflects the seriousness of such acts to bring perpetrators to justice.[18] Similar to previous attempts, the resolution did not provide a definition for terrorism or terrorist acts. In 2002, Canada ratified the Inter-American Convention Against Terrorism.[19] Rather than developing an independent definition of terrorism, Article 2 of the convention defines "offences" by reference to the earlier suppression treaties. In the years to come, international organizations will continue the endeavour to develop a universal definition. In 2004, the UNSC passed Resolution 1566, which described terrorism as:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope

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14 At least 14 such treaties have been signed thus far. See Craig Forcese & Leah West, *National Security Law,* 2nd ed (Toronto: Irwin Law Inc, 2021) at 153.

15 Boister, *supra* note 12 at 62.

16 Ben Saul, "Terrorism as a Transnational Crime," in N Boister & Robert J Currie, eds., *Routledge Handbook of Transnational Criminal Law* (London: Routledge, 2015) at 398.

17 *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002), Art 2.

18 UNSCOR, 56th Year, 4385th Mtg, UN Doc S/RES/1373 (2001).

19 *Inter-American Convention Against Terrorism,* Organization of American States, 6 June 2002, (entered into force 10 July 2003).

> of and as defined in the international conventions and protocols relating to terrorism...[20]

The Resolution offered a comprehensive description similar to the *Financing Convention*, taking no account of the perpetrator's motive.

In contrast, the North American Treaty Organization ("NATO") adopted a definition that describes terrorism as:

> the unlawful use or threatened use of force or violence, instilling fear and terror, against individuals or property in an attempt to coerce or intimidate governments or societies, or to gain control over a population, to achieve political, religious or ideological objectives [emphasis added].[21]

While a number of Canadian allies, like the United States, France, Germany, Italy, and others, have *not* included a motive clause in their domestic definitions of terrorism, Canada ultimately joined Australia, New Zealand, and South Africa in modelling its definition of terrorism after the description included in the UK's legislation.[22]

III. History and Evolution of the Legislative Framework: Domestic Context

Canada responded to Resolution 1373 with the *ATA* and adopted a definition of terrorist activity into domestic criminal law. There are two "pathways" to fall within the definition of "terrorist activity" under section 83.01. The first is an act that falls under the suppression treaties ratified by Canada. The second requires three essential elements. First, the "kinetic" element is an act or omission (which occurs inside or outside Canada) which causes death or bodily harm or endangers a person's life. Second, the act must have been committed with the intention to intimidate the public or a segment of the population or compel a person, government, or international organization to do or refrain from doing any act. Lastly, the "motive clause" requires that an accused be found to have committed the prohibited act "in whole or in part for a political, religious or ideological purpose, objective or cause." This clause distinguishes Canada's definition of terrorism from those developed by various international institutions. As

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20 UNSCOR, 59th Year, 5053th Mtg, UN Doc S/RES/1566 (2004).

21 NATO, *NATO Glossary of Terms and Definitions*, AAP-06 (2018) at 124 [emphasis added].

22 *Terrorism Act 2000* (UK), s 1(1)(c); *Criminal Code Act 1995* (Aus), s 100.1(1)(b); *Terrorism Suppression Act 2002* (NZ) s 5; *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (South Africa), s 1(1)(xxv).

noted above, many of these international legal instruments do not contain any provisions similar to the "motive clause" in Canadian legislation.

During debate in the House of Commons, there was vocal opposition to the clause because of concerns that it would be discriminatory due to the intrusive nature of prosecutors investigating and litigating an accused's religion, politics, or ideology. Opposition MPs introduced a motion to delete the clause raising concerns about the irrelevance of motive to the crime of terrorism, as well as possible discrimination resulting from Crown prosecutors litigating the religious beliefs of an accused person.[23] Then-opposition MP, Peter MacKay, commented on the challenges of always ascribing motivation to a coherent or logical structure of thought—opening the possibility of potential offenders escaping the scope of "terrorist activity." He argued that other motives also ought to be considered, particularly pointing out the salience of hatred in terror offences.[24]

In response, the Parliamentary Secretary to the Minister of Justice defended the provision by arguing that the motive clause is not intended to single out a community or criminalize expression or religion. He suggests that the clause actually acts as a limitation to narrow the scope of terrorism offences. In his conception, removing the clause would transform the counter-terror provision into something "nearly indistinguishable from a general law enforcement provision."[25] To address concerns raised in the Senate that the motive clause criminalizes political or religious expression in violation of section 2 of the *Canadian Charter of Rights & Freedoms*, Parliament added section 83.01(1.1). Rather than agreeing to Senate's recommendation to add a clear non-discrimination clause within the bill,[26] this addition simply reiterates that terrorist activity does not capture any expression that falls outside the scope of the definition in its entirety (in other words, expression not engaging in violence does not constitute an offence). The second Senate report expressly acknowledged that the representatives of religious and ethnic minorities that were consulted were not persuaded that their liberty would be protected by the tools provided in the bill. Rather than substantively addressing these concerns, the majority's recommendation was simply to encourage the Attorney General to prioritize an educational program to ensure cultural sensitivity amongst federal agents.[27]

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23 "Bill C-36, Anti-terrorism Act", Report Stage, *House of Commons Debates*, No 118 (26 November 2001) at 1225 (Scott Reid) and 1315 (Vic Toews).

24 *Ibid* at 1315 (Peter MacKay).

25 *Ibid* at 1235 (Stephen Owens).

26 Senate, Special Senate Committee on the Subject Matter of Bill C-36, *First Report* (Ottawa: November 2001).

27 Senate, Special Senate Committee on the Subject Matter of Bill C-36, *Second Report*

During a review of the *ATA* in 2007, the special senate committee delegated to review the legislation provided a strong critique of the motive clause and recommended its deletion.[28] The key concerns of the committee were related to how the clause requires or encourages state agencies to investigate the personal beliefs of individuals intrusively, prompting racial profiling amongst investigative agencies as well as other broader discrimination. Further, the Senate committee noted how Canada's diplomatic representatives abroad have been advocating a straightforward definition of terrorism within international fora—that does not include the motive clause. Similarly, the judiciary has acknowledged the challenges of defining terrorism in *Suresh* and adopted the definition in the *Financing Convention*—which does not include motive—for the purposes of that immigration decision. The committee also considered a UN Human Rights Committee review of Canada's anti-terror legislation, which raised concerns that Canada should "adopt a more precise definition of terrorist offences" to ensure that individuals will not be targeted based on religion, politics, or ideology.[29] The committee accordingly recommended a single definition of terrorism for federal purposes without the motive clause, recognizing the "importance of having a domestic definition of terrorism that reflects Canada's specific needs, concerns and experiences with terrorism, as well as the importance of developing an internationally acceptable definition of terrorism."[30]

In response to the concerns raised, the House of Commons report limited its focus to addressing concerns about the possibility of racial profiling by enforcement agencies—ignoring other forms of systemic racism and discrimination that may occur.[31] The report reiterates that the RCMP and CSIS have various policy statements denying that they engage in profiling and cited testimony provided to the committee by a former RCMP commissioner. The report acknowledges that racialized communities still had serious concerns at the time but made no recommendation beyond maintaining the outreach strategies and cultural sensitivity training that were already being conducted. This report argues that the motive clause is useful as a safeguard because the offence could be more easily prosecuted to

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(Ottawa: December 2001).

28 Senate, Special Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (Ottawa: February 2007).

29 *Ibid.*

30 *Ibid.*

31 House of Commons, Standing Committee on Public Safety and National Security, *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues* (Ottawa: March 2007) at 8-10.

a conviction without it.[32] The response failed to substantively address the intrusive nature of investigating and prosecuting an individual's religion, politics, or ideology and the concerns that arise from this. The Government response was similar, arguing that the clause operates to seemingly narrow the scope of the offence and distinguish terrorism from other criminal activity.[33]

A. Constitutional Challenge

The landmark prosecution of Momin Khawaja is important to understand the challenges to the motive clause.[34] Not only was this case Canada's first prosecution under the new offences, but it dealt substantially with some of the constitutional questions that arise from the *ATA's* definition of terrorist activity, including the motive clause. At trial, Justice Rutherford found that the motive clause created a *prima facie* violation of *Charter* rights under section 2, which could not be saved under section 1. This was due to the "chilling effect" believed to have on the freedoms of those groups associated with the religious, political, and ideological cause of accused persons. Justice Rutherford's concerns were that the focus on the motive would chill freedoms associated with protected speech, religion, thought, belief, expression, and association; promote fear and suspicion of targeted political or religious groups; and result in racial or ethnic profiling by governmental authorities.[35]

To complete the section 1 analysis, Justice Rutherford sought out the government's objective and quoted then-Justice Minister Anne McLellan on the purpose of the provision. He noted the stated purpose of the offences was to set up preventative steps to cut off terrorists from financing and other means to execute their deadly plans.[36] This explanation was supplemented by a government media release which stated that the motive clause itself is important to the definition of terrorist activity in order to recognize:

> the unique and insidious nature of this activity. Removing the notion of political, religious or ideological motivation would transform the definition from one that is designed to recognize and deal strongly with terrorism to one that is not distinguishable from a general law enforcement provision in the Criminal Code [emphasis added].[37]

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32 *Ibid* at 9.

33 Government of Canada, *Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security* (Ottawa: 18 July 2007).

34 *R v Khawaja*, [2006] 42 CR (6th) 348, 214 CCC (3d) 399.

35 *Ibid* at 73.

36 *Ibid* at 65.

37 *Ibid* at 66 [emphasis added].

In his analysis, Justice Rutherford found that the stated purposes were to thwart terrorist activity before it occurred by identifying, interrupting, and disabling plots while also distinguishing terrorism from other provisions in the *Code*. The actual effect, however, narrows the range of activity targeted by the legislation while inevitably putting investigative and enforcement powers—as well as public attention—"on some of the freedom-protected aspects of the lives of those on whom any shadow of suspicion may fall, with or without justification."[38] Accordingly, Justice Rutherford found that there was no justification for the violation.

The trial judge's decision was subsequently overturned by the Ontario Court of Appeal, mainly on the ground that the trial judge did not base his decision on evidence that clearly established the chilling effect he describes as an effect of the motive clause. Further, with respect to profiling concerns, the Court clarified that the provision did not require profiling. As improper police conduct does not subsequently render lawful legislation unconstitutional, this ground was also dismissed. Noting that an appellant bears the onus of establishing a breach, the Court found that the trial judge did not draw on any evidence of a chilling effect and instead improperly took judicial notice on the basis of academic commentary without saying so.[39] The Court also found difficulty in specifically connecting such a chill to the motive requirement and instead linked it amorphously to the "post '9/11' environment."[40] The Supreme Court of Canada ("SCC") upheld the above decision and reasoning. In upholding the appellate decision, the SCC decided that the motive clause was "clearly drafted in a manner respectful of diversity, as it allows for the non-violent expression of political, religious or ideological views. It raises no concerns with respect to improper stereotyping."[41]

Despite the SCC's decision to uphold the constitutionality of the motive clause, it is crucial to note that this does not foreclose the possibility—or necessity—of amendments to the clause for policy reasons. The conclusion of the SCC simply confirms that enacting the provision was wholly within the power of Parliament and that the appellant failed to fulfill his onus to provide evidence that would establish a *prima facie* violation of the *Charter*. While the Court's decision acknowledges that Parliament exercised its lawful authority to enact the legislation, this recognition does

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38 *Ibid* at 77.
39 *R v Khawaja*, 2010 ONCA 862 at 123.
40 *Ibid* at 125.
41 *Khawaja III*, *supra* note 5 at 83.

not prohibit lawmakers from recognizing the subsequent harmful impacts of the law and exercising that same legislative authority to repeal the clause.

B. Reviewing the Motive Clause: Twenty Years On…

Despite the concerns raised by opposition MPs, the Senate committee, civil liberties, and international organizations, Parliament has chosen to maintain the clause up to the date of publication. Reviewing the nature of the debate throughout the Parliamentary process is relevant for a number of reasons. Firstly, this history illustrates that opposition has been intelligent, consistent, and emanating from a diverse array of actors throughout the entire legislative process. Legislators and civil liberties organizations consistently flagged the potentially discriminatory impacts of the clause—beyond just racial profiling—and the intrusive nature of putting the accused's beliefs on trial. With the benefit of hindsight almost twenty years later, we can see that the evidence has illustrated that these concerns were valid and real. As will be discussed further below, the concerns and problems with the motive clause are not limited to concerns of racial profiling—or even general discrimination by investigative agencies alone—even though this is what much of the early debate has focussed on. Experiences since the provision was enacted have made it clear that the harmful impacts go much further and subsequently seep into the judicial process itself.

Secondly, reviewing this history provides a degree of insight into Parliament's explanation for enacting the provision and, ultimately, what legislative objective is being considered in the trade-off for its deleterious effects. The government's stated objective for enacting the *ATA* overall was to target dangerous preparatory conduct and prevent a possible terrorist attack. Within this framework, the motive clause is portrayed as the primary demarcating factor that is key to distinguishing the severe implications of terrorist activity from "ordinary criminal activity." Government sources consistently argue throughout this period that the motive clause is necessary as a safeguard to narrow the scope of terrorism and increase the burden on the Crown to secure a conviction. As will be discussed below, this is a weak argument, especially when confronted with the expansiveness of its harmful impact. Terrorism can already be distinguished from ordinary crime through the "purpose clause," which requires an intent to intimidate the public or compel a governmental entity to do or refrain from doing any act. This does not require litigating the religion or politics of an accused person.

IV. STIGMATIZING RACIALIZED COMMUNITIES: ADMISSION AND TREATMENT OF PREJUDICIAL EVIDENCE

One way the motive clause contributes to the stigmatization and discrimination of racialized communities is through the evidentiary requirement it creates to prosecute and litigate the accused's religious, political, or ideological beliefs. By legally requiring the Crown to draw a link between the criminal act and motive, prosecutorial strategies are forced to achieve this by drawing on some evidence to ascribe a religious, political, or ideological cause to the accused. In practice, this has largely meant that the ideas of Muslims and/or Islam must occupy prominence to prove an element of the offence in each trial. As a result, what would otherwise likely be considered prejudicial evidence, must now be adduced to prove an element of the offence—often with the effect of presenting the possession of certain literature or media to ascribe a belief and motive to the racialized accused.

One of the foundational principles of the law of evidence is that the evidence admitted by the courts must be relevant by tending to prove or disprove a material fact at issue.[42] Even if the evidence is relevant, there remain circumstances in which submitted evidence may be inadmissible, including if the prejudicial effect outweighs its probative value. The safeguard against admitting prejudicial evidence, unless outweighed by its probative value, is crucial to protecting the integrity of a fair trial. The exclusion is meant to avoid "moral prejudice" due to its potentially inflammatory nature, causing it to be given more weight by the trier of fact than deserved, as well as "reasoning prejudice," which confuses or distracts from the issues at trial.[43] While moral prejudice can mar the character of the accused in the eyes of the jury—creating a risk that the jury will determine guilt based on the accused's general disposition or nonetheless deserving of punishment, reasoning prejudice distracts the jury's focus away from the offence towards extraneous acts of misconduct.[44] In *Handy*, the SCC elaborated on this principle:

> It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather

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[42] *R v Arp*, [1998] 166 DLR (4th) 296 at para 38, 232 NR 317.

[43] *R v Handy*, 2002 SCC 56 at 100 [*Handy*].

[44] *R v Hart*, 2014 SCC 52 at 74.

> than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.*[45]

In a criminal trial, the elements of the offence play a pivotal role in weighing the probative value of proposed evidence against its prospective prejudicial effect. Although a body of evidence may be exceedingly inflammatory, its probative value significantly increases where the evidence becomes necessary to prove a key issue, such as an element of the offence. In this case, if proving a motive is mandated by the *Code,* in order to secure a conviction, the Crown is required to adduce evidence to prove this element beyond a reasonable doubt. To do so, prosecutors often produce circumstantial evidence of literature and media consumed by the accused in order to ground an inference that the possession and consumption of such materials <u>must</u> mean that the accused <u>accepts</u> and <u>believes</u> the ideas presented. This relies on a particularly tenuous connection between the materials and the accused's beliefs despite the SCC's guidance that an inference of guilt based on circumstantial evidence must be the only reasonable inference permitted by the evidence.[46] This is the structural problem with the offence as it currently stands. Not only does this evidence usually consist of inflammatory content which arouses the emotions and hostility of the jury, but as will be shown below, it is often interpreted within a racialized framework that compounds the prejudice faced by the accused.

Second, Canadian criminal law does not generally make "motive" an essential element of an offence.[47] Although the court has made it clear that this is not an inviolable principle of fundamental justice and Parliament is empowered to make motive an element of an offence if it so chooses,[48] academic commentators suggest that this is still somewhat anomalous.[49]

In the case of terrorism offences, both principles have been impacted to some extent due to the motive clause—resulting in a legislative framework that reinforces systemic racism within Canada's legal system. In such cases, the requirement to prove motive for the Crown to secure a conviction means that successful prosecution will include proof beyond a reasonable doubt that the accused (or the relevant terrorist group) was motivated or driven to some degree by a religious, political, or ideological cause. This inevitably results in a dynamic in which the ideas, beliefs, or cause <u>must</u> be argued and proven to secure a conviction. Kent Roach describes this

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45 *Handy, supra* note 43 at 139.

46 *R v Villaroman*, 2016 SCC 33 at 30.

47 Kent Roach, *Criminal Law,* 7th ed (Toronto: Irwin Law Inc., 2018) at 208.

48 *Nadarajah, supra* note 5.

49 Kent Roach, "The New Terrorism Offences and the Criminal Law" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002) 151 at 156 [Roach].

dynamic as the "forced admissibility" of political or religious evidence that could expose a jury to prejudicial and inflammatory evidence about the accused's religious or political beliefs that may have little to do with guilt. Roach suggests that even if the correct result is reached, "the process may be tainted by the admission of what should be irrelevant evidence."[50] This dynamic also leads to the politicization of criminal trials.[51] Considering the statistics that 100% of cases that resulted in trials dealt with al-Qaeda-inspired individuals and groups, this has meant that Courts have had to litigate the ideas of Muslims and/or Islam exclusively.

This problematic dynamic can be witnessed in terrorism cases, such as the prosecution of Asad Ansari. Ansari was charged for his alleged role in what has become known as the 'Toronto 18' case. In June 2010, he was convicted by a jury for participating in or contributing to the activities of a terrorist group. The allegations presented against him included:

- attendance at a camping trip in Washago, which was characterized as a terrorist training camp by the Crown. Ansari was not in attendance for the full duration, and it was believed Ansari did not know the leaders' real intention for the trip when attending;[52]
- providing technical assistance to one of the ringleaders of the plot with regards to video recordings of the Washago trip; and
- repairing another ringleader's computer by removing keylogging software.[53]

In a powerful analysis of Ansari's case, Anver Emon and Aaqib Mahmood strongly argue that his trial "took shape through the explicitly inexpert and implicitly racially structured litigation of Islam itself"—because of the law's requirement to prove motive and its resulting infusion of religion with extremism and violence.[54] Despite his testimony to the contrary and the fact that the seized material was easily accessible to the public, Ansari's possession of alleged *jihadi* content became central to proving his motive and knowledge. Due to the legislative framework of the definition, the Crown was encouraged to meet the motive clause by inferring Ansari's terrorist motive from his mere possession of material considered damning.[55] According to the authors:

> The legislative framework effectively required the prosecution to presume that because a text or video says X, the person watching it must therefore *believe* X. If a

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50 Roach, *supra* note 4 at 47.

51 Roach, *supra* note 49.

52 *R v Ansari*, 2015 ONCA 575 at 20-23 [*Ansari*].

53 *R v Ahmad*, [2009] OJ No 6154 at 70-71, 89 WCB (2d) 246 [*Ahmad*].

54 Anver Emon & Aaqib Mahmood, "*Canada v. Asad Ansari*: Avatars, Inexpertise, and Racial Bias in Canadian Anti-Terrorism Litigation" (2021) 44:1 Man LJ at 256-257 [Emon & Mahmood].

55 *Ibid* at 260.

> propaganda video states that Muslims must fight *jihad* against the American infidel, and a local Muslim has a copy of that video on his phone, this litigation approach requires a jury to assume from that circumstantial evidence that the Muslims must therefore harbour such views, or hold fast to them as a matter of ideology.[56]

Ansari's guilt appears to have largely been premised upon the fact that he possessed and presumably consumed ideas "that the security state considers radical and even threatening, particularly when held by racialized Muslims."[57] While some of the inflammatory evidence was excluded, police also seized literature and media retrieved from his bedroom after his arrest, which allegedly contained *jihadi* content. The contents discovered in his bedroom also included "farewell letters" to his family, described as suicide notes during a bout of depression by the defence and contemplation of a 'suicide attack' by the Crown (this was, notably, not interpreted with the aid of expertise). Much of this evidence was excluded early in the trial, while some were admitted and considered corroborating factors. In the initial ruling, Ansari successfully filed a motion to exclude certain evidence considered inflammatory (to bias the jury and allow propensity reasoning) and, therefore, prejudicial. Upon his testimony regarding his understanding and beliefs regarding Islamic history and geopolitics, the Crown argued to reverse this decision based on the argument that Ansari's understanding of these topics was connected to his character.[58] The Crown explicitly argued in the second hearing that "this is a case about extreme views."[59]

In deciding the subsequent admissibility of documents, Justice Dawson relied on the "doctrine of documents in possession" to draw inferences about the state of mind of an accused from their possession of certain documents.[60] While he does note that this is a permissive inference, not a mandatory one, the evidence on record does not appear to show that Ansari recognized, adopted, or acted upon the contents in any way beyond simple possession, based on the contents of the ruling.[61] Despite this, however, the evidence was still admitted. In the appellate decision, the Court found that Ansari's defence was inconsistent with his possession of the alleged *jihadi* content, his association with the ringleaders of the group, and his attendance at the Washago trip where the training camp allegedly took place.[62] According to the Court, the possession and knowledge of these

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56 *Ibid.*
57 *Ibid* at 257.
58 *Ibid* at 261.
59 *R v Ahmad,* 257 CCC (3d) 199 at 17, [2009] OJ No 6151.
60 *Ahmad, supra* note 53 at 12.
61 *Ibid* at 14.
62 *Ansari, supra* note 52 at 142.

documents were relevant to cast doubt on the truthfulness of Ansari's claim that "he was a moderate Muslim who eschewed jihadist activity."[63] In his consideration of whether to admit the previously excluded evidence, Justice Dawson observed and commented:

> Mr. Ansari has presented himself as a Muslim youth with political, religious, and ideological views that the jury will likely conclude, based on Mr. Ansari's evidence and the effects of 911 on Muslim youth and common sense, are well within the normal range within the Muslim community… Mr. Ansari has been able to convey that impression so far by virtue of my previous protective rulings. I must say that overall, armed with the knowledge that I have about the nature and quantity of material related to religious extremism and violent *jihad*… I fear that the jury is being deprived of information they need to properly assess Mr. Ansari and the rest of the evidence.[64]

His character was deemed to have been raised by rejecting and countering the Crown's theory in his testimony, and his mere possession of certain content was considered necessary to share with the jury despite its acknowledged inflammatory impact. Emon and Mahmood incisively analyze this decision whereby the judge—who was not the trier of fact nor a qualified expert—assessed the probative value of excluded evidence based on the structural demands of the criminal law by collapsing the texts into Ansari's mind and racialized body.[65] In this sense, the Court was "inclined to suspect Ansari's testimony about himself given the library of materials he had in his possession."[66] It is important to reiterate that Ansari did not recognize or adopt the contents of the texts in any of the evidence referred to in the motion rulings or sentencing judgement. Despite this, however, the possession and presumed agreement with the content was admitted—regardless of its acknowledged prejudicial effect—and permitted to make several inferences about Ansari's motives, knowledge, and, ultimately, his guilt.

The impacts of admitting and interpreting such prejudicial evidence were further compounded by the Court's use, misuse, and lack of use of expert evidence.

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63 *Ibid* at 154.

64 Cited in Emon & Mahmood, *supra* note 54 at 286.

65 *Ibid* at 287.

66 *Ibid*.

V. STIGMATIZING RACIALIZED COMMUNITIES: EXPERT EVIDENCE THROUGH THE 'NATIVE INFORMANT'

Proving the motive of an accused requires a complex social analysis that lay lawyers, judges, and jury members may not be competent to interpret, therefore requiring the aid of expert witnesses. As a result of the problematic application of the rules of expert evidence (or lack of application) in terrorism cases, courts have had to make grave decisions concerning the accused's liberty without having the tools to fully understand and interpret the evidence. There are grounds to argue that this has led to bias in favour of the Crown based on racist stereotypes and cultural incompetency. The combination of the "purpose" and "motive" clauses in the definition results in extraordinarily complex litigation, which requires the court to interpret, for example, what mere ownership of certain texts and symbols might mean in terms of ideology.[67] The motive clause specifically opens itself to a need for expert evidence because to secure a conviction, it requires the Crown to prove an identifiable religious, political, or ideological cause and interpret the evidence provided in order to satisfactorily connect the acts of the accused with the purported cause. This requires a fluid labyrinth of evidence. When dealing with such complex social factors and attempting to comprehend texts, symbols, and practices of religion, politics, or ideology, it appears inevitable that expertise would be required.

Expert evidence is a unique category of evidence in which witnesses are permitted to provide their opinion on issues and evidence within a carefully circumscribed purview. This category of evidence is admitted by the court when dealing with subject matter that ordinary people are unlikely to form a correct judgement about without assistance or an issue arises that is outside the experience and knowledge of the judge or jury.[68] Studies regarding the use of expert evidence in terrorism trials have illustrated that such evidence plays an important role, especially with regard to social science expertise, in understanding the foundational elements of terrorist activity, including the motive clause.[69] Despite how pivotal expertise appears to be, to prevent courts from relying on stereotypes or confirmation bias to interpret evidence, this importance does not appear to have been translated

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[67] Michael Nesbitt & Ian M Wylie, "An Empirical and Qualitative Study of Expert Opinion Evidence in Canadian Terrorism Cases: November 2001 to December 2019" (2020) 43:3 Man LJ at 63 [Nesbitt & Wylie].

[68] David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law Inc., 2015) at 213.

[69] Nesbitt & Wylie, *supra* note 67 at 95.

into practice. The reality is that expert evidence is not used in litigating the motive clause in terrorism prosecutions as often as one might expect.

As of December 2019, expert evidence was called in approximately 50% of proceedings before the court.[70] These proceedings can be further broken down into several categories of expertise: technical, psychological, and social science. Social science experts, in particular, are invaluable in providing testimony regarding religious, political, and ideological causes, symbols, and practices to prove the motive clause. Surprisingly however, social science experts on such matters seem to have only appeared in six matters out of the 22 in which experts were called (multiple experts appeared in a single matter at times).[71] Another related expert testimony has dealt with attempts to discern whether the accused was motivated by religious, political, or ideological concerns or a mental health illness. Of the social science experts providing some form of context or interpretation, they have been called to explain religious ideology or texts, overviewing general political or historical issues and the specific activities of an accused.[72]

In proving motive, the Crown must particularly avoid the risk of circular logic (i.e., the accused would have committed the act because of their ideology, and their ideology can be seen through their planned attack) with independent corroboration of the ideology through properly contextualized and interpreted evidence.[73] This is particularly the case when <u>every</u> trial to date has concerned a "religious" motive (except for a guilty plea by someone accused of an offence concerning the Liberation Tigers of Tamil Eelam).[74] Considering this exclusive focus on al-Qaeda-inspired individuals and groups, this has meant that interpreting and understanding religious texts and symbols—not well understood by legal professionals—has played a prominent role in almost every case to date.[75] Adding the motive clause as an essential element has, therefore, "all but opened the door to" facile understandings of Islam and Muslims when neither the judge nor the lawyers (for either party, in most cases) deem expertise salient in trials despite the complex claims and inferences being made with regards to Islamic doctrine, geopolitics, and other specialized topics.[76] This highlights the importance of cultural competence and raises concerns about bias

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70 *Ibid* at 50.
71 *Ibid* at 69. See also *supra* note 61.
72 *Ibid* at 69.
73 *Ibid* at 61.
74 *Ibid* at 51. See also *supra* note 11.
75 *Ibid* at 83.
76 Emon & Mahmood, *supra* note 54 at 291.

seeping into decision-making in the absence of informed opinions.[77] In this regard, the Canadian legal system is specifically structured to allow certain biases consistently inform litigation strategies and judicial discretion.[78] A simple example of this problem (discussed in further detail below) is the lack of expertise deemed necessary to determine whether a black flag with the foundational Islamic creed suggests a *jihadi* motive or whether it is simply a symbol of piety used by devout Muslims. These biases in both the law and conduct of trials make prosecutions about *Islam* as much as they are about the accused—litigated in light of "Orientalist tropes about Muslims and medieval inquisitorial models of how people make religious meaning" through the books they possess.[79]

The requirement to prove motive in this framework leads to a fundamental problem concerning the use of expert evidence. Either expert evidence is not deemed necessary due to the "self-evident" nature of the evidence and religious symbols—which are then litigated without expertise—or expert evidence is relied upon without acknowledgment. Relying on racist stereotypes in the latter case, racialized witnesses and accused persons are called upon as spokespersons to speak "on behalf" of their respective communities, similar to the 'native informants' used by colonial anthropologists.[80] In other words, lay witnesses are asked to provide expert testimony without the requisite procedural safeguards or instructions. In a detailed analysis of the use of expert evidence in terrorism trials, Nesbitt and Wylie noticed a number of occasions where experts could have helped better understand an issue or piece of evidence during the trial. Despite this, the authors noted that complex phenomena outside the training of lawyers, such as the specifics of religion or ideology, foreign conflicts, or technical international legal doctrines, were too often evaluated without the use of an expert.[81] As a result of the status quo, religious symbology and ideation were discussed in every trial to date, but social science experts only appeared in a fraction of the cases.[82]

As helpful as expert evidence can be, Nesbitt and Wylie note that it can also be extremely dangerous where the evidence will speak to the foundational elements of the offence (i.e., motive).[83] This is the case when the evidence being proffered is highly complex, and the concerned officers

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77 Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41:2/3 Osgoode Hall LJ 293 at 306.
78 Emon & Mahmood, *supra* note 54 at 291.
79 *Ibid* at 292.
80 Linda Tuhiwai Smith, *Decolonizing Methodologies,* 2nd ed (London: Zed Books, 2012).
81 Nesbitt & Wylie, *supra* note 67 at 100.
82 *Ibid* at 99.
83 *Ibid* at 65.

of the court may have little to no familiarity, let alone expertise, with the subject matter. In surveying the case law and academic commentary, it appears that Crown witnesses, including police, testified in terrorism prosecutions without the expert qualification their evidence arguably should have required. In this regard, Nesbitt and Wylie note the real risk of wrongful convictions without "increased scrutiny of both expert and non-expert evidence that skirts the line with expert opinion evidence."[84] The risk is compounded when the apparent expert evidence is not even preliminarily limited within the procedural safeguards as vetted experts.

This dynamic is particularly evident in the prosecution against Asad Ansari, where the Crown's approach to meet its evidentiary onus regarding motive was fraught with a lack of expertise which they sought to overcome through a "presumptive nexus between religion, violence, and extremism."[85] In this case, the Crown sought to construe a black flag and the Islamic creed seen in Washago as an unequivocal symbol of extremism and carefully curated this alarming imagery for the jurors. This was done by playing a video found during the search of Ansari's room in which a black screen with the Islamic creed preceded a *jihadi* video. Pausing the video at this moment, the Crown cross-examined Ansari about whether he recognized this symbol and whether it was similar to the one that appeared on a black flag at the Washago "training camp." Ansari agreed while denying the terrorist connotation and linking it to the venerated Kaaba in Mecca instead.

No one in the courtroom among the prosecution, defence, or judge addressed the long history and complexity of the symbol—nor did they even recognize the need for expertise. Emon and Mahmood note further examples where Ansari appears to be playing the dual role of both defence and expert on modern Islamic politics (particularly during cross-examination), forced to explain to the court "what 'Muslims' think" while simultaneously rejecting the Crown's incriminating suggestions in the context of his prosecution.[86] The Crown interrogated Ansari's religious beliefs and Ansari's beliefs on what "true Islam" is—suggesting his "true" beliefs were reflected in the content recovered from his room. As a result, Ansari was effectively put in the role of an expert while also maintaining his innocence. Because no one in the courtroom considered expertise to be required for the questions or the answers, Ansari's explanation could easily be disqualified or ignored as strategic manipulation.[87] The Crown's star

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84 *Ibid* at 101.
85 Emon & Mahmood, *supra* note 54 at 259.
86 *Ibid* at 283.
87 *Ibid* at 293.

witness—a paid informant—was also asked to describe Islamic legal doctrine about *jihad*—arguably as an expert—without being qualified by the court or bound by impartiality.[88] Two lay witnesses—and very clearly, partisan witnesses—were thus expected to address highly complex and contentious issues on their own. The lack of discussion between the lawyers in the courtroom on the need for expertise arguably reveals a tendency to revert to facile assumptions about religion, specifically Islam, and its link to violence.

Roach acknowledges the relevance of motive in non-terrorism criminal prosecutions to bolster an inference and prove an element of an offence (either the prohibited act or the accused's state of mind). But he also remarks that in some cases, sentiments or similar motives can become so widespread within a community (perhaps due to a response to extraordinary events) that the motive is no longer relevant to advancing the Crown's case because the motive is no longer unique or sufficiently probative.[89] This observation is highly relevant in the present case as it deals with a young racialized Muslim in Canada who testified to have struggled to navigate the racist backlash in the aftermath of the 9/11 attacks and the subsequent military invasions of Iraq and Afghanistan. It is plausible for emotional and political turmoil to impact a young person who may potentially explore or engage with highly publicized yet controversial ideas for answers in such a context. To place undue weight on this evidence, or interpret simple possession as evidence of uncritical adoption of the contents without expert analysis or further corroboration, may lead to problematic results for the administration of justice and problematic assumptions about the ideas of racialized youth.

It is possible that the origins of this issue (undue weight to prejudicial evidence without appropriate contextualization) is a problem to be addressed by emphasizing cultural competency, addressing problems with prosecutorial strategy, or possibly further training for judges; however, it appears that the disproportionate emphasis placed on motive—and the presumptions that may be drawn between certain ideas and an inclination to violence—is linked to the motive clause. The absence of the motive clause would not prohibit motive evidence from ever being admitted; it would simply limit motive from receiving undue and unfettered attention. As a result, this may discourage biased prosecutorial strategies, which are required to emphatically insist on the radicalization of individuals' religion and politics or the admission of otherwise prejudicial evidence. By doing so, motive evidence may continue to be admitted, but only where relevant, and

88 *Ibid* at 277.

89 Kent Roach, "The Three Year Review of Canada's Anti-Terrorism Act" (2005) 54 UNBLJ 308 at 315.

only if admitted according to the relevant exclusionary rules, the judge's discretion to exclude or limit instructions where necessary.

VI. RACIALIZING TERRORISM: THE IMPACT OF STIGMATIZATION AND BIAS

Tracing the history of Canada's motive clause to the UK legislation, Roach notes its origins in an FBI manual used for operational purposes—not as a legal term with a decisive impact on the liberty of an accused person. He builds on this genealogy to point out how this clause effectively begins to blur the lines between criminal law enforcement on the one hand and the security concerns of intelligence agencies on the other. According to Roach, "once policy-makers focus on the extremist politics and religion that motivate terrorism, they may want to use the criminal law to respond directly to such politics and religion."[90] In other words, not only does the motive clause make the politics, religion, or ideology of the accused a "central feature of their criminal trials,"[91] but an argument can be made that criminal law is being used bluntly to respond to certain ideas considered abhorrent or undesirable. This inference is bolstered by the nearly exclusive application of terrorism offences to Muslim individuals and groups. Subsequently, the motive clause contributes to an environment where specific ideas and religions are stigmatized due to their alleged association with terrorism. This sentiment is echoed by Professor Irwin Cotler, former MP and Minister of Justice, who suggests that the criminalization of motive politicizes investigative and prosecutorial procedures, chills the expression of other community members, and departs from the general principles of criminal law.[92]

While the text of the motive clause may not directly point to the targeting and scrutiny of certain groups, the political discourses used to justify such laws feature highly racialized language and practice.[93] This impact is evidenced by the fact that predominantly, and almost exclusively, Muslim individuals are prosecuted under these offences. In fact, a well-documented systemic problem stems from a disproportionate focus on violence associated with racialized and Islamicate contexts at the expense of

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90 Roach, *supra* note 4 at 45 [emphasis added].
91 Roach, *supra* note 49.
92 Irwin Cotler, "Terrorism, Security and Rights: The Dilemma of Democracies" (2002) 14:13 Nat'l J Const L.
93 Nagra, page 168.

other motivations and forms of violence.[94] This can be seen in the clear systemic bias under which Al Qaeda-inspired individuals and groups are being charged under terrorist offences, whereas individuals and groups on the "far-right" or linked to White supremacy are being dealt with under ordinary criminal offences and hate speech.[95] Recognizing this massive disparity, Roach engages with the suggestion that anti-terrorism has some resonance with "enemy criminal law," which targets "others" deemed enemies using harsh preventative measures in comparison to the "citizen criminal law" used against those considered its own.[96] The qualitative study conducted by Nagra and Monaghan between 2014-2015 further reveals an overwhelming concern among interviewees that terrorism was being conflated with Islam through Canada's anti-terror measures, including security certificates, no-fly lists, airport and border security, and criminal prosecutions. In particular, the study revealed that Canadian Muslims were experiencing stigma, alienation, limited religious freedom, and a sense of diminished citizenship as a direct result of Canada's counter-terrorism practices.[97] These results make it clear that even though the legislation is drafted in seemingly objective terms, the underlying political discourse and implementation in investigation, prosecution, and sentencing work to racialize terrorism offences with real and actual impacts on affected communities.

The application of the terror offences not only overdetermines terrorism and terrorist activity with reference to Al-Qaeda-inspired individuals and groups, but the legislative framework explicitly ties terrorist activity with the ideas of Muslims and/or Islam as the primary "motivation" for extremist violence. While the specific drafting of the clause has been carefully wordsmithed to be "respectful of cultural diversity,"[98] the actual application of the provision, combined with the statements of public officials, suggests that the motive clause is the defining characteristic of terrorism itself and may function as a way of actually identifying the "distinctiveness" of terrorism in relation to some Islamicate connection. In this sense, the argument in favour of the clause that "motive" is the distinguishing factor between terrorism and ordinary crime may be

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94 Michael Nesbitt & Dana Hagg, "An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offence" (2020) 57:3 Alta LR 595 [Nesbitt & Hagg].

95 Michael Nesbitt, "Violent crime, hate speech or terrorism? How Canada views and prosecutes far-right extremism (2001-2019)" (2021) Comm L World Rev 1 at 4.

96 Kent Roach, "Counterterrorism and the challenges of terrorism from the far right" (2020) Comm L World Rev 1 at 8.

97 Nagra and Monaghan, *supra* note 9 at 181.

98 *Khawaja III*, *supra* note 5 at 83.

conflating the criminal act of terrorism with acts of violence, motivated specifically by racialized religions and politics. This suggests that the existence of the motive requirement should be understood as "symptomatic in the sense that it represents the legislators' sense of what terrorism involves" based on the historical and political context of the time.[99] Functionally, this produces an arbitrary distinction between people—on the basis and evaluation of motive—who otherwise engage in similar criminal activity by inflicting violence for the purpose of intimidating a segment of the population or compelling a government body to do or refrain from some act.[100] This illustrates a clear systemic bias in the Canadian legal system whereby violence (contemplated or perpetrated) by racialized individuals is treated as terrorism, while far-right extremist violence is treated as "ordinary crime," punishing and stigmatizing the former far more than the latter.[101]

This overdetermination of terrorism as a concept in relation to Muslims and Islam can be seen in the subtle ways terrorism is characterized and described by public officials, in specific reference to violence ascribed to Muslims, without saying so explicitly. After an incident in which violence had been inflicted by seemingly ideologically motivated individuals within Canada, the former Minister of Justice, Peter MacKay, stated on record that since the attack did "not appear to have been culturally motivated," it was "therefore not linked to terrorism."[102] This cognitive bias seems to be similarly reflected in RCMP documents which expressed doubt about whether "right-wing" violence can amount to terrorism or whether it is "ideological violence."[103] These anecdotal statements give further credence to the perception that terrorism is an inherently political concept which has been racialized as the (irrational) political violence of a racialized "other." This argument is corroborated by investigative and prosecutorial trends.

Barbara Jackson's insightful analysis of intelligence profiles highlights how racially neutral factors are effectively used to substitute for race and religion, while race remains the lens through which the activity of a suspect

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[99] Douglas, *supra* note 4 at 306.

[100] *Ibid* at 302.

[101] Nesbitt & Hagg, *supra* note 94 at 4.

[102] "Alleged Halifax shooting plotters 'were prepared to wreak havoc and mayhem'," (14 February 2015), online: *CBC News* <www.cbc.ca/news/canada/nova-scotia/alleged-halifax-shooting-plotters-were-prepared-to-wreak-havoc-and-mayhem-1.2957767> [perma.cc/T8YR-KLWY] [emphasis added].

[103] Stewart Bell, "What does it take to lay terrorism charges? An internal government document explains the RCMP view" (27 April 2018), online: *Global News* <globalnews.ca/news/4173552/canada-terrorism-charges-rcmp-document/> [perma.cc/PED4-U2GG].

is assessed.[104] Using the example of a Syrian Arab Muslim deemed a threat to Canada, she illustrates how threat profiles use seemingly objective characteristics to develop a profile not based solely on being Arab and/or Muslim but which remains heavily dependent on race and religion for interpretation.[105] This divorces the profile from explicitly racial factors, although it is a profile that draws its very sustenance from such characteristics.[106] Overall, this work outlines the bias that exists within investigations, prosecutions, and judicial decision-making wherein assumptions about individuals—supposedly incapable of rational thinking and prone to extremist violence—are imputed to a person based on their ethnicity, religion, race, or a combination of such factors which appear unrelated to a racial profile but serve as substitutes for these characteristics.[107]

The historical backdrop of the enactment of the *ATA* was the response to the 9/11 attack by Al-Qaeda. As we have seen, the provisions have been almost exclusively applied against Muslim accused persons, and the procedural framework created by the provision creates a dynamic in which the religious, political, and ideological ideas of the accused Muslims are put on trial and dealt with based on prejudicial presumptions about the relationship between Muslim ideas and extremist violence. In contrast to government claims that the clause acts as a "safeguard," none of the reported cases thus far have seen an acquittal of a Muslim accused on the basis that he or she did not have a motive animating their alleged conduct. Rather than a "safeguard," the statistics and enforcement trends seem to indicate that offenders who commit violent offences with links to far-right causes and/or White supremacy are the ones who have been "safeguarded" from being charged with terrorist offences, partially because of the absence of a "cultural" motive. The result is that violence committed to intimidate a segment of the population or compel the government to do or refrain from an act—that is not driven by a perceived Islamic (or otherwise racialized) animus—is excluded from the realm of terrorist activity. This bolsters the suggestion that the "safeguard" of the motive clause, intentionally or unwittingly, only operates to safeguard those persons coded as 'White' from being prosecuted for terrorism, or in other words, that the "motive" is a means to specifically criminalize individuals and groups associated with Muslim or "Islamist" politics. As such, the motive clause's

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[104] Barbara Jackson, "Sustaining Investigations and Security Certificates Through the Use of Profiles" in Richard Marcuse, ed, *Racial Profiling* (Vancouver: BC Civil Liberties Association, 2010) at 69.

[105] *Ibid* at 70.

[106] *Ibid.*

[107] *Ibid* at 75-76.

role as a "safeguard," weighed against the stigmatization of racialized communities due to a problematic evidentiary requirement and compounded by biased implementation, does not appear as a convincing argument to maintain the provision by any means.

In this vein, Sherene Razack's argument that the "exiling" of Muslims from the political community has been a central facet of the war on terror since 2001 offers important theoretical insight into the racialization of terror offences. In the context of the war on terror, Razack identifies how "racial distinctions become so routinized that a racial hierarchy is maintained without requiring the component of individual actors who are personally hostile towards Muslims."[108] Expanding on this, Razack outlines how this process is underpinned by the idea that "modern enlightened, secular peoples must protect themselves from pre-modern, religious peoples whose loyalty to tribe and community reigns over their commitment to the rule of law."[109] The comments of Canadian lawmakers and investigative agencies that the "distinctiveness" of "terrorism" cannot be identified without a "cultural motivation" similarly belie the trademarks of this systemic racism. This is not expressed simply in racial hostility borne towards racialized groups but in the idea that the state must "protect itself from those who do not share its values, ideals of beauty, and middle-class virtues."[110]

This paper's overall argument thus focuses on the process of racialization, which requires two discrete analytical steps: first, identifying and enumerating certain biological or social characteristics, and second, asserting that these characteristics bear social significance by ascribing them to a particular racialized group. By tracing this process, this paper argues that the motive clause within Canada's terror offence contributes to a dynamic that racializes terror offences as a specific criminal offence committed by racialized individuals—marking terrorism as a unique social characteristic of racialized communities. As evidenced in the discourse of various policymakers and the application of the provision by investigative agencies and prosecution services, the motive clause is central to what sets terror offences apart from "citizen criminal law" or "general law enforcement provisions," as suggested by Former Minister McLellan. In practice, this motive is exclusively associated with the politics, religion, and ideology of racialized accused and, most often, Muslims. In this sense, the

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108 Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at 9.

109 *Ibid* at 9-10.

110 *Ibid* at 11.

theoretical underpinning of critical race theory helps identify and understand this dynamic. By questioning the dominant legal claims of neutrality and challenging ahistoric readings of the terror offence, critical race theory insists on a contextual and historical analysis of the law.[111] In this case, this is achieved by tracing the development and implementation of the motive clause in practice. In this context, the concept of systemic racism is helpful as it elucidates how seemingly neutral legal provisions can have an adverse impact on racialized groups, while the role of implicit bias also provides some explanatory power in the way that numerous individuals in the criminal justice system appear to have unconsciously associated terrorism with the cultures and ideas of racialized communities.

VII. REVISITING THE MOTIVE OF THE MOTIVE CLAUSE

Assessing whether the skewed dataset is due to a reflection of empirical reality (i.e., Muslims are the only people engaged in "terrorist activity" in Canada), the biased interpretation of the provisions leading to the racialization of terrorism as a concept, or the biased enforcement of the provisions by investigative agencies, prosecutors, and the courts is beyond the scope of this paper. While a dedicated study to this question may be useful to provide a definitive answer, the motive clause clearly appears to be a contributing factor to this reality.

Roach provides a strong argument in favour of defining terrorism with restraint to focus on intentional violence against civilians.[112] He agrees that a definition of terrorism needs to distinguish the phenomenon from ordinary crime but disagrees with the motive clause being the means to do so. Instead, he argues that the focus should be on whether the alleged terrorist is "pursuing a purpose of intimidating a population or compelling governments or international organizations to act."[113] Removing the motive clause avoids an official inquiry into the accused's political and religious beliefs that may give the impression that the state is "responding to the accused's politics or religion as opposed to his or her plans to commit acts of violence."[114] Doing so protects the accused (and others) from discrimination on the basis of holding unpopular—even heinous—religious, political, or ideological views. It also prevents the criminal trial from

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[111] Mari J Matsuda et al, "Introduction" in Mari J Matsuda, ed, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, 1st ed (Boulder, Colorado: Westview Press, 1993) at 6.

[112] Roach, *supra* note 4 at 39.

[113] *Ibid* at 40.

[114] *Ibid* at 41.

becoming a political or religious trial which would be contrary to the logic and spirit of criminal law—which asserts that "motive neither excuses nor constitutes intentional crime."[115] Going further, Roach makes a striking argument that targeted violence against civilian targets should not be exempted from the label of terrorism simply because there is no evidence of the accused person's motivation or where the motive cannot be described as political, religious, or ideological. If Parliament successfully made this transition, not only would Canada's penal definition of terrorism realign with international definitions, but it would also harmonize itself with the foundational principles of criminal law, including international criminal law. When analyzing other serious offences for which international consensus has been developed, motive does not characterize, justify, or excuse an abhorrent act. Although Canadian law has developed a constitutional principle that certain high-stigma offences may require a minimum fault requirement so that the stigma of certain offences corresponds to the accused person's moral blameworthiness, this principle does not require a specific motive to set it apart—only a specified threshold of fault.[116] This can be seen clearly across the board, whether discussing murder, crimes against humanity, or genocide. Bringing terrorism in line with these similarly grave offences could be a crucial step to resisting the racialization of the offence and the stigmatization of racialized communities.

The motive clause, as it is, is also currently afflicted by another problem. None of the three categories (religion, politics, and ideology) have been clearly defined by the statute or jurisprudence. The terms "political," "religious," and "ideological" are key elements of the offence but arguably remain ambiguous. Nesbitt and Wylie point to the challenges of identifying and defining "ideology,"[117] while a body of research in social science and the humanities also illustrates that the category of "religion" itself does not have a stable definition that can be relied upon universally. This literature further problematizes attempts to clearly distinguish between the "religious" and "political" by suggesting that these distinctions and categorizations are themselves based on racist perspectives about non-Western politics and Eurocentric presumptions about the relationship between religion (especially Islam) and violence.[118] In the absence of a clear definition in the statute or jurisprudence and no application to other suspects in practice, these restrictive yet uncertain terms arguably contribute to an unnecessarily

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115 *Ibid* at 43.

116 *R v Vaillancourt,* [1987] 2 SCR 636, 39 CCC (3d) 118.

117 Nesbitt & Wylie, supra note 67 at 60.

118 William Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009) [Cavanaugh].

narrow definition, which may leave some activity outside the scope of the offence due to its indeterminate status as a coherent ideology.

VIII. CONCLUSION: DISMANTLING SYSTEMIC RACISM WITHIN THE *CRIMINAL CODE*

The government's consistent justification for maintaining the clause has revolved around distinguishing terrorism from ordinary crime and acting as a safeguard. In reality, the clause adds little to no benefit as a safeguard other than maintaining systemic racism within Canada's legal system by stigmatizing racialized communities based on prejudicial presumptions and the myopic application of terrorism provisions. The clause does not increase security; thwarted attacks and successful prosecutions were not made possible by virtue of the motive clause. To the contrary, however, the evidence reviewed in this paper suggests that the motive clause, as currently framed, is functioning to help restrict the application of terrorism offences to those acts committed by racialized actors and subsequently prosecuting their religious and political ideas based on facile understandings of complex social issues. As suggested by Canadian civil liberties organizations and legal scholars, however, the solution is not simply to "expand anti-terrorism in the name of anti-racism" but to identify and address the systemic problems and concerns within Canada's anti-terrorism apparatus.[119] This paper is one small contribution to this effort to identify how Canada's terror offences have been racialized and disparately impact Canada's racialized communities.

While there is undoubtedly a wider social context that can provide explanations for the systemic racism within the Canadian legal system, adding a political or religious motive element to terrorism offences has specifically structured criminal law in such a way that reinforces the stigmatization and discrimination of racialized communities. The systemic effect of the provision demands that courts litigate religion in terrorism trials—ultimately leading to furthering a systemic association between terrorism and racialized communities, particularly Muslims and Islam. This is especially problematic when courts fail to appropriately seek the guidance of experts in which liberty and guilt are contingent on complex claims about religious ideas and politics. Despite the fact that the bias and cultural incompetence of some counsel contributes to this problematic treatment of

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[119] Letter from Azeezah Kanji and Tim McSorley et al to Federal Party Leaders, "Re: Use of anti-terrorism laws to combat racism and white supremacism" (22 February 2021), online (pdf): <bccla.org/wp-content/uploads/2021/02/Letter-to-leaders-regarding-Terrorist-List-for-White-Supremacist-Organizations.pdf> [perma.cc/QG52-VFUF].

the evidence, the motive clause enables this by creating a burden to prove motive by some means in a way unique from the regular treatment of motive in criminal law. This legislative framework, combined with bias and cultural incompetency in some cases, leads to circumstances where accused persons are made vulnerable to the risk of penal sanction without appropriate contextual analysis conducted on the evidence presented to the courtroom. Considering the "systemic racialization of terrorism"[120] across political and security institutions, it is imperative that policymakers and enforcement agencies reflect on these discriminatory impacts of the motive clause on the criminal justice system in Canada.

[120] Cavanaugh, *supra* note 118 at 28.

Establishing Police Accountability: How Do We Stop *Charter* Violations from Happening?

LAUREN GOWLER*

ABSTRACT

In response to public criticism and protests to defund police, this article seeks to analyze a few of the problems facing Canadian policing today and tackle the question: how do we stop police *Charter* violations from happening in the first place? This article begins by laying out a number of the general concerns facing policing. First, it shows that the current remedies available under section 24 of the *Charter* are imperfect tools for tackling larger systemic policing misconduct. This problem is compounded by the fact that police forces lack formal systems to track or follow up on judicial rulings that find their officers have violated Canadians' *Charter* rights. This inevitably leads one to wonder whether those officers – who have been found to have violated the *Charter* – are actually facing the consequences or re-training for their misconduct. In the face of these concerns, this article seeks to make two recommendations that could help improve police accountability and re-establish public trust. First, it suggests that the laws surrounding what the police are legally authorized to do need to be clarified and solidified. This requires the courts to stop expanding the scope of police powers on a case-by-case basis and leave the task to Parliament to work with police and the public to legislate police powers. Second, this article suggests that policing needs to evolve from an occupation into a formal profession by establishing a "College of Policing"

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in each province and territory. The College would be responsible for protecting the public from police malpractice and misconduct. The College would accomplish this goal by providing education and licensing of officers, ensuring police practices respect Canadian *Charter* rights, and responding to public complaints and *Charter* violations.

***Keywords*:** *Charter* Violations, Police Misconduct, Common Law Police Powers, Police Accountability, Section 24 Remedies, College of Policing, Police Training & Education, Rebuilding Public Trust.

I. INTRODUCTION

In the early hours of May 12th, 2004, the RCMP received a tip about an intoxicated driver in the town of Leduc, Alberta.[1] When the patrolling officers came across Lyle Nasogaluak, a 24-year-old man of Inuit and Dene descent, they attempted to pull him over. Rather than comply, Mr. Nasogaluak sped up, and a short yet high-speed chase ensued before he abruptly stopped his vehicle. Constables Dlin and Chornomydz approached his truck, revolvers drawn, loudly instructing Mr. Nasogaluak to get out of his vehicle. The young man initially complied but grew hesitant as the police approached with guns drawn. Concerned that Mr. Nasogaluk would drive away, Constable Chornomydz grabbed the young man — who was now clutching onto the steering wheel and door frame — and punched him several times in the process of bringing Mr. Nasogaluk to the ground.[2] It was fairly obvious by this point that he neither had weapons nor were there any other passengers in the car. With Mr. Nasogaluk lying on the ground, Constable Dlin coaxed him to cooperate further with several heavy punches in the rib area - blows that were so forceful they cracked ribs and punctured his lung.[3]

Mr. Nasogaluak was taken to the police detachment, where tests revealed he was well over the legal blood alcohol limit. In their report, the Constables made no mention of the force used to arrest or the fact that they drew their weapons; and stated that Mr. Nasogaluak had no obvious signs of injury and did not require medical assistance.[4] However, the truth is that the young man repeatedly pleaded with the Constables saying that he was hurt, spending most of his time at the police station leaning over in pain

1 *R v Nasogaluak*, 2010 SCC 6 at para 10 [*Nasogaluak*].
2 *Ibid.*
3 *Ibid* at para 11.
4 *Ibid* at para 12.

and struggling to breathe.[5] When Mr. Nasogaluak was released the following morning, he immediately sought medical treatment, requiring life-saving surgery to treat his broken ribs and collapsed lung.[6]

Even though this incident occurred over fifteen years ago, it is a familiar refrain, not that dissimilar from interactions between police and young men of colour occurring today. While instances of police brutality and the use of deadly force been widely scrutinized in the United States, Canadian police services have been largely able to avoid the same pointed criticisms. This is not because Canadian police officers are not engaging in this type of behaviour. There is a subset of law enforcement officers abusing their power and flagrantly violating the rights protected in the *Canadian Charter of Rights & Freedoms ("Charter")* as a normal part of their daily interactions with Canadians.[7]

In July 2022, the Toronto Star released an investigation that identified 600 cases of "police brutality, callousness and ignorance" that occurred across the country between 2011 and 2021.[8] The judges found that conduct displayed by the officers in these cases not only constituted a violation of the suspect's *Charter* rights but that the misconduct was so serious that the judges excluded the evidence acquired by the police to protect the reputation and integrity of the justice system. For in repeatedly violating *Charter* rights, unwittingly or not – police are demonstrating that *Charter* rights and freedoms are not important. The public is left feeling that their rights do not matter and that police are above the rule of law. It is a long way from the principle that suggests "the police are the public, and the public are the police."[9]

The police are the most visible and direct manifestation of the government with which everyday citizens interact. Since the 1980s, these police interactions have increased exponentially, a change which can be attributed to the Supreme Court of Canada's gradual expansion of common law rules defining police powers and authority.[10] Over the last thirty years, the courts have endeavoured to balance the freedoms and rights of

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5 *Ibid.*

6 *Ibid* at para 13.

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

8 Rachel Mendleson & Steve Buist, "Unchartered Part 1: Rights Wronged" (9 June 2022), online: *Toronto Star* <www.thestar.com/news/investigations/police-rights-violations.html> [perma.cc/F2AK-6WDZ] [TorStar].

9 Susan Lentz & Robert Chaires, "The invention of Peel's principles: A study of policing 'textbook' history" (2007) 35:1 J Crim Justice 69-70 online: *ScienceDirect* <doi.org/10.1016/j.jcrimjus.2006.11.016> [perma.cc/7VNQ-X92S].

10 Richard Jochelson & David Ireland, *Privacy in Peril: Hunter v Southam and the Drift from Reasonable Search Protections* (Vancouver: UBC Press, 2019).

Canadians with the state's need to instill social order and investigate crime. However, in this balancing act, the Court has been more willing to give the police greater powers and flexibility when it comes to roadside stops, detentions, searches, seizures, and arrests. This is a *Charter* problem for Canadian citizens.

Most notably, a place where the public has seen a substantial increase in invasive police interactions is on the road. In light of the highly regulated nature of driving, police officers have essentially been granted the power to pull over any driver at any time to ensure public safety.[11] Over the last decade, we have seen instances where officers had inadequate knowledge of the laws they are tasked with enforcing or were unaware of how their actions violated constitutionally-protected *Charter* rights. Low-level infractions are met with intense, invasive, and unnecessarily aggressive responses: "They treat those that they encounter with fear and hostility and attempt to control them rather than communicate with them."[12] Although these stops are intended to be undertaken in the interest of public safety, they are often abused as an opportunity to investigate Canadians who are deemed suspicious. These tactical stops may lead to charges such as drunk driving, drug trafficking, or possession of weapons – but in many cases, they jeopardize the trust of the Canadians they claim to protect.

By carving out the scope of police powers on a case-by-case basis, the Supreme Court's jurisprudence is complex for legal scholars, police, and regular Canadians to understand. Although these rules are often difficult for police to implement – Parliament and the provincial legislatures have been reluctant to get involved. Many have called to "defund the police" and suggested that we should dismantle the police entirely. Others suggest that we need to impose harsher punishments on police to keep them accountable. I am not convinced either of those strategies are going to help.

The main goal of this paper is to address the question: how do we stop these habitual *Charter* violations from happening? I will first lay out the current measures available to the courts under section 24 of the *Charter* for remedying *Charter* violations and scrutinize the effectiveness of those remedies in addressing larger systemic police misconduct. I will then consider a recent Toronto Star investigation which shows that police forces are not being notified or following up on judicial rulings that find their officers have violated Canadians' *Charter* rights. With these findings in mind, the paper will question whether those officers – who have been found

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[11] *Dedman v The Queen*, [1985] 2 SCR 2, 20 DLR (4th) 321 2; *R v Orbanski*, 2005 SCC 37; *R v Elias*, 2005 SCC 37.

[12] Alex Vitale, *The End of Policing*, (New York: Verso, 2017) at 9-10.

to have violated the *Charter* – are actually facing the consequences or re-training for their misconduct. Finally, I will make two recommendations that could help improve police accountability and re-establish public trust. First, the laws surrounding "what the police are legally authorized to do" need to be clarified and solidified – this requires the courts to stop expanding the scope of police powers on a case-by-case basis and leave the task to Parliament to work with police and the public to legislate police powers. Second, policing needs to evolve from an occupation into a formal profession by establishing a "College of Policing" ("College") in each province and territory. The College would be responsible for protecting the public from police malpractice and misconduct. This goal would be accomplished by the College through providing education and licensing of officers, ensuring police's practices respect Canadian *Charter* rights, and responding to public complaints and *Charter* violations. While it will be hard not to blame the police administration and seek to punish individual officers, I believe that credibility is only going to be developed through fair, accessible, and community-focused regulation and independent external oversight.

II. CURRENT APPROACHES TO ADDRESSING *CHARTER* VIOLATIONS

How does the *Charter* currently deter the police from misconduct and provide remedies for claimants whose constitutional rights have been violated?

Remedies for violations are mostly found under section 24 of the *Charter*.[13] In seeking a remedy, a *Charter* claimant first must demonstrate that the state's conduct breached their constitutional rights. Once this breach has been established, the challenge passes to the government to demonstrate that it is a "reasonable limit in a free and democratic society" under section 1 of the *Charter*.[14] Using the *Oakes* test, the courts are able to conduct a proportionality analysis weighing the impact of the police's actions on the claimant, the individual's interests, and broader societal values. If the court has concluded that the *Charter* breach cannot be justified, the court must then decide what practical measures should be taken to remediate this infringement. This is consistent with the long-held legal principle that states, "for every right, there is a remedy; where there is no remedy, there is no right."[15] Namely, when lawmakers claim to provide

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[13] *Charter, supra* note 7, s 24.

[14] *Ibid*, s 1; *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[15] David Paciocco, Palma Paciocco & Lee Stuesser, "Chapter 8: Improperly Obtained

and protect rights, there must be appropriate redress when those rights have been withheld or violated.

A. Section 24(2): Remedial Provision for the Exclusion of Evidence

Section 24(2) is the most commonly relied on remedial tool for addressing *Charter* breaches in criminal proceedings. Under a section 24(2) application, an accused argues that the court should exclude evidence acquired in connection with the violation. The most recent iteration of section 24(2) analysis comes from the Supreme Court's 2009 case of *R v Grant*.[16] Beyond demonstrating that the police's actions constituted a violation of their rights, the claimant must show that the evidence was "obtained in a manner" that violated their rights and that the "admission of the evidence would bring the administration of justice into disrepute."[17] Most of the analysis occurs in the second stage of the test. The majority in *Grant* suggested that courts should consider the assessment of the following factors: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests; and (3) society's interests in the adjudication of the case on its merits.[18]

The first line of reasoning invites judges to evaluate and gauge the "blameworthiness of the conduct, the degree of departure from *Charter* standards, and the presence or absence of extenuating circumstances."[19] This assessment focuses on the officers' state of mind when they committed the violation and extends to include institutional failures in *Charter* compliance. Since police conduct can vary in seriousness, the Supreme Court has held that judges must evaluate the conduct of the police in each instance and place it along a spectrum of fault: "police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights."[20]

Over the years, the Supreme Court has stated that section 24(2) operates to "oblige law enforcement authorities to respect the exigencies of

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Evidence" in *The Law of Evidence*, 8th ed (Irwin Law, 2020) at 466.

16 *R v Grant*, 2009 SCC 32 [*Grant*].

17 *Ibid* at paras 67-73.

18 *Ibid*.

19 *Ibid* at paras 72-75.

20 *R v Harrison*, 2009 SCC 34 at para 23 [*Harrison*].

the *Charter*."[21] However, the Court has explicitly said that this provision is not intended to punish illegal police conduct.[22]

As noted by the majority in *Grant*, the fact that we are conducting this kind of exclusionary review means that a *Charter* breach has already occurred and that damage has already been done to the administration of justice. Chief Justice McLachlin (as she then was) and Justice Charron stated in *Grant* that "Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through the breach does not do further damage to the reputation of the justice system."[23] They further described how the focus of section 24(2) is societal, long-term, and prospective and that "Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns."[24]

I can certainly appreciate how the exclusion of evidence in these types of situations could be a best-case scenario from many perspectives. The accused, having narrowly avoided prison time, will hopefully be deterred from getting involved in other criminal activities in the future. Canadians will hopefully be comforted by the courts' careful diligence in protecting important *Charter* rights. Finally, the exclusion of evidence and the loss of a conviction could hopefully encourage police to update their training and implement investigatory techniques that will not violate Canadians' rights. However, I have doubts that this is a realistic outcome.

I respect the court's difficult balancing and efforts to protect the "administration of the justice system" on a case-by-case basis; however, I have concerns about whether excluding the evidence actually offers an effective remedy that addresses larger systemic concerns about the administration of justice and police investigative techniques beyond an individual accused's case. The administration of justice does not start with the trial. The process starts when an individual is investigated, charged, and tried. If the courts want to protect the long-term reputation of the legal system, they should focus on ensuring that justice and due process is followed from the start – so that *Charter* rights violations and state misconduct do not occur in the first place. The Court in *Grant* acknowledged that it was a "happy consequence" that *Charter*-infringing police conduct would be deterred due to the risk of exclusion.[25] However, should the court not be striving for more than that? The justices spend a significant amount of time dwelling on the blameworthiness and often

[21] *R v Burlingham*, [1995] 2 SCR 206 at para 25, 124 DLR (4th) 7 [*Burlingham*]; *R v Buhay*, 2003 SCC 30 at para 71.
[22] *Grant*, *supra* note 16 at para 70.
[23] *Ibid* at para 69.
[24] *Ibid* at para 68.
[25] *Ibid* at para 73.

illegal nature of police conduct in the first stage of *Grant*. But by only excluding the evidence to protect the court's legitimacy, it seems like a missed opportunity to meaningfully address the risk of police repeating the same mistake in the future.

While I understand the desire not to use section 24(2) to punish police officers for their *Charter*-violating actions, I believe that there is insufficient motivation for police to take accountability and legitimately change their conduct. I believe that when it comes to police, what we are seeing is that there is too much after-the-fact accountability.

B. Section 24(1): General Remedial Provision for *Charter* Violations

Section 24(1) operates as the *Charter*'s general remedial provision against unconstitutional government action – stating that "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[26] Given the broader and more flexible nature of this provision, section 24(1) may be better positioned to address the larger systemic issues of policing. This provision is designed for the courts to be mindful of the past – giving attention to the nature of the violation and the inflicted harm. More importantly however, section 24(1) also grants the courts the opportunity to be forward-looking – working to ensure that government agents comply with the *Charter* in the future. Justice McLachlin once described section 24(1) as the "cornerstone upon which rights and freedoms guaranteed by the *Charter* are founded" and a "critical means by which they are realized and preserved."[27]

This section gives the court discretion to pursue remedies such as awarding damages, making a judicial declaration, issuing a stay of proceedings, or providing injunctive relief. Perhaps the most telling example of the Supreme Court of Canada's generous interpretation of section 24(1)'s broad remedial guarantee is its decision in *Doucet-Boudreau v Nova Scotia (Minister of Education)*.[28] In that case, the trial judge applied section 24(1) to remedy a breach of the appellants' minority language rights under section 23 of the *Charter* by requiring the Province of Nova Scotia to use its "best efforts" to provide French school facilities. The court additionally sought to retain jurisdiction after the order to hear reports from

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26 *Charter, supra* note 7, s 24(1).

27 *R v 974649 Ontario Inc*, 2001 SCC 81 at para 20.

28 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*].

the Province regarding the status of its efforts. When the case went to the Supreme Court over the use of this section 24(1) remedy, the majority of the Court upheld the trial judge's flexible and creative application of section 24(1) – despite the dissenting justices' complaints that the majority was going beyond its jurisdiction and breaching the separation of powers.

The majority held that under section 24(1), a superior court could craft any remedy that it considers "appropriate and just in the circumstances." In doing so, a court must exercise its discretion based on its careful perception of the nature of the right and the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies that usurp the role of the other branches of governance. The boundaries of the courts' proper role will vary according to the right at issue and the context of each case.

This leads one to consider whether the court could use section 24(1) to complement the decision to exclude evidence under section 24(2). A suggestion made by law professor Kent Roach recommends that the court could ask the police officer to state in open court "what, if anything, they have done to prevent a repetition of the violation of the suspect's rights."[29] Roach suggests that this could provide the police with more incentive to take reasonable training, employment, and deployment measures to prevent repetitive rights violations and acts of over-policing. If the court is unsatisfied with the efforts taken by or failed to be taken by the officer, perhaps the court could refer the matter directly to the police forces and require the officer to take further steps to address the behavioural misconduct. I think that section 24(1) could offer a promising and more direct way of addressing police behaviour when compared to the limited focus and purpose of section 24(2).

However, some scholars are concerned that the Supreme Court has become more reluctant to award remedies as broadly as it did in *Doucet-Boudreau*.[30] In the case of Mr. Nasogaluak, highlighted at the beginning of this article, the trial judge found that the police had violated Mr. Nasogaluak's section 7 rights.[31] The trial judge, however, refused to grant the requested remedy of a stay of proceedings and, using section 24(1) – chose instead to reduce the accused's sentence to a conditional discharge.

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29 Kent Roach, "The Limits of Legalized and After-the-Fact Accountability" in *Canadian Policing: Why and How it Should Change* (Irwin Law, May 2022) at 55 [Roach].

30 Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter: Bjelland, Khadr and Nasogaluak" (2010) 51:1 SCLR, online: *Osgoode Hall Law School* <digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/14> [perma.cc/MA42-RQ33] [Chan].

31 *Nasogaluak*, *supra* note 1.

The Supreme Court of Canada agreed that the police had used excessive force in arresting Mr. Nasogaluak but held that the remedy of a sentence reduction under section 24(1) had to be constrained by the mandatory minimum sentences imposed by Parliament in all but "exceptional circumstances." The Court did not define "exceptional circumstances" but simply held that they did not exist in this case.

In his article, *Remedial Minimalism under Section 24(1) of the Charter,* Gerald Chan notes that in the *Nasogaluak* case – as well as *R v Bjelland and R v Khadr* – we have started to see the Court shift the analytical focus of section 24(1) from the promotion of remedial efficacy toward the minimization of remedial burdens imposed on the government. From a rights-protection perspective, this is a worrisome trend.[32]

It is perhaps also important to examine the SCC's approach to awarding monetary damages under section 24(1) in relation to police misconduct. In *Vancouver (City) v Ward,* the Court found that the police violated Mr. Ward's section 8 *Charter* right when they mistakenly identified him as the individual who attempted to throw a pie at the Prime Minister during a speech and, as a result, strip-searched him at the police station and seized his vehicle.[33] The Supreme Court described the plaintiff's injury as "serious" and the violation as "egregious." However, the Court held that $5,000 was a sufficient remedy to compensate Mr. Ward and to achieve the remedial objectives of vindication and deterrence.

It is difficult to see how any potential plaintiff would decide that an action for a breach of *Charter* rights is worth pursuing when even a victory would likely not offset the cost of legal fees. Moreover, to the extent that such actions are pursued, it is difficult to imagine the government viewing a potential damages award as anything more than a "licence fee" to pursue state interests aggressively at the expense of individual *Charter* rights. This deterrent effect on individual officers is eroded by the fact that statutory rules in many provinces require that governmental authorities pay damages awarded against individual officers.[34] So, even if an officer is found civilly liable for professional misconduct, it is unlikely that they are facing financial or professional repercussions for their actions.

As the Supreme Court held in *Grant*, the difference between sections 24(1) and 24(2) is that the first provides for an "individual remedy," whereas the second focuses on the "societal interest in maintaining public

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32 Chan, *supra* note 30 at 3.

33 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

34 In Manitoba, *The Police Services Act*, CCSM c P94.5, s 40(2); In Alberta, *Police Act*, RSA 2000, c P-17, s 39(8); In British Columbia, *Police Act*, RSBC 1996, c 367, s 22.

confidence in the administration of justice."[35] As discussed earlier, section 24(2) is mainly focused on ensuring the court's legitimacy rather than the legitimacy of the police. In trying to "distance themselves from the misconduct of police" or being concerned about placing too onerous burdens on the government – without taking further steps to address the roots of these issues – are not the courts enabling *Charter* violations? If the courts are (1) continually identifying flagrant *Charter* violations and systemic patterns of abuse; (2) readily admitting that the law they are laying out is so complex and confusing that it would be impossible for the police to implement in the field; and (3) not taking steps to address these infringements on Canadian's *Charter* rights -- how can this be acceptable to Canadians?

III. AFTER-THE-FACT ACCOUNTABILITY & EROSION OF PUBLIC TRUST

The court's warnings for the police to "do better" are falling on deaf ears. In the summer of 2022, the Toronto Star conducted an investigation to uncover cases where the courts had found that the police violated the *Charter*.[36] Their main goal was to determine whether courts are notifying police forces of these rulings and whether the officers involved are facing any consequences. With the help of Western University's law school, the Toronto Star uncovered 600 court rulings from 2011 to 2021, where judges found that officers committed *Charter* violations that resulted in the evidence being excluded under section 24(2).[37] From 2017 to 2021, the Star reported that "the court rulings came down at a rate of two per week," resulting in almost 400 of the 600 cases occurring in the last five years.[38] This investigation revealed a number of very concerning problems.

A. Problem #1: No Systems in Place to Track Police Violations of the *Charter*

The Toronto Star found that <u>none</u> of the 40+ police forces that were consulted had a way of tracking cases. Upon further research, the Star also discovered that neither the courts nor provinces were required to keep systemic track of *Charter* breaches.[39]

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35 *Grant*, *supra* note 16 at para 201.
36 TorStar, *supra* note 8.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*

B. Problem #2: No Systems in Place to Notify Police Forces of *Charter* Violations

There are also no formal systems in place to notify police forces of court rulings. Across the country, police forces rely on the Crown to inform them when their officers are found to have committed serious *Charter* violations. However, this "informal line of communication" between the Crown prosecution and police leadership is either broken or non-existent.[40] In many cases, what happens in the courtroom never reaches the police station.

The Toronto Police Service said it was unaware of 94 cases of *Charter* breaches in their force until the Star told them about the rulings — this was two-thirds of the cases identified where Toronto police officers were involved.[41]

The article showcased that this lack of communication also extends to the individual officers themselves. In October 2020, Officer Salomon Gutierrez was cross-examined in relation to an unlawful search he had conducted. In questioning the officer, the defence attorney brought up a previous case where a judge had found that Officer Gutierrez had arbitrarily detained another individual and had failed to inform him of his right to counsel. At this point, Officer Gutierrez admitted to the court that it was the first time he had heard of the results of the 2018 ruling. He said that "when he testified in that case, no one ever told him which way it went after he left the witness stand. No one told him his conduct concerned the judge and led to key evidence being excluded."[42]

This corresponds with what many officers said in response to a survey conducted by Troy Riddell and Dennis Baker for their article *The Charter Beat: The Impact of Rights Decisions on Canadian Policing.*[43] Most commentators stated that:

> [Officers] usually received no feedback whatsoever about what happened to the evidence or the case: the officers were left wondering whether the Crown proceeded, whether the evidence collected was used or avoided because of potential *Charter* problems, or if the case ended in a plea bargain. Only in exceptional cases – perhaps a major crime in which key evidence is excluded – was it possible that officers might be made aware of any mistakes they had made. Minor transgressions were likely to go unidentified and uncorrected.[44]

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40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 Troy Riddell & Dennis Baker, "The *Charter* Beat: The Impact of Rights Decisions on Canadian Policing" in *Policy Change, Courts, and the Canadian Constitution* ed by Emmett MacFarlane (University of Toronto Press, 2018) [Riddell].

44 *Ibid* at 179.

However, many respondents expressed a desire for more regular feedback from the prosecution: "I am aware that many cases can get pled out because of other circumstances, but it would be helpful to know if it was something we did incorrectly or could refer to case law to improve upon."[45] This systemic failure to provide behaviour-shaping feedback is a seemingly glaring oversight in policing protocols.

C. Problem #3: Public Concerns over Police Discipline & Investigation

Many factors contribute to citizens' views of the police. Yet one that has substantial influence is a sense that police officers are not always held accountable for their behaviour. A survey conducted by the Angus Reid Institute in September 2020 found that 73% of respondents believed that "the police are not held accountable when they abuse their power."[46]

This distrust arises because of a few reasons. The first is that there is generally a lack of transparency when it comes to disciplining police. Often, investigations concerning police *Charte*r violations take place internally in the police force as "personnel matters." Due to the informal nature of these reviews and privacy concerns, the results of those investigations (or any discipline that might occur) are kept hidden from public view.

There are concerns that *Charter* violations or public complaints regarding police officers are not taken seriously. The public may question how police can be held accountable for their actions – when the officers or their forces fail to keep track of *Charter* violations committed by their members.

In his review of Independent Police Oversight in Ontario, Justice Michael Tulloch noted, "[m]embers of the public have also told me that the internal prosecution and adjudication of complaints about police by police is one of the main reasons they would not make a complaint…Reasonable members of the public worry that officers are not being vigorously or fairly prosecuted when the officers' peers and co-workers are managing the prosecutions."[47] Interestingly, Justice Tulloch also discovered that individual officers, who potentially stand accused of misconduct, felt that

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45 *Ibid.*

46 "Defend or Defund? One-in-Four Support Cutting Local Police Budgets: Most Back Social Welfare Over Hiring More Cops" (26 October 2020) at 8, online (pdf): *Angus Reid Institute* <www.angusreid.org/wp-content/uploads/2020/10/2020.10.24_Policing2.pdf> [perma.cc/F223-8KGY].

47 Honourable Michael H Tulloch, "Report of the Independent Police Oversight Review" (2017) at 187, online (pdf): <www.policeoversightreview.ca/ReportoftheIndependentPoliceOversightReview.pdf> [perma.cc/LS37-SYLS] [Tulloch] [emphasis added].

they had "no confidence in the fair adjudication of their matter...and that the process was rigged."[48]

In the cases where police were criminally prosecuted in court proceedings, officers are often not found liable for their transgressions. Kent Roach has remarked that "the police, better than other suspects, know when to 'lawyer up' and exercise their right to silence."[49] Roach also pointed to a 2004 study that found that Ontario's Special Investigation Unit prosecutions had a "conviction rate five times less than ordinary criminal prosecutions."[50] When police are held liable, the public often concludes that they receive light to mild penalties: "disciplinary penalties often involve temporary demotions and/or docking of pay or days off."[51]

These three identified problems – lack of tracking, lack of notification, and lack of transparent and unbiased discipline – undoubtedly lead members of the public to question whether enough is being done to address problematic behaviour and illegal conduct exhibited by the police.

These identified problems raise more general concerns about how police are implementing *Charter* decisions into their policies and practices. Even though the law regarding police powers changes from each court ruling to the next, there is nothing that legally orders the police to change their policies and practices to reflect new *Charter* rules. In fact, we have very little empirical data on the impact of *Charter* decisions on police behaviour. In 1998, legal scholar Alan Young remarked, "we can only speculate whether or not police are trying to live up to the constitutional obligations imposed upon them by the *Charter*."[52] I think that comment still holds true today.

In his recent book, *Canadian Policing: Why and How it Must Change*, Kent Roach argues that this "massive investment in legalised, after-the-fact accountability and due process is no guarantee that our police forces will be effective or law abiding."[53] He demonstrates this point by providing an example of the after-effects of the Supreme Court's 2001 decision of *R v Golden*. Within the case, the SCC described strip searches as "one of the most extreme exercises of police power" and an "inherently humiliating and

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48 *Ibid.*

49 Roach, *supra* note 29 at 51.

50 Kent Roach, "Models of Civilian Police Review" in *Issues in Civilian Oversight of Policing* (Toronto: Canada Law Book, 2014), at 330-31, citing Ian D Scott, "Addressing Police Excessive Use of Force: A Proposal to Amend the Mandate of the Special Investigation Unit." [emphasis added]

51 Roach, *supra* note 29 at 51.

52 Riddell, *supra* note 43 at 170, citing Alan Young, "Search and Seizure in 2004 – Dialogue or Dead End?" (2005) 29 SCLR 351-84.

53 Roach, *supra* note 29 at 52.

degrading" experience.[54] The Court set out eleven questions that police must consider in determining whether performing a strip search (without a search warrant) was necessary. However, in trying to minimize the use of this tactic by police, the decision ultimately had the opposite effect. Roach reports that before the judgment – Toronto police only strip-searched a quarter of those they arrested. In the three years following the decision, this percentage increased to 37.5% and resulted in the Toronto Police Service conducting 50,000 searches in that three-year period.[55] This percentage rose higher in 2014 and 2015 when the Toronto police strip-searched 40% of the people they arrested. Interestingly, during the period between 2014-2016, only 3% of those strip searches actually resulted in evidence being found.[56] In 2019, the Ontario Police Complaints System found that twenty years after *Golden*, the provincial policing standards still had not been updated to reflect the SCC's decision.[57] Only ten out of fifty-three of the police forces defined strip searches as per the Court's description.[58] Even more worrisome was that only a handful of the police services offered an annual refresher course on the limits of searches of this nature.

However, perhaps the blame should not be held entirely by the police. Hearing from officers themselves, through Riddell and Baker's survey, they commented that their biggest challenge was "keeping up to date with the judicial interpretations of police actions" due to its ever-changing nature.[59] In the survey, a majority of respondents took the opportunity to highlight how "*Charter* decisions have made investigations lengthier, more difficult, and uncertain."[60]

Interestingly enough, the officers were not upset with the impact of the *Charter* on their policing practices. In fact, one officer indicated, "if it makes our job more difficult [,] then I'm fine with that. It slows us down and compels us to think critically."[61] Many officers voiced that the truly frustrating aspect was the lack of consistency in the court's interpretations of the *Charter* or areas in the law that were left unresolved. In particular, a number of respondents argued that the expanded requirements for search warrants in the cases of *Feeney*, *Spencer*, and *White* were incredibly difficult to understand, follow in practice, or presented arbitrary obstacles to an

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54 *R v Golden*, 2001 SCC 83 at para 83.
55 Roach, *supra* note 29 at 52.
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 Riddell, *supra* note 43 at 177.
60 *Ibid* at 175.
61 *Ibid.*

investigation.[62] Other concerns were that the courts were not considering the limits of police resources when they made decisions.

While I believe that the courts have tried their best to fill gaps in the law relating to policing, it seems they have failed to provide both the police and Canadians with clear rules and proper feedback on what officers can and cannot legally do. As we have seen, the various tests for determining when a warrant is needed or not needed fail to provide adequate guidance and strategies for police to use when they are in the field. Overall, I believe the biggest mistake has been that Parliament and the legislatures have chosen to abdicate this task to the courts.

I think it is fair to say that what is currently happening does not seem to be diminishing the occurrence of repetitive acts of aggressive over-policing or *Charter* violations. The Toronto Star reported that there were nine police forces in particular, where judges were finding that police officers were repeatedly breaching the same *Charter* rights in successive cases. In highlighting the 600 most recent cases of police *Charter* violations across Canada, the Toronto Star shows that there is an increasingly disturbing trend of brutality, callousness, and ignorance among police. How do we take steps to meaningfully change this type of behaviour?

IV. SOLUTIONS & REFORMS FOR BETTER POLICE ACCOUNTABILITY

If the objective is to proactively stop police from infringing on Canadian's *Charter* rights, many things must happen. Most importantly, public trust in policing needs to have increased support, not the opposite. Ironically, this is important because eroding confidence in police services is an existential threat to policing and Canadian's *Charter* rights.

What does the Canadian public need from our police? We need officers who are critical thinkers and who understand the diverse and complex natures of the communities and people they serve. They must have a temperament and empathy that support their role as both law enforcement and civil service professionals. Finally, we need police who fully understand the law and have the appropriate tools to protect the rights afforded to Canadians.

If we are ever going to achieve these things, we need to work towards establishing objective, fair, accessible, and community-focused regulation and oversight. We need to clarify and legislate the laws governing what police can and cannot do and provide better governance, oversight, and

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[62] *Ibid.*

feedback to police operations – with the main goal of protecting the public from police malpractice and misconduct. While I admit that these are ambitious suggestions, perhaps it is best to look to the British for inspiration, like we have traditionally done when it comes to policing.

A. Recommendation #1: Legislate Clearer Rules Regarding Police Powers

In 1984, British Parliament enacted *The Police and Criminal Evidence Act* ("PACE"), a legislative framework that sought to unify police powers under one code of practice and to carefully balance the rights of the individual against the powers of the police in England and Wales.[63] This legislation offers a comprehensive and realistic "rulebook" on how police must conduct stops, searches, arrests, detentions, identifications, and interrogation practices. PACE requires that Codes of Practice governing particular police powers are regularly issued and updated. For example, the Code of Practice on the treatment and questioning of detained persons is almost 100 pages long – but it provides detailed, plain-language directions to the police on what is expected of them and guidance on what to do in related situations.

The enactment of new laws or amendments in Canada would allow the police to provide input on what will work in the "field," mindful of the resources available. Legislating these procedures would give police more time to train their officers on new requirements as opposed to reactively adjusting policies every time a judicial decision comes out.

The courts need to stand firm and say that they are no longer going to recognize police powers that are derived from the common law. This would force Parliament to codify and hopefully solidify the rather vague and complex rules surrounding police powers. I believe there needs to be a clear, definitive transfer of responsibility from the courts to Parliament. Considering the power and impact that policing can have on Canadians' lives, there should not be any ambiguity in the rules governing what officers are legally allowed to do.

B. Recommendation #2: Professionalize the Police & Establish College of Policing

With growing public distrust, the time has come for the police to evolve from an occupation into a formal profession. In order to do this, the creation of provincial regulatory "Colleges of Policing" should be established with the key objective of protecting the public from police

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[63] *The Police and Criminal Evidence Act 1984* (PACE), c 60.

malpractice and misconduct. This suggestion was implemented by the United Kingdom in 2012, where the College of Policing was established as a professional body to regulate those involved with police work.[64] It operates as an independent, arm's length body of the Home Office – the governmental department in charge of immigration, security, and law and order – and has seen positive results.

In the article, *Peeling the Paradigm: Exploring the Professionalization of Policing in Canada,* the authors believe that the current governance and organization of Canadian policing fall short of the traditional definitions of a formal profession – that is, "an occupation directed by a government registered body that establishes the scope of practice, minimum educational credentials, continuing education requirement, and oversight process."[65] This idea of professionalizing the police and creating an independent regulatory body has been endorsed by a number of legal scholars and police leaders in Canada. In fact, one of the top recommendations of Justice Tulloch's report was the establishment of a College of Policing in Canada.[66] A College of Policing in each province and territory could better help provide education and competence of officers, the regulation of police practice, and a means of responding to complaints. However, what would professionalizing the police mean in practice?

1. Help develop training and education

Currently, officers receive most of their training through short-duration classroom instruction and on-the-job learning from experienced officers. This type of training focuses on helping new officers acquire job-specific technical knowledge and the skills to perform effectively. Police organizations invest heavily in this type of training; however, "education" – which focuses on the continuous process of developing knowledge, critical thinking skills, empathy, and judgment – is left up to the individual officers to pursue. Unfortunately, there are not many options available to officers who want to gain a better understanding of what the law means and how it impacts their practices. In fact, in Riddell and Baker's survey, the respondents showed a considerable desire for "additional training with respect to the *Charter* and its impacts on police practices."[67]

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64 "About Us" (2022), online: *College of Policing (UK)* <www.college.police.uk/about> [perma.cc/Q2NV-NLDM].

65 Kelly Sunberg et al, "Peeling the Paradigm: Exploring the Professionalization of Policing in Canada" (2021) 6:4CSWB at 187, online: <doi.org/10.35502/jcswb.227> [perma.cc/LJ72-3UXZ] [Sunberg].

66 Tulloch, *supra* note 47 at 257.

67 Riddell, *supra* note 43 at 176.

The College would ensure that policing services recruit and develop more educated, comprehensively trained, and socially diverse officers. While working to improve the training, the College would help create continuing education and training initiatives for both new recruits and current officers. The College could require that all police participate in a certain number of workshops or seminars each year and may even require competence testing throughout an officer's career. This would be similar to how other regulated professions, such as Law Societies or College of Physicians and Surgeons, require mandatory continuing education for their members. In the context of a College of Policing, education could be tailored to address the problems that police are most often encountering in the field and could help provide skills that officers need – sensitivity and mental health training, etc. The College could adopt the task of informing officers on how new legislation would affect policing practices by creating easy-to-understand bulletins that lay out the facts, reasonings, and rules derived from each case as well as practice scenarios for police to think through.

2. The College could also assist in the development of policing practices

In addition to providing educational resources and support for officers, the College could be a hub for researching the best police practices. They could be responsible for collecting a variety of different statistics related to activities performed by the police – looking at things such as the demographic of individuals who the police interact with, the success of police tactics, and the challenges that officers face. With this information, the College would be in a position to help police forces and the government craft the best approaches to a number of policing issues.

3. The College could help facilitate open communication between the courts, police, and public

Perhaps one of its best features is that the College could act as an independent entity – facilitating communication between the courts, prosecution, government, police, and public. For example, the College could be in charge of tracking judicial decisions regarding *Charter* breaches and notifying police forces and officers of these rulings. This could be similar to how the Law Society of Manitoba releases a newsletter that includes summaries of important decisions or issues that lawyers need to be aware of to meet competence ethical standards. With this information, the College could follow up on *Charter* breaches by commencing an investigation and disciplinary proceedings or provide further training programs and resources to address behavioural problems. The College

could also gather feedback from the Crown – dispersing it to individual officers and providing supplementary instruction if needed.

If lawmakers were to codify the rules governing police powers, the College would be in an excellent position to share research about best practices, facilitate conversations with the police forces on the "workability" of proposed amendments, and survey the public for their thoughts and concerns.

4. Licensing of police officers

The College of Policing could also assume the role of licensing police officers. Currently, a police officer's badge is the symbol of authority granted by both the government and the police profession. However, if policing was transitioned to a licensed profession, an individual's badge could essentially be the "professional license" – an indicator that the officer's conduct, training, and education have satisfied the established guidelines and standards of the profession. The risk of falling below those standings could result in an officer having their license suspended or withdrawn. As suggested by Justice Tulloch, the College of Policing could maintain a public register of licensed police officers in the same way as the regulated health and legal professions.[68]

5. Help keep police accountable to the Canadian public

Where a judge finds that police misconduct was sufficiently serious to put the "administration of justice into disrepute" and exclude the evidence – it is also imaginable that those same actions would bring equal disrepute to the profession of policing. As suggested above, one of the main tasks of the College would be to identify instances of *Charter* violations, take the necessary steps to remediate behaviour, and proactively stop these types of violations from occurring. The College would similarly be the entity receiving and reviewing public complaints of misconduct, carrying out investigations, and adjudicating disciplinary hearings.

In his report, Justice Tulloch argued that a College of Policing should not replace the public oversight bodies – but rather, the College should seek to complement through the development of a culture of professionalization.[69] However, one of the main motivators behind Justice Tulloch's report was to reduce the overlap and inefficiencies in each service.

I believe these oversight agencies would be better situated and supported under the larger operations of the College. This would be

[68] Tulloch, *supra* note 47 at 259.

[69] *Ibid* at 20.

important considering that the College's ultimate responsibility would be to restore the relationship between the police and the public. Many members of the public do not understand how police oversight functions, who works for the oversight bodies, and what are the consequences that officers face when charged and convicted. The College could inform the public of what the police do, how the police are required to respect Canadian's rights, and how officers are kept accountable if they fail to abide by the standards and expectations laid out by the profession. The College can help transform policing from a largely reactive to a proactive profession.

6. Requirement for the College to be an independent regulator rather than a self-regulator

The biggest challenge that the College would face would be its independence. There have been a number of criticisms of self-regulating professions.[70] By having practitioners be in charge of regulating the profession, there is a genuine concern that the interests of the profession could supersede the goal of protecting the public. Given the growing public distrust, it would be critical for the College to be an independent entity – free from the influence of both the police and the government. In order to inspire trust and public support, the College would need to be capable of delivering its services to its stakeholders in an impartial and objective way.

This would be no easy task. Essentially acting as a "referee," the College would be required, at times to balance the competing wants and needs of the police, government, and public. The College could seek to elect board representatives from a variety of groups, including the police, members of the provincial government, lawyers, leaders from the communities, representatives from social services, and members of the general public. The College's executives may come from a variety of different backgrounds, but their main goal would be to ensure the protection of the public in the delivery of policing services.

The Organisation for Economic Cooperation and Development ("OECD") suggests that a regulator's independence "does not imply that regulators are anonymous, silent or above and beyond the policy arena."[71] Rather, the OECD encourages "[r]egulators to interact with ministries, who are ultimately responsible for developing the policies for the regulated sector; with parliament, who approve those policies and often

[70] Alison Motluk, "Self-regulation in health care professions comes under scrutiny" (2019) 191:33 CMAJ, online: <doi.org/10.1503/cmaj.109-5790> [perma.cc/77B4-RD7Y]; Andrea MacGregor, "Conflicts of Interest in Self-Regulating Health Professions Regulators" (2021) 44:1 Dal LJ 339, online: <canlii.ca/t/t9g6> [perma.cc/84KB-AS5K].

[71] "The Governance of Regulators" (2016), online: *OECD iLibrary* <doi.org/10.1787/9789264255401-en> [perma.cc/2NAW-AJBQ].

evaluate/assist in their implementation; with the regulated industry, which needs to comply with the decisions of the regulator; and with citizens, who are the ultimate beneficiaries of the actions of government and regulators. These interactions are inevitable and desirable."[72] The biggest challenge will be to ensure that the College is not swayed too much one way or the other by these stakeholder interests – but endeavours to respect what the police need and the concerns that the public voice.

V. CONCLUSION

If we are going to tackle the problems, each stakeholder is going to have a role to play. Parliament would be required to draft and codify clear rules governing police powers; they would have to "professionalize" the police through legislation; and would need to help establish the College of Policing as an Independent Regulator in each province. The courts would have to refrain from expanding common law police powers and become more actively involved in referring concerns over police misconduct to the College, perhaps under section 24(1). The police would have to be open-minded to working with the College of Policing and accepting the help and constructive criticism they would receive. The public would have to move past the urge to punish the police for the harm they have caused and actively work to create a profession of policing that truly serves to protect the *Charter* rights of Canadians.

[72] *Ibid.*

To Serve and Protect the Mental Cost of Policing

NIKKI BOGGS *

ABSTRACT

Police officers are exposed to high-stress levels with consistently high ever-evolving demands. In addition to the orders and stress, there is also the exposure to unpredictable danger and physical challenges. However, it was frequently overlooked what impact such work had on a frontline officer's mental health. In recent years there has been a shift to focus on such impacts as the number of officers who committed suicide continued to grow, and the number of officers on leave increased. This paper aims to examine the effect that serving and protecting one's community has on officers' mental health and its impact on their ability to continue to do their job. Additionally, this paper aims to explore some recommendations for police agencies to adopt to best support active members. More research is ultimately required to determine the impact that Post-traumatic Stress Disorder, Operational Stress Injuries, and other mental health concerns can have on policing. As well, more research is necessary to determine the best practices that would be able to assist officers following a traumatic event or ensuring ongoing good mental fitness and support. Finally, the assistance police officers receive for on-the-job mental health injuries; and the requirement for continuous mental health checks should have the benefit of being standardized across the nation.

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Keywords: Police Officer, Policing, Impact, Post-traumatic Stress Disorder, Operational and Organizational Stress.

I. INTRODUCTION

Policing is a mentally tasking occupation due to the shift work, threats of violence, occupational demand for increased hypervigilance, and, at times, lack of public support, among other job-related factors. These factors add to the chronic stress experienced by frontline officers in addition to any institutional trauma seen in the examples and cases explored below. Therefore, it is not surprising that those entrusted with public safety are at a greater risk of suffering from mental health challenges than the general population. Such challenges include Post-traumatic Stress Disorder (PTSD) and Operational Stress Injuries (OSI). Undoubtedly, there is no lack of literature on the impact policing has on those who signed up to do the job. However, what is unclear is, do these factors impact how an officer can perform this job, and if so, how and to what extent? As we will see, it will be determined, without a doubt, the impacts of policing on an officer's mental health affect how and if an officer can continue to serve and protect. What is not clear is to what degree. More research is ultimately required to determine the impact PTSD and an OSI can have on policing. In addition, more research is necessary to determine the best practices that would be able to assist officers following a traumatic event or ensuring ongoing good mental fitness and support. National standards should also be implemented concerning the assistance police officers receive for any mental health injuries received on the job, such as PTSD and OSIs, in addition to standards for mental health assessments for new recruits and ongoing mental evaluations for active members.

II. OVERVIEW OF PTSD

In order to help understand how an officer may be impacted on the job by PTSD or another form of OSI, a cursory overview will be conducted. This is by no means intended to be extensive or encompassing but instead covers some general points that could realistically impact the requirements of an officer on duty.

Anyone can develop PTSD; however, personal factors can affect whether someone will develop PTSD.[1] In addition, several factors can

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[1] Such factors are previous traumatic exposure, age, and gender. See "PTSD Basics" in Angela L Williams, ed, *Health Reference Series: PTSD and Coping with Trauma Sourcebook*

increase the chance of someone developing PTSD, most of which are not under that person's control. For example, being physically injured in the event or having a very intense or long-lasting traumatic event can make a person more likely to develop PTSD.[2] There are four main types of difficulties someone with PTSD may experience. One such obstacle is reliving the traumatic event, which can be through flashbacks, vivid nightmares, or reoccurring memories.[3] PTSD is also more common after specific types of trauma, such as combat.[4]

Additionally, PTSD can create negative changes in an individual's thoughts and feelings.[5] And lastly, individuals can become overly alert or wound up, which can significantly impact sleep.[6] What happens after a traumatic event is also crucial to what impact PTSD will have on the individual following. Stress following the event can make PTSD more likely, while social support can make it less likely.[7]

PTSD can affect a person's ability to perform day-to-day activities or work.[8] In addition, when the disorder goes on for some time and is not adequately treated, it is not unusual for people to experience other mental health problems simultaneously. In fact, up to 80 percent of people with longstanding PTSD contend with additional issues.[9] Some of those most commonly seen are depression, anxiety, alcohol, and other substance misuses.[10] Therefore, conducting mental health screenings for police recruits is a proactive approach to ensure that individuals assuming the responsibility of law enforcement are in the best mental health state possible.

(Omnigraphies Inc, 2020),online: <search.credoreference.com/content/entry/ogiptsd/ptsd_basics/0?institutionId=1217> [*PTSD Basics*].

2 *Ibid.*

3 Another would be an attempt to avoid reminders of the distressing event. This can include avoiding places, activities, or situations; some even avoid certain people. This can add to feelings of detachment. See Victoria, Australia Department of Health, "Post-traumatic stress disorder (PTSD)" (4 April 2022), online: *Better Health Channel* <www.betterhealth.vic.gov.au/health/conditionsandtreatments/post-traumatic-stress-disorder-ptsd> [perma.cc/N4QP-UKRC] [*Better Health*].

4 *Ibid.*

5 Those can include feeling angry, guilty, afraid, or numb. See *Better Health*, *supra* note 3.

6 Lack of sleep can have several negative effects such as irritability, lack of concentration, easily becoming startled, or continually being on the lookout for danger. See *Better Health*, *supra* note 3.

7 *Better Health*, *supra* note 3

8 *Ibid.*

9 *Ibid.*

10 *Ibid.* This may have developed directly in response to a traumatic event or due to the stress disorder's effects.

As such, police agencies in Canada conduct psychological screenings with their new recruits.[11] Ideally, the clinical assessment aims to identify any candidates who demonstrate personality traits, behaviour patterns, or psychological characteristics that could pose issues while working as a police officer.[12] In 2013, the Canadian Psychological Association released *Principles and Guidelines for Canadian Psychologists* who conduct pre-employment clinical assessments for police candidates.[13] The handout indicates that Canadian psychologists conducting clinical assessments face a significant obstacle as Canada has no uniform standard for such evaluations.[14] While some provinces like Alberta and Ontario have established their own protocols, psychologists in Canada often resort to American methods and legal precedents.[15] While these resources can be useful, certain US standards and precedents may not be applicable to the Canadian context.[16] Given the potential for significant adverse consequences of hiring the wrong individual to do police work, the stakes are high in assessing a candidate's suitability. What is not clear is what, if any, ongoing psychological or mental fitness examinations are required throughout an officer's career. Additionally, it is unclear if there is a uniform standard across the country for such ongoing examinations.

In addition to a clinical PTSD diagnosis, officers can suffer from Operational Stress Injuries (OSI). More about OSIs and their impact on policing is discussed below. There are understandably many stressors a police officer can face. Some of these seem fairly obvious, the risk of

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11 See Recruiting, "Police Constable," online: *City of Winnipeg* <legacy.winnipeg.ca/police/policerecruiting/constable.stm#4> [perma.cc/Q9GZ-JH74]; See also, "Qualifications and standards to become an RCMP officer" (30 July 2020), online: Royal Canadian Mounted Police <www.rcmp-grc.gc.ca/en/qualifications-and-requirements> [perma.cc/2VRG-YGT5].

12 Notably, a presence or history of mental illnesses does not necessarily imply that a candidate would not meet the selection criteria. See Canadian Psychological Association, "The Pre-employment Clinical Assessment of Police Candidates: Principles and Guidelines for Canadian Psychologists" (2013) at 2, online (pdf): <cpa.ca/docs/File/News/2013-07/Police%20assess%20guidelines%20April2013final.pdf> [perma.cc/A46Y-Z3CZ] [Clinical Assessment of Police Candidates].

13 *Ibid*.

14 *Ibid* at 2.

15 *Ibid*.

16 For instance, several states in the US have laws that prohibit the employment of individuals with any Axis 1 disorder as police officers. However, in Canada, such legislation would likely be deemed a violation of human rights laws in most, if not all, jurisdictions. See *ibid*.

personal bodily harm, seeing horrendous things, and having to use lethal force against a person. However, some of the stressors are not so obvious. To best understand how an officer is exposed to on-the-job trauma, a look into the various stressors an officer can face is required.

III. CAUSES OF STRESS AS IT RELATES TO POLICING

Police officers are exposed to events of a traumatic nature regularly. In addition, the profession's dangerous and sometimes unpredictable nature exposes officers to acute and chronic stress over their careers.[17] In many fields, job stress generally plays a significant problem for employees. For example, in 2019, Career Cast conducted a survey finding that 78% of people felt excessive stress in their positions.[18] The most significant stressors included frequent and rigid deadlines, public interaction, and growth potential.[19] This study's participants were not Police but rather office workers and the like. Police work is inherently stressful; such pressure involves the apparent possibility of life-threatening situations. Other not-so-obvious ones include organizational and operational stressors, which the Deer Lodge Centre explains as a term devised by the Canadian Forces to describe the scale of adverse health effects caused by service.

A. Operational Stress

Defining operational stress as it relates to public safety officers in Canada has not been consistent. For example, in 2016, it was recommended by the Standing Committee on Public Safety and National Security that Public Safety Canada work in conjunction with Veterans Affairs, Canadian Armed Forces, etc., to create such a uniform definition,

> …to create a clear, consistent, and comprehensive definition of Operational Stress Injuries that encompass both diagnosed illnesses and other conditions, and that this definition be developed in collaboration with medical experts and according to international standards.[20]

Dr. Carleton explained to the Standing Committee on Public Safety and National Security that an OSI developed amongst public safety officers

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17 Katelyn K Jetelina et al, "Cumulative, high-stress calls impacting adverse events among law enforcement and the public" (2020) 20:1137 BMC Public Health at 1 [Cumulative].

18 CareerCast.com, "2019 Jobs Rated Report on Stress," online: *Career Cast* <www.careercast.com/jobs-rated/2019-jobs-rated-stress> [perma.cc/KV6T-8FSB].

19 *Ibid.*

20 House of Commons, *Healthy Minds, Safe Communities: Report of the Standing Committee on Public Safety and National Security* (October 2006) (Chair: Robert Oliphant) at 27.

differs from a military member.[21] Dr. Carleton, an Associate Professor of the Department of Psychology at the University of Regina, explains,

> When we deploy our military to Afghanistan, for example, we're taking them from a safe zone and we are deploying them to an unsafe zone, and then we are bringing them back to a safe zone. There's an important distinction between that framing and what we do with our public safety personnel or our first responders; we deploy them, effectively, to an unsafe zone for 25 or 30 years. They're in a constant state of uncertainty. On day one they might be out for a coffee with someone, and on day two they might be responsible for arresting that person, resuscitating that person, or rehabilitating that person. We're really deploying them to their own communities, which makes for a very different form of exposure.[22]

The Canadian Mental Health Association defines an OSI as any persistent psychological struggle from operational duties such as law enforcement.[23] Those experiencing high levels of OSIs are more likely to suffer from depression, anxiety, and PTSD.[24]

Occupational stress, or operational stress as it can be referred to, is inherent to police work as the threat of physical danger, exposure to horrific events, shift work, overtime demands in addition to staff shortages, and managing relationships with coworkers.[25] The domino effect of occupational stress is littered throughout an officer's career.[26] As police continually work with the public, ensuring public confidence and support is crucial to successfully carry out their duties. As police rely on the public to cooperate in reporting crimes, help during investigations, call for assistance if needed, and abide by laws and, if given, abide by police orders.[27] Yet, in Statistics Canada's 2019 report on public perceptions of the police, only 41% of Canadians said they had great confidence in the police.[28] Moreover, citizens' confidence in police varies based on what the province

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21 *Ibid* at 9.

22 *Ibid.*

23 "Operational Stress Injury" (2023), online: *Canadian Mental Health Association: Ontario* <ontario.cmha.ca/provincial-policy/criminal-justice/operational-stress-injury/> [perma.cc/NUR6-HMUH].

24 *Ibid.*

25 Filip Kukic et al, "Operational stress of police officers: A cross-sectional study in three countries with centralized, hierarchical organization" (2022) 16:1 *Policing: A Journal of Policy and Practice* at 96 [Operational Stress].

26 *Ibid.* For example, working shift work and overtime can contribute to an officer's fatigue and sleep disruptions, which can increase an officer's risk of cardiovascular disease and overall feeling of unwellness.

27 Dyna Ibrahim, Canadian Centre for Justice and Community Safety Statistics "Public perceptions of the police in Canada's provinces, 2019" *Statistics Canada* (Released: 25 November 2020) [Public Perceptions].

28 *Ibid* at 3.

reported.[29] If police frequently struggle to perform their job due to a lack of trust and cooperation from citizens, that would undoubtedly be an additional stressor that the individual officer may have little to no control over.

A 1989 study published in Psychological Reports looked at the career stages, satisfaction, and well-being among Police Officers.[30] One component analyzed was individual well-being and health. Some of the issues identified in the 1989 study were also seen in a 2012 report, Caring for and about those who serve: Work-life conflict and employee well-being within Canada's Police Departments.[31] Both speak to work-life balance, long work hours, understaffing issues, and managing the public's expectations, just to mention a few identified matters.[32]

In 2021, Jennifer Shorts researched the operational stress factors officers felt overall, some of which included working alone at night and negative comments about the police.[33] For sworn members, the five most stressful operational factors were: fatigue, negative comments from the public, paperwork, shiftwork, and finding the time to stay in good physical condition.[34] As seen from the studies from 1989, 2012, and 2021, the operational stressors felt by serving members remain relatively identical. It is important to note that the impact of occupational stressors on an officer can be a build-up over the years of exposure to some of the worst circumstances.[35] However, it can also be "a single traumatic event, which is often followed by intense analysis by supervisors, media, and the general public, all with the benefit of hindsight and time…."[36] Given that operational stress factors can contribute negatively to the physical and

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29 See *ibid* at 5.

30 Ronald J Burke, "Career Stages, Satisfaction, and Well-Being among Police Officers" (14 June 1989) 65:1 Psychol Rep [Ronald J Burke].

31 Linda Duxbury & Christopher Higgins, "Caring for and about those who serve: Work-life conflict and employee well being within Canada's Police Departments" (2012), online (pdf): <sprott.carleton.ca/wp-content/uploads/Duxbury-Higgins-Police2012_fullreport.pdf> [perma.cc/3ALR-XJSX].

32 See *ibid*; See also Ronald J Burke, *supra* note 30.

33 Jennifer L Short, "Predicting Mental Health Quality of Life in Policing: Officers and Civilians" (2020) 36:276-287 *J Police and Crim Psychol* at 279 [Predicting Mental Health].

34 *Ibid* at 280.

35 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 7 (10 March 2016) at 12:10 (Tom Stamatakis) [*Evidence*].

36 *Ibid*. See also Olivia Johnson et al, *Practical Considerations for Preventing Police Suicide* (2022) Springer Nature Switzerland AG at 40 [*Practical Considerations*]. To some degree, operational stressors are somewhat expected, which officers are prepared and trained to face. But on the other hand, the stress felt as a result of the organization is not often expected and can be perceived as unnecessary and inescapable.

mental health of officers, police organizations must prioritize this aspect and provide support and resources to mitigate the impact, in addition, to looking at internal ways to ease the effect felt on frontline officers.

B. Organizational Stress

The stress experienced by officers is not limited to the pressure felt about the job itself. Instead, it can come from the policies and practices implemented by the organization for which the police work. Witnesses who testified before the Standing Committee on Public Safety and National Security in 2016 indicated that organizational stressors exist in the workplace. Although they can be distinct from a traumatic event, they are nonetheless aggravating factors.[37]

It is understood that there is a long-time culture that encourages members to tough it out and work through problems while ensuring they are complying with the full complement of their police duties.[38] The executive level within police organizations needs to do its part to "end the stigma," then-President of the Canadian Police Association Tom Stamatakis said.[39] He also added that more work is required to better understand the difficulties officers who are suffering face. It was noted that Canadian police associations have made progress in recent years concerning such issues by developing employee assistance programs, peer counselling, and implementing psychological health and safety standards.[40]

The study noted in the above section by Jennifer Short also examined the impact of operational stress factors on police. The five most stressful ones indicated by members concerning the organization were staff shortages, bureaucratic red tape, the feeling that different rules applied to other people, the need to constantly prove oneself to the organization, and inconsistent leadership styles.[41] Not overly surprisingly, Ms. Short found in her research psychological and social relationship quality of life are significantly and positively correlated,[42] suggesting that as one increases, the other also increases. Psychological quality of life among officers is significantly and negatively related to operational stress, organizational stress, public stigma, and self-stigma.[43]

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37 *Evidence*, *supra* note 35.
38 *Ibid*.
39 *Ibid*.
40 *Ibid*.
41 Predicting Mental Health, *supra* note 33 at 280.
42 *Ibid* at 279.
43 *Ibid* at 280.

As a result, the psychological quality of life can be significantly predicted based on operational stress.[44] Ms. Short's findings show that operational stress alone accounts for 25% of the psychological impact on the quality of life for members.[45] Ultimately, she notes that adding organizational stress to her model does not significantly improve the prediction of an officer experiencing an impact on their psychological quality of life.[46] Nor does organizational stress mediate the effect of operational stress on their psychological quality of life.[47]

However, what happens when the organization itself is part of the problem? Victoria Police Sergeant Paul Brookes feels that this is what he faced. Brookes, who suffers from PTSD and major depressive disorder, says the department failed to treat mental-health injuries equally or even remotely close to physical injuries.[48] Sergeant Brookes' feelings about the Victoria Police are shared with other colleagues. The department's co-sponsored mental health and well-being study had a high response rate. 79% of the department's officers participated.[49]

Results from the study found 20% of the 249 officers on the force were on leave, many due to mental health challenges.[50] With so many officers on leave due to mental health injuries, criminology Professor Griffiths said, the force was not meeting its minimum staffing requirements.[51] Professor Griffiths, who led the research team, added that as a result of the understaffing uninjured officers are overworked, leading to burnout.[52] The study also revealed something else disturbing, the majority of officers who took part in the study described the workplace culture as "toxic," "micromanaged," and "crumbling," with 69% noting the department does not have a respectful workplace.[53]

The culprit for the department's discontentedness is the senior leadership, as a significant number of officers surveyed said they felt the

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44 *Ibid* at 280.

45 *Ibid.*

46 *Ibid.*

47 Tori Marlan, "On stress leave with a service weapon: Victoria police officers with PTSD say the department is failing them" (2 November 2022), online: *Capital Daily* <www.capitaldaily.ca/news/victoria-police-officers-ptsd> [perma.cc/B2M4-8DP2] [Stress leave with a service weapon].

48 *Ibid.*

49 *Ibid.*

50 Stress leave with a service weapon, *supra* note 47. Of the officers still actively on duty, 22% had clinical symptoms of PTSD.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

department "did not value members' mental health."[54] For example, Sergeant Brookes added, "to say [senior managers] have been less than supportive is giving them more credit than they're due."[55] In an interview concerning the Victoria Police Force and PTSD, five officers asserted that their mental-health injuries are "exacerbated by the workplace culture of VicPD – a place where cronyism, rather than merit, determines whose careers advance and whose don't."[56]

The feelings of the five officers with respect to their police force and the impact on their mental health are not uncommon. Research shows what officers experience inside their detachment can be just as significant to their mental health as what they experience on the streets.[57] For example, a study conducted after one year of policing examined the relationship between the work environment and PTSD.[58] It found the work environment of the police officer "was more strongly associated with symptoms of PTSD than either work-related critical incident exposures or negative life events that are unrelated to policing."[59] A significant finding from the study was "a compassionate work environment becomes a protective factor that arguably shields police officers against the development of PTSD."[60]

Victoria Police officers are not alone in their findings. For example, a survey conducted in 2021 found morale within the Winnipeg Police Service (WPS) was terrible.[61] With 80% of the 1104 officers who responded to the survey sharing their opinion, in addition to the high degree of employee burnout, nearly a third of officers (and civilian staff) meet the criteria for PTSD, generalized anxiety disorder, or depression.[62] The terrifying part is that 12% of the 884 participating officers meet the diagnostic criteria for all three.[63] In addition, 4% of the officers surveyed said they seriously contemplated suicide within the last year.[64] The culture of police work can profoundly affect an officer's mental health. Therefore, police departments

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54 *Ibid.*

55 *Ibid.*

56 *Ibid.* In addition, the undertone of racism is also present and challenging for officers.

57 Stress leave with a service weapon, *supra* note 47.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 Sean Kavanagh et al, "Survey paints bleak picture of morale within Winnipeg Police Service ranks"(11 June 2021), online: *CBC Manitoba* <www.cbc.ca/news/canada/manitoba/winnipeg-police-service-morale-survey-1.6062698> [perma.cc/4HGC-3LLZ].

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

must make officers' well-being a priority and establish a work environment that is positive and supportive. This involves granting officers access to mental health resources, fostering a culture of openness and support, and acknowledging the potential impact of trauma exposure on an officer's mental health. Given the potential impact of the job on an officer's mental well-being, police departments should take responsibility for identifying and addressing any organizational stressors that could negatively affect their officers.

Also of consideration is what happens when some of the job struggles officers face result from the location where they are posted. All communities require officers to serve and protect. However, balancing the necessity of having police officers in such challenging areas with the effect such locations may have on officers is a delicate undertaking. The challenges discussed below relate to policing in northern and remote areas and Indigenous policing.

IV. NORTHERN, REMOTE AREAS AND INDIGENOUS POLICING

In addition to the stress many frontline officers feel, certain positions or postings come with their own unique experiences. Policing in northern and remote areas and Indigenous Policing all provide a different experience from their urban counterparts.[65] Some of the health and safety risks attributed to such an experience are inaccessible or delayed backup, geographic obstacles, inclement weather, understaffing, and poor or deficiencies with police equipment.[66] Also, some of the health issues are seen in the form of mental health due to the additional stress felt from policing in such areas.[67]

Concerning confidence in general for police among Indigenous people, Statistics Canada reported that that did not appear to differ regardless of where the person lived. In urban areas, 33% of Indigenous people had confidence in policing, whereas, in rural areas, 25% had confidence in policing.[68] Interestingly though, concerning reporting low confidence, Indigenous people who live in a rural area were more likely to say this compared to their urban counterparts at 23% compared to 13%,

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65 Rosemary Ricciardelli, "Risk It Out, Risk It Out": Occupational and Organizational Stresses in Rural Policing" (2018), 21:4 Police Q 415-439.

66 *Ibid* at 415.

67 *Ibid*.

68 Public Perceptions, *supra* note 27.

respectively.[69] As noted above, the impact of the public's perception is tied to the stress officers feel while conducting their job.

First Nations policing programs have many limitations compared to their counterparts nationwide. The Standing Committee on Indigenous and Northern Affairs published its collaborative approaches to the enforcement of laws in Indigenous communities in June of 2021.[70] Chief Keith Blake testified as to the limitations of the First Nations Police programs. He testified inequalities and unfair restrictions are placed on officers within the First Nations program.[71] Chief Blake added that the funding does not allow for proper preparation and strategizing for the community's needs and public safety. It is a responsive model that is "...funded only for what could be termed core policing function...."[72]

A tragic example of underfunding seen in policing a First Nation community was observed throughout the inquest into the death of Benjamin Richard.[73] Although the overseeing judge declined to make any formal recommendations, observations outlined the role underfunding and understaffing could have had on the events that led to the officers shooting Benjamin.[74] For example, the judge observed that had more than three officers been available to attend the call, officers could have prioritized their response to the call for a weapon being discharged differently.[75] Although the judge also noted that three officers were only available to respond due to a shift change, had the call come in one hour earlier, there would have only been one officer there to respond.[76] The inquest report states, "simply put, more officers means more options in terms of manner and intricacy of tactical response."[77] The report emphasized this by bolding the sentence.

Deficiencies in cell phone and police radio communications were identified as contributing factors.[78] For example, the seemingly inadequate reception of an officer's police radio prevented her from hearing the other officer on the scene say that shots had been fired. Therefore, she continued

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69 *Ibid*.

70 House of Commons, *Collaborative Approaches To Enforcement of Law in Indigenous Communities: Report of the Standing Committee on Indigenous and Northern Affairs* (June 2021) (Chair: Bob Bratina).

71 *Ibid* at 18.

72 *Ibid*.

73 *An Inquest into the Death of: Benjamin Richard* (2022) *The Fatality Inquiries Act*, CCSM, c F52, Report on Inquest: Judge Shauna Hewitt-Michta.

74 *Ibid*.

75 *Ibid* at 27.

76 *Ibid*.

77 *Ibid* at 28.

78 *Ibid* at 29.

to proceed up the driveway where Benjamin was.[79] However, as commitments were made to upgrade an outdated system used by emergency providers, the observations from the judge were limited to the fact that the Province of Manitoba must ensure police agencies have access to the highest quality communications technology, especially in rural and remote areas.[80]

Issues with communication and lack of police resources are not unique to First Nations policing. The RCMP also suffers from similar problems. The House of Commons Committee Report noted that due to a lack of police resources, response times could be delayed by hours, sometimes even days.[81] And there is an absence of emergency dispatch in rural and remote areas. For example, Fort Nelson, British Columbia, only received 911 service in January 2021.[82] Until that point, people had to call a ten-digit number for assistance.[83] In an inquiry reviewing matters related to emergency 911 service, it is estimated 98% of Canada has access to 911 service.[84] The areas without "service include some rural, remote and sparsely populated parts of the country."[85] Being able to communicate with citizens calling in so the police can receive vital information about ongoing calls, having the ability to communicate with other officers on the scene, and being able to call for additional support seem all essential to police agencies and frontline officers. 911 service plays a vital role in saving lives and protecting public safety by enabling fast and effective responses to emergencies. In many cases, a timely response could mean the difference between life and death. The 911 service is also essential for communities to ensure public safety, as it helps coordinate and direct resources to where they are needed most.

It is not overly surprising that the government plays a part in police services, as it is a public service. However, because both provincial and territorial governments are responsible for their police agencies, and the federal government is accountable for the RCMP, there is some overlap

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79 *Ibid* at 14.

80 *Ibid* at 30.

81 House of Commons, *Study on Crime in Rural Areas on Canada: Report of the Standing Committee on Public Safety and National Security* (May 2019) (Chair: Hon John McKay) at 48 [*Study on Crime in Rural Areas on Canada*].

82 Andrew Kurjata, "One of the last places in Canada without 911 service finally gets coverage" (27 January 2021), online: *CBC* British *Columbia* <www.cbc.ca/news/canada/british-columbia/fort-nelson-911-1.5890101> [perma.cc/VTK7-WV9V].

83 *Ibid.*

84 Canadian Radio-television and Telecommunications Commission, "A Report on Matters Related to Emergency 9-1-1" (5 July 2013) (Commissioner Timothy Denton Inquiry Officer).

85 *Ibid.*

between the levels of government as it pertains to policing. The overlap in federal and provincial governance within policing is explicitly seen when provinces and municipalities contract the RCMP to provide police services.[86] When such policing arrangements are entered into, the provinces and municipalities are the ones to set the level of resources, the budget, and the priorities for policing with consultation from the RCMP.[87]

To what extent this may impact equal access to police services is not overly explicit. However, in the 2018 study on crime in rural areas in Canada, The Standing Committee on Public Safety and National Security encouraged increased investment in policing by provincial and territorial governments. Additionally, the Committee thinks the RCMP should consider ways to connect with other police agencies and better use auxiliary and reserve programs.[88] Doing so, especially in rural areas, would help ensure all Canadians have equal access to police regardless of where they live.

The aforementioned factors directly impact the ability of officers to carry out their duties and serve their assigned community while also affecting their mental well-being. Unfortunately, besides the pressure experienced from the location and inadequate resources, on-the-job trauma and external events happening globally can significantly affect not only the policing profession but also the individual officer's well-being. There is no better example of the impact of a global event than the recent COVID-19 pandemic.

V. POLICING DURING PANDEMIC

The World Health Organization (WHO) declared the novel coronavirus a global pandemic on March 11, 2020.[89] Despite world leaders' efforts to flatten the curve of infection, reduce fatalities, and prevent healthcare systems from collapsing during the COVID-19 pandemic, citizens were divided on its impact and how to deal with it. Moreover, there were debates regarding vaccination, and the strain from the government's control over citizens' daily lives was discernible. Nevertheless, police officers still had to fulfill their duties.

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86 *Study on Crime in Rural Areas on Canada, supra* note 81 at 2.

87 *Ibid* at 3.

88 *Ibid*.

89 Christopher J Schneider, "Assholes in the News: Policing in the Age of the COVID-19 Pandemic" (2021), online: *CanLii* <canlii.ca/t/t9hq> [perma.cc/L2LH-WJCT] [Assholes in Policing].

During the early months of the pandemic, police departments were scrambling to adjust to a rapidly evolving landscape.[90] In addition to new mandates enforcing pandemic-related rules and modifying frontline officers, police were also struggling with the impact of the virus on staff and increased scrutiny. Overall, policing during the pandemic was more complex and challenging, requiring officers to navigate new stressors and situations under constantly changing circumstances.

Professor Schneider writes that one consequence of the pandemic was the expansion of the police powers over routine activities had become a situation where police could make arrests where they otherwise would not.[91] The expansion of powers given to the police lasted nine days after the federal government invoked the Emergencies Act.[92] With such great power and responsibility, it is unsurprising that policing during the pandemic is one of the most recent instances of operational stress for officers. In addition to the regular policing burden, officers carried concern for ill coworkers and family members. Before COVID, daily interaction with the public already put police officers at risk of exposure to diseases like Hepatitis C and tuberculosis.[93] During the pandemic, the additional risk of exposure to COVID-19 was palpable. In addition to being at risk of personally contracting the virus, the risk of giving it to a family member also added stress for frontline officers.[94] The pressure was exponentially high for those with loved ones with compromised immune systems.[95]

Additionally, officers were required to adapt existing practices related to service calls and patrol practices to limit exposure.[96] New policies were implemented to ensure social distancing while government directives were

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[90] John Shjarback & Obed Magny, "Cops and COVID: an examination of California officers' perceptions and experiences while policing during a pandemic" (2022) 45:1 Policing: An International Journal 61.

[91] Assholes in Policing, *supra* note 89.

[92] *Emergencies Act*, RSC, 1985, c 22 (4th Supp). For a detailed discussion of the application of the emergency powers, see Leah West, Michael Nesbitt & Jake Norris, "Invoking the Emergencies Act in Response to the Truckers' 'Freedom Convoy 2022': What the Act Requires, How the Government Justified the Invocation, and Whether it was Lawful" (2022) 70:2 Crim LQ 262. See also Robert Diab, "The Real Lesson of the Freedom Convoy 'Emergency': Canada Needs a Public Order Policing Act" (2022) 70:2 Crim LQ 230.

[93] Shahin Mehdizadeh & Katy Kamkar, "COVID-19 and the impact on police service" (2020) 5:2 J Community Safety WellBeing 42-44 at 42 [COVID-19 and the impact on police service].

[94] *Ibid.*

[95] *Ibid.*

[96] John Stogner et al, "Police Stress, Mental Health, and Resiliency during the COVID-19 Pandemic" (2020) 45:4 Am J Crim Justice at 722 [Resiliency during the COVID-19 Pandemic].

in place.[97] Despite the rules of social isolation put in place across the world or even distancing procedures, police were often not able to work within such parameters; despite best efforts and the use of protective equipment in addition to other measures, officers were exposed to the virus.[98] Adding to the angst among officers was the possibility that one officer being exposed could impact other team members requiring them to be tested or take time off of work and be away from loved ones to ensure the virus was not spread further.[99] This became extremely taxing not only on police departments and organizational resources but also on the members themselves as the pressure to maintain the same level of service with fewer officers remained.[100] A genuine concern was ensuring enough officers were healthy to maintain public safety.[101] It is undeniable that many businesses may have been worried about this issue. Still, few professions have the potential to cause such devastating consequences for the public due to the absence of healthy employees as police officers, first responders, doctors, and nurses.

The pandemic has brought about many challenges for families, including separation and difficulty in reuniting with loved ones. Police officers have been on the front lines of enforcing quarantine and social distancing measures, sometimes separating families and preventing them from gathering. This has been a difficult task for police officers, as they have had to balance the need to enforce public health measures with the emotional toll separating families can take.[102] Police officers have also had to deal with a rise in domestic violence, and child abuse calls due to the social isolation measures implemented during the pandemic.[103] Finally, while officers were enforcing rules as part of their job, they were forced to witness pain and financial devastation of business closures.[104] As agents of the latest and often unpopular restrictions, additional anxiety and disapproval from some members of the public were substantial.

The demand for officers to manage potentially violent groups was seen with the various riots and social unrest as the period of restrictions carried on and increased throughout the pandemic.[105] Almost every part of the country experienced some form of protest.[106] One notorious protest was the

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97 *Ibid* at 719.
98 COVID-19 and the impact on police service, *supra* note 93 at 42.
99 *Ibid*.
100 *Ibid*.
101 Resiliency during the COVID-19 Pandemic, *supra* note 96 at 722.
102 COVID-19 and the impact on police service, *supra* note 93 at 43.
103 *Ibid*.
104 *Ibid*.
105 Resiliency during the COVID-19 Pandemic, *supra* note 96 at 43.
106 Protests included: The Ottawa protest, The Windsor and Ambassador Bridge

"Freedom Convoy," which occupied Ottawa streets for over three weeks.[107] Ottawa's Auditor General conducted an audit into the Ottawa Police Service's response to the convoy and noted that the police's priorities were traffic management, maintaining emergency routes, keeping peace and order, protecting monuments, addressing threatening or high-risk behaviours, and maintaining the safety of all individuals.[108] The audit noted that officers worked under the harshest conditions, such as staff vacancies and shortages, cold winter temperatures, and extended shifts.[109] Managing such protests significantly strained police resources in ensuring public safety in such an event and managing large resource-intensive crowds, leading to longer shifts, increased overtime, and a higher risk of fatigue and burnout among officers. In addition, managing the protest during a pandemic puts officers at risk of exposure to the virus, which could create additional stress and anxiety for frontline officers.

The police have various ways to deal with public order disturbances; the vast majority pre-existed the COVID-19 protests.[110] The balancing act of utilizing the coercive authority given by the state to police to maintain order during such public protests presents obvious challenges. On the one hand, police imposing "too much 'order' threatens many of the fundamental civil rights that citizens in a liberal-democratic societies hold dear." On the other hand, "allowing too much 'freedom,' in contrast, may compromise public

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protests, The Coutts protests, Protests at other ports of entry, and Protests in other locations such as British Columbia, Alberta, Saskatchewan, Winnipeg, Toronto, Quebec, New Brunswick and Nova Scotia. For more information See *Commission of the Public Inquiry into the 2022 Public Order Emergency: Report* vol 1: Overview (Ottawa: Public Order Emergency Commission, 2023), online: <publicorderemergencycommission.ca/files/documents/Final-Report/Vol-1-Report-of-the-Public-Inquiry-into-the-2022-Public-Order-Emergency.pdf>.

107 The group was protesting COVID-19 vaccine mandates and restrictions and while doing so set unlawful fires, discharged fireworks, blocked and damaged highways and idling vehicles in additional to relentless noise by-law infractions see *Audit of the Ottawa Police Service's Response to the Convoy Protest – Collaboration with the City of Ottawa: Audit,* (Ottawa: Office of the Auditor General, 2023), online (pdf): <www.oagottawa.ca/media/1lrbio3n/final-audit-report-audit-of-the-ottawa-police-service-s-response-to-the-convoy-protest-collaboration-with-the-city-of-ottawa11.pdf> [perma.cc/QK2D-SW8J].

108 *Ibid* at 5.

109 *Ibid* at 10.

110 Such powers can be grouped into three categories (i) criminal law enforcement powers; (ii) regulatory law enforcement powers; and (iii) military assistance to law. See *Commission of the Public Inquiry into the 2022 Public Order Emergency: Report* vol 5: Policy Papers (Ottawa: Public Order Emergency Commission, 2023) at 10-2, online (pdf): <publicorderemergencycommission.ca/files/documents/Final-Report/Vol-5-Report-of-the-Public-Inquiry-into-the-2022-Public-Order-Emergency.pdf> [perma.cc/98PQ-7XG3].

safety, economic stability, and psychological well-being."[111] The impact of such a high burden during unprecedented times in a pandemic on police is unknown. Speculating though the combination of enforcing criminal and regulatory powers, the added strains of the pandemic where health concerns were heightened for many, and the exceptional response from citizens to the government control over their daily lives would place a heavy burden on police who had to balance all of these factors.

The Journal of Community Safety and Well-being published a commentary aiming to address some of the issues officers faced during the pandemic.[112] Adding to the mix of what police had to contend with was noted in the commentary is that an officer can suffer from a moral injury, which can have a "long-lasting emotional and psychological impact."[113] This can occur when one does not believe that they have done enough or that they have done the right thing.[114] A psychological imbalance can happen when one's actions or the actions of others are not in harmony with one's moral values, ethical values, core beliefs, and expectations.[115] During the pandemic, officers could have been torn between their beliefs and what was expected of them as civil servants. For example, Ottawa police officer Kristina Neilson pleaded guilty to one count of discreditable conduct for donating $55 to a crowd-funding campaign for the "Freedom Convoy" protest that took over Ottawa streets for three weeks.[116] The discipline hearing chair noted, "unfortunately, instances of real and perceived police officers' support for the illegal occupiers have received much attention and criticism and has had a significant detrimental effect on the reputation of the (Ottawa Police Service)."[117] During the *Emergencies Act* inquiry Keith Wilson, a lawyer for some of the main convoy organizers, testified that leaks were received from police officers who were sympathetic to their cause.[118] Wilson testified that a "steady stream of information: came from Ottawa Police Service, the Ontario Provincial Police, the RCMP, and even the Canadian Security

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111 *Ibid* at 10-4.
112 COVID-19 and the impact on police service, *supra* note 93.
113 *Ibid* at 43.
114 *Ibid*.
115 *Ibid*.
116 Jacquie Miller, "Ottawa police officer who donated to the 'Freedom Convoy' docked pay" (19 November 2022), online: *Ottawa Citizen* <ottawacitizen.com/news/local-news/ottawa-police-officer-who-donated-to-the-freedom-convoy-docked-pay>.
117 *Ibid*.
118 Catharine Tunney, "Convoy lawyer says protesters were receiving a 'steady stream' of leaked police information" (02 November 2022), online: *CBC* <www.cbc.ca/news/politics/wilson-marazzo-pat-king-emergencies-act-1.6637766> [perma.cc/MK68-YW78].

Intelligence Service."[119] The tension between officers who showed support for the COVID protests and their obligation to enforce the law and keep public safety intact was evident, with some supporting financially and others supporting with information.

Furthermore, it is conceivable that such perspectives could have affected the dynamics between colleagues who held contrasting views on the matter but still had to work alongside one another. The pandemic added to the stress of policing, as the role of police during the pandemic was often controversial. This challenged the necessity of police to establish public confidence, which, as previously mentioned, is crucial to do their job.

COVID-19 is not the first epidemic police have dealt with. In the '80s, HIV/AIDS was considered a pandemic by the WHO.[120] Similar to COVID-19, police encountered a risk of contracting HIV by contact with the public they served.[121] In a 1998 study of HIV and the police, it was found police were exposed to such risk due to activities they had to perform in the line of duty, such as being exposed to blood, bodily fluids, and tissue, having to administer CPR, possible needle pricks, being spat on in addition to body contact during scuffles while making arrests were all possible transmission methods.[122] Although COVID-19 poses distinctive challenges, the lessons learned from previous experiences can guide us in addressing future public health crises. It is crucial to prioritize law enforcement safety and well-being and consider the impact of policing during such situations in the planning and preparation stages, including protecting officers' mental health.

VI. IMPACT ON ABILITY TO SERVE THE PUBLIC

As noted in the above sections, there are many ways in which an officer can have their mental health impacted by simply doing their job. These are outside any day-to-day or personal mental health impacts officers may face. Not only are officers exposed to traumatic events, but they can also experience mental health strains from the agency they work for and other organizational-associated issues, in addition to the impact due to the area or location in which they serve.

Police officers are called to situations that require quick decisions. The most extreme examples are whether to fire a shot and the risk of doing so to potential bystanders and by not firing and having the potential of being

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119 *Ibid.*

120 John Violanti, *Occupation Underseige: Resolving Mental Health Crises in Police Work* (Illinois, USA-Charles C Thomas Publisher LTD, 2021) at 10.

121 *Ibid.*

122 *Ibid.*

injured or killed that day.[123] Therefore, determining how these decisions may be impacted by an officer with even minor symptoms of PTSD is concerning. In addition, police officers' mental health concerns are not limited to PTSD or OSIs. They can include various problems from alcohol and substance abuse, depression, chronic fatigue, and somatic and psychosomatic complaints.[124]

Dr. Violanti of the University of Buffalo researches officer safety and wellness issues. Being a retired NYPD officer, he can relate to some of the impact policing has on an individual.[125] Dr. Violanti notes that the exposure to trauma the officers encounter can impair their mental well-being and ultimately affect their ability to perform their job.[126] Additionally, the long-term impact of exposure to such events as seeing children abused and neglected, seeing dead bodies, assisting people that have been severely assaulted, and being personally involved in shootings may lead to additional "behavioral dysfunction."[127] Dr. Violanti notes such further health issues can include substance abuse, aggression, and suicide.[128]

Dr. Violanti is a co-principal on a three-year study looking at how the quick decision-making required of police officers is affected by even minor symptoms of PTSD to do their job.[129] The study will focus on the effects of PTSD, ranging from mild to severe, on attention and cognitive control in policing. The researchers believe that even mild PTSD symptoms can affect.[130] Project lead Dr. Janet Shucard notes, "[v]ery few studies have examined brain structure and function in police officers. Our study is the only one to our knowledge that will examine the neurobiology of rapid decision-making in police officers."[131] The ultimate goal of their research is that new training and treatment approaches will be made available to police

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123 David J Hill, "New study aims to measure how PTSD affects police officers" (13 February 2018), online: *University of Buffalo News Center* <www.buffalo.edu/news/releases/2018/02/021.html> [perma.cc/92CG-RZCV] [New study].

124 *Evidence*, *supra* note 35 at 12:15 (Ms. Louise Bradley).

125 Dr. John Violanti, "PTSD among police Officers: Impact on critical Decision Making" (201), online: *Dispatch* <cops.usdoj.gov/html/dispatch/05-2018/PTSD.html> [perma.cc/RE5J-64YQ].

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 New study, *supra* note 123.

130 *Ibid.*

131 *Ibid.*

officers when more knowledge on the impact of PTSD on policing is available.[132]

Dr. Violanti went so far as to say, "[i]f proper steps are taken by the police organization to help officers with high PTSD symptoms to get help, the number of problematic decisions on the street will be substantially reduced."[133] In part, this could be due to PTSD being known to affect brain circuits that are associated with attention, decision-making, and inhibitory controls.[134] Now considering the impact an officer with severe PTSD may have on their control, attention, and responsivity in high-stress situations, it seems probable that an officer with severe PTSD will be impacted by their PTSD while doing their job, potentially negatively.

Locating examples of where officers' PTSD symptoms have impacted their ability to serve and protect has been challenging. This may be partly because there is no definitive conclusion that the officer's PTSD is why they engaged in certain conduct. Still, explored below, there are stories and cases where an officer has been diagnosed with PTSD, and they are found to lack the ability to do their job by medical professionals. In addition, sometimes, the police agency does not believe that PTSD from on-the-job trauma is related to their inability to work. Or sadly, there are cases where, rather than providing support and services for an officer who has PTSD and faces disciplinary hearings, the police agencies seek to fire them.

Furthermore, attention can be drawn to the matter because stories reach the news about an officer's behaviour bringing to the forefront that the officer suffers from PTSD. Some of these stories and cases explored below provide a more wholesome picture of how the issues and trauma explored above may directly impact real-life officers in the field and their daily lives.

One such story made headlines in 2013 when Corporal Ron Francis's smoking marijuana legally while on duty as an RCMP officer went viral across Canada.[135] Corporal Francis was provided a prescription for marijuana which in part helps calm him down and reduces his PTSD symptoms.[136] His prescription allows him up to three grams daily, which Corporal Francis estimates could be nine to 15 joints.[137] In his interview,

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[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

[135] Evan Dyer, "Pot-smoking Mountie can't smoke publicly in uniform: RCMP" (28 November 2013), online: *CBC Ottawa* <www.cbc.ca/news/canada/ottawa/pot-smoking-mountie-can-t-smoke-publicly-in-uniform-rcmp-1.2442576> [perma.cc/DEE7-PWMU].

[136] Stress leave with a service weapon, *supra* note 47.

[137] *Ibid.*

he indicates, "smoking marijuana has no negative effect on his ability to be a police officer."[138] Corporal Francis further adds that the prescription for marijuana came after battling PTSD and failed attempts to self-medicate with alcohol and anti-depressants, which left him with no significant improvement.[139]

Although a deep dive into the impacts of marijuana use will not be undertaken, Health Canada reports that the short-term effects of cannabis use can differ and vary from one time to the next.[140] Some of the short-term effects can be slow reaction times, reduced ability to pay attention, and impaired coordination.[141] Despite Corporal Francis saying that smoking marijuana helps him, the RCMP states so long as he is in uniform or wearing the decorative red serge, he cannot smoke marijuana.[142]

Another example of an officer's mental health overlapping with his police duties was seen when Officer Brad Meyer was diagnosed with longstanding PTSD, but not before he was put on administrative leave and ordered to go to counseling for storming out of a work-related meeting after an argument with a colleague.[143] Following, Meyer was investigated for discreditable conduct due to an altercation that occurred with members of the public and with the RCMP; Meyer was off duty at the time.[144] Witnesses said Meyer became hostile and confrontational when he was questioned about where he was shoveling snow from around his wife's car, which escalated to the point that the RCMP was called to calm Meyer down; however, Meyer's cursing and yelling did not cease.[145]

On another occasion, Meyer was given a one-day suspension without pay after being pulled over for excessive speeding.[146] Victoria Police tried to have Meyer fired for his misconduct. However, the retired judge appointed by the police complaint commission did not think it was justified.[147] Part of the decision to suspend over termination was due to his PTSD, which had

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138 *Ibid.*

139 *Ibid.*

140 "Cannabis and your health" (11 March 2023), online: Government of Canada <www.canada.ca/en/services/health/campaigns/cannabis/health-effects.html#a1> [perma.cc/S2LD-BGAX].

141 *Ibid.* It can also make learning and remembering things harder

142 Stress leave with a service weapon, *supra* note 47.

143 *Ibid.*

144 *Ibid.*

145 The investigation found Meyer did not recall speaking to anyone other than the police and denied yelling.

146 *Ibid.*

147 *Ibid.*

not been adequately treated.[148] Unfortunately, no update regarding what Meyer may be doing for Victoria Police or what support and treatment, if any, could be found.

One potential issue discovered in tracking how many officers with PTSD are involved in disciplinary investigations within their force is seen when they leave the department before such investigations are concluded. This was an issue in Minneapolis following the death of George Floyd.[149] The day after George Floyd was killed by a police officer, another Minneapolis police officer sprayed a large blast of pepper spray from her police cruiser at a group of protestors and bystanders.[150] The incident went viral after being caught on video.[151] As a result, the public wondered what, if anything, happened to the officer responsible. However, city records never showed an officer was disciplined for the incident. There was no record of any disciplinary action taken against the officer because the officer took early retirement due to PTSD. In an interview, the officer said she decided to leave policing altogether after she and fellow officers were assaulted by protestors while trying to help a man who had been shot in the chest following George Floyd's death.[152]

When there comes a time an officer can no longer perform their duties as a result of PTSD, one would think agencies would be accommodating in assisting these officers. After all, depending on the situation, these could be workplace health and safety injuries, correct? Unfortunately, it seems that that is not an approach adopted, at least for some.

In 2018, the Workplace Safety and Insurance Appeals Tribunal allowed an officer's appeal in Ontario. They ruled that the officer was entitled to loss of earning benefits. Initially, the Workplace Safety and Insurance Benefits Appeals Resolution Officer (ARO) denied such benefits. The denial was due to the delay in the officer experiencing traumatic events at work in 2005 and 2006 being so far removed from when he was unable to work starting in 2014.[153] In addition, the ARO found that the officer was experiencing other stresses in 2014 unrelated to work or the trauma previously found to have caused the PTSD.

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148 *Ibid.*

149 Deena Winter, "The Minneapolis police officer who maced protesters and bystanders is unmasked by court documents" (07 December 2022), online: *Minnesota Reformer* <minnesotareformer.com/2022/12/07/the-minneapolis-police-officer-who-maced-protesters-and-bystanders-is-unmasked-by-court-documents/> [perma.cc/9QVW-QXUM].

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Decision No. 2719/18*, 2018 ONWSIAT 3615 at paras 5-6.

Based on the available medical evidence, the appeals officer found that a conclusion was supported that the officer could not perform his position due to psychological restrictions. Noting,

> As of September 29, 2014, the worker was experiencing stress from sources not directly related to his exposure to the stressful incidents of 2005 and 2006. However, I am satisfied that on the balance of probabilities, the worker would not have been incapable of working following September 29, 2014 were it not for his compensable PTSD.[154]

Despite the Centre for Addiction and Mental Health noting the officer's psychological condition was impacted by pre-existing factors such as vulnerability related to childhood trauma, anxiety sensitivity, recurrent workplace trauma, period of alcohol abuse (long remitted), workplace strain, and perception of a lack of support in the workplace.[155]

The ARO's decision specifies the officer's trauma from seeing his partner shoot a suspect and witnessing an individual die in a fire whom he was unable to save had no direct connection to his inability to perform his duties and denied him benefits in 2014. If the officer conceded, he might have had to return to work despite being unable to do the job due to a mental health diagnosis and contrary to his doctors' indication that he should not.

During disciplinary hearings for a Toronto officer, it was determined that the officer had been dealing with PTSD and addiction issues for some time. The officer's lawyer said it is "emblematic of the tremendous toll policing took on his client."[156] However, the officer was subject to several discreditable conduct complaints. Such conduct resulted in an accused, who was charged with assaulting the police officer and his partner during arrest, having charges dropped. Upon arrest, the accused resisted; the officer swore at the accused and sprayed him with pepper spray. The court found this amounted to excessive force, and the Crown conceded and stayed the charge.

There were other instances of disciplinary action against the same officer, who eventually resigned amid the Toronto Police Force trying to fire him.[157] The officer's lawyer had a different view of what had actually

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154 *Ibid* at para 13.

155 *Ibid* at para 30.

156 Adam Carter, "Toronto cop resigns after period of 'egregious' misconduct, cut from payroll after appeal fails" (18 August 2022), online: *CBC Toronto* <www.cbc.ca/news/canada/toronto/toronto-police-officer-misconduct-resigned-1.6553952> [perma.cc/LZ8R-J388].

157 His resignation came just as the Ontario Civilian Police Commission threw out the

transpired. The lawyer stated that his client "fought an exemplary fight given his PTSD and addiction issues,"[158] and his client is now in a better place concerning his health. However, he said people need to understand that police officers, who give until it breaks, frequently do not have "a straight line to recovery."[159] The lawyer ends his interview by stating, "we can't punish our way out of this problem."[160] This last statement is quite true despite his client's lengthy disciplinary conduct raising the question of how the issues escalated to this point. Had adequate resources been available to this officer, would things have intensified so far for him? Are there other employment options within the police agency for the officer while he undergoes treatment? Many questions are left undetermined when an officer who suffers from PTSD due to on-the-job trauma is ultimately fired. However, the alternative of leaving an officer on active duty when they mentally should not be can have devastating consequences.

In a 2018 incident involving an Edmonton RCMP officer, his actions of pocketing cash from a crime scene stemmed from his job-related PTSD.[161] At least, his lawyer stated this in the officers' disciplinary hearing.[162] To support this, the lawyer produced an assessment by a forensic psychologist who indicated such a link.[163] The officer's side suggested that instead of firing him, the officer could be demoted and be required to continue undergoing mental health treatment.[164] No record of the outcome of the disciplinary hearing could be found. However, the officer did plead guilty to three counts of theft and three counts of breach of trust in Provincial Court and was sentenced to 18 months probation.

In another case, an Edmonton Police officer was convicted of sexual assault for groping another officer at the gym in the police headquarters in 2022.[165] The accused officer was on disability leave for PTSD but still had

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officer's appeal. In the initial decision, the police agency was ordered to fire the officer for his conduct. The hearing officer believed the police officer's behaviour fell below the highest standards of conduct the Toronto Police Service has for all its officers and staff. Additionally, the officer was "unfit to perform his duties in the capacity of a police officer, and his usefulness to the Toronto Police Service and the community has been annulled." *See Ibid.*

158 *Ibid.*

159 *Ibid.*

160 *Ibid.*

161 Jonny Wakefield, “Faced with firing, Edmonton police officer says PTSD influenced decision to take cash from crime scene” (22 December 2021), online: *Edmonton Journal* <edmontonjournal.com/news/local-news/faced-with-firing-edmonton-police-officer-says-ptsd-influenced-decision-to-steal-from-crime-scene> [perma.cc/TES2-V6H9].

162 *Ibid.*

163 *Ibid.*

164 *Ibid.*

165 Jonny Wakefield, “Edmonton police officer found guilty of sexual assault for groping

access to the gym when the sexual assault occurred.[166] Sentencing was delayed as the defence requested time for a forensic psychiatrist report, given his client's PTSD.[167] A disciplinary hearing will take place following the accused officer's sentencing in the spring of 2023.[168]

A positive example of what a police agency did to support an officer traumatized by an on-the-job incident was an incident in Cobb County, Georgia. An officer was trying to help an individual in distress when that individual ran into traffic and was hit and killed by oncoming traffic.[169] As a result, the officer was mandated to undergo a mental health evaluation and was assigned to less stressful tasks by the police agency.[170] The co-founder of the Cobb Coalition for Public Safety, Sally Riddle, said that mental health is frequently stigmatized in law enforcement. It is often not discussed and swept under the rug as it is easier to suppress those thoughts and feelings than to deal with the trauma of a painful experience.[171]

Another positive model was also evident in another Georgia police agency. Chief Ferrell of the Marietta Police Department implemented mental health rooms.[172] The rooms help officers decompress from their stressful jobs. It also provides a space to reflect on traumatic occurrences at work instead of going from a traumatic call straight to another one.[173] In addition, the room allows officers to talk things over with their peers and process their thoughts instead of heading straight home.[174] The department also utilizes licenced clinicians to help support officers and requires annual checkups and mental health evaluations with all officers.[175]

The Cobb Coalition for Public Safety and Chief Ferrell advocate for annual mental health evaluations. One reason is to help officers through

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colleague" (24 October 2022), online: *Edmonton Journal* <edmontonjournal.com/news/crime/edmonton-police-officer-found-guilty-of-sexual-assault-for-groping-colleague> [perma.cc/YL22-3LTD].

166 *Ibid.*

167 *Ibid.*

168 *Ibid.*

169 Caleb Groves, "Marietta And Cobb Police Departments Take Steps To Improve Mental Health Services For Officers" (14 December 2022) online: <cobbcountycourier.com/2022/12/marietta-and-cobb-police-departments-take-steps-to-improve-mental-health-services-for-officers/> [perma.cc/C7PS-RRSD] [Improve Mental Health Services].

170 *Ibid.*

171 *Ibid.*

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

175 *Ibid.*

their stressful job and avoid what Chief Farrell calls "political extremism."[176] Chief Farrell, in part, was motivated to make such positive changes after two officers in the Marietta Police Department died from suicide within a year. However, Sally Riddle from the Cobb Coalition states it is not just about the police. It is also about the community. Sally notes, "if an officer is not able to attend fully and with emotional stability to their job, that could put the public at risk as well."[177] Therefore, how frontline officers' mental health is cared for should ultimately concern the public, police agencies, and the government.

The mental health standards on an ongoing basis are not entirely clear. For example, WPS, in their Collective Agreement, discusses fitness and fitness standards. However, there is no mention of specifics.[178] Therefore, whether such measures include a mental health component or are strictly a physical requirement is unknown.[179] Further research on what standardized conditions exist relating to mental health for Canadian police officers would be beneficial. Such research could indicate if there are any gaps in mental health assessment requirements on an ongoing basis and ensure that police forces have such a requirement.

In order to determine the needs of a particular police force and the officers it employs, further research and studies are necessary. This would involve analyzing the unique organizational stressors and challenges that officers face within that specific agency and identifying ways to prevent and treat mental health issues amongst its police officers.

VII. CONCLUSION

Police officers in Canada are faced with many challenges. In addition to being a mentally and physically demanding occupation, policing has additional operational and organizational stressors. Due to the profession's unpredictable nature and physical challenges, along with witnessing some of the most awful things a human can see, an officer is more prone to PTSD and OSIs than most Canadians. This prevalence comes from serving and protecting their communities. There is nothing that a police officer has done that makes them more susceptible. However, as seen above, having a history of mental health issues increases the likelihood of developing job-

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176 *Ibid.*

177 *Ibid.*

178 "The City of Winnipeg and The Winnipeg Police Association Collect Agreement: Effective Deceember 24, 2016 to December 31, 2021" at 77, online (pdf): < legacy.winnipeg.ca/hr/department-information/collective-agreements/pdfs/WPA-CA-2016-2021.pdf> [perma.cc/TUF3-6W6A].

179 *Ibid.*

related PTSD as a police officer. Not to suggest that an officer with a history of mental health is incapable of doing the job, but resources must be in place to ensure mental health concerns and problems are addressed and treated when needed.

The impact of PTSD on a police officer's ability to serve and protect is really unknown. What is known is that someone who is experiencing PTSD symptoms can experience flashbacks and become overly alert or wound up. In addition, increased anger and guilt may arise, along with having one's sleep impacted. Such symptoms can make an officer irritable, lack concentration, and quickly become startled. Additionally, longstanding PTSD can manifest into additional issues such as depression, anxiety, and alcohol and substance abuse.

One challenging component in preventing PTSD for officers is how unpredictable it may be. As noted above, for some officers, it can result from a single traumatic event followed by intense analysis. For others, PTSD is developed over years of exposure to continual heightened awareness, potential physical harm, and the possibility of using deadly force. This is in addition to seeing horrific accidents, dealing with victims of homicide, being involved in child abuse investigations, and helping the most vulnerable citizens who have been victimized. Police are the first ones called when someone is in mental distress, when shots have been fired, when someone is missing, or when someone has ended their life. These officers must deal with the stuff that makes novels best-sellers and draws people into movie theatres. However, this is their reality, helping and investigating such matters on a reoccurring basis and being able to testify in court to secure convictions for the guilty.

And if all of that was not enough, officers are also subjected to OSIs. Policing during the COVID-19 pandemic is a recent example. However, historically the HIV/AIDS pandemic tells us that although this may not be a common occupational stressor, it most certainly is reoccurring. As seen with both pandemics, the length of the impact is significant. The host of concerns with the COVID-19 pandemic and the HIV/AIDS crisis was vast, especially for frontline officers. Whether they liked it or not, they had a job to do, and they were putting themselves at risk of contracting COVID or HIV simply by doing that job. The balance of citizens' rights and freedoms with public safety was profound.

Additional OSIs result from negative perceptions and interactions with the public. The shiftwork, understaffing, and build-up of the impact of a police force's organizational stress also contribute to the likelihood of an office developing PTSD or an OSI. Although most people who go into policing realize that there will be some occupational stress, the impact of

organizational stressors is not as expected. This is important as the research indicates that stress due to the organization can be just as critical to an officer's mental health as operational stressors.

If all of this is not enough to challenge a person, or a police officer, the location of their posting can also be a factor in their mental well-being. The optimal performance of police officers depends on tangible resources. Such resources include modes of communication and citizens' access to 911 so that officers can receive as up-to-date and accurate information regarding the emergency as possible. Other resources are adequate staff and the availability of a backup. It is unsurprising that one's overall psychological and physical well-being is affected under circumstances where these resources are lacking. Psychological well-being is associated with decreased job performance, high turnover rates, poor job attitudes, and health issues. Mental and physical well-being is essential for police to perform efficiently and successfully to carry out their role of serving and protecting. This can be severely aggravated by policing in remote areas and for Indigenous Police forces.

So yes, policing is mentally and physically challenging. Some of it is mainly expected by those going into the profession some of it is not. Why is this important? In addition to the fact that these individuals have volunteered to serve and protect the public, ensuring that they are mentally fit and reducing as much of the impact of their job on their mental well-being should be paramount. Adequate access to mental health resources should be the rule, not the exception. So, when the effect of serving the people in this capacity weighs on their mental health to the point that it affects them, citizens, police forces, and all levels of government should be concerned. These officers carry lethal weapons on them every day they put on that uniform. They are trained to restrain people, defend themselves, and use compliance devices such as tasers, pepper spray, and batons if needed.

Frontline officers must make quick, sound decisions while processing information and in extraordinarily stressful and intense situations. Anything that may impact their mental and physical ability to do this job and utilize the weapons and training they have acquired against citizens should be at the forefront for police agencies. For example, having an on-duty officer suffering from hypervigilance, flashbacks, and avoidance would be problematic. Let alone the impact of having an officer who is overly cautious or hesitant when responding to calls that could put themselves and others in danger. Officers could also experience intense emotional reactions to situations that remind them of their traumatic experiences, which can interfere with their ability to remain calm and objective on the job.

Furthermore, there can also be physical symptoms such as fatigue, insomnia, and headaches, which can further impact an officer's ability to perform their duties. In addition to the impact of PTSD or an OSI, the potential for further health issues such as substance and alcohol abuse, aggression, and in severe instances, officer suicide, all of which must have prevention methods and resources available to combat.

So we know officers are prone to PTSD due to the demand and stress of their job. The risk to themselves and the public is significant if the officer is not in the best mental health sphere. The next factor is how much PTSD can impact an officer's ability to police. This is a challenging part. With further research and casting light on this issue, hopefully, more focus will be placed on this aspect to yield an answer. At this time, we know PTSD impacts officers and likely also affects their ability to do their job. It seems unclear to what extent. Some researchers are exploring the issue; however, ensuring Canadian police forces are represented in that research is important as seen above, there are challenges with applying results from one study to another country's police officers. More research in this area would also help shine some light on what can be done for officers to help prevent long-term PTSD and the subsequent side effects. Future research should also consider clarifying whether the significant prevalence of mental health issues is predominately due to occupational exposure or if other factors are also present. Some of the stressors the officers face will never go away and, realistically, will only worsen with time and the advancement of technology. People seem to find more gruesome ways to hurt and exploit one another. However, some things can be done to reduce the impact of policing on an officer. The organizational structure of the police force is the most significant starting point.

Internal reviews and employee surveys may assist with obtaining suggestions of what would work internally. Ultimately police organizations are in the best position to put resources in place to help officers with trauma that occurs on the streets and within the confines of the detachment. Recognizing the role of administration and the organization and providing access to support would benefit frontline officers. Trying some of our American counterparts' techniques, for example, implementing mental health rooms and improving access to mental health professionals, may also assist Canadian police. Ensuring after an officer has attended a traumatic call, that they are not just put back out to another call but allowed time to decompress and process what happened while doing a less stressful position may be helpful. In addition to mental health screening for new recruits, active officers must undergo continual screening. This would allow struggling officers to be directed to mental health professionals when and if

required. Further research in this area would be beneficial to see what gaps regarding screening and access to mental health professionals there are in Canadian police forces.

Ultimately ensuring officers entrusted to serve and protect while carrying lethal weapons in public are supported in the best possible way mentally and physically is critical. If this is not happening, research into how this can be accomplished is certainly required. It is crucial for police departments to acknowledge the job's impact on officers' mental health and provide support; by doing so, police departments can help ensure that officers are better equipped to do their job safely and effectively while also promoting their overall well-being. In addition, as policing and human nature evolve, the mental support officers receive will also need to grow. A proactive approach is necessary instead of a reactive one after an officer has injured or killed someone or themselves.

Body Worn Cameras (BWCS): Privacy Versus Solid Evidence

STANISLAVA ZGUROVA *

ABSTRACT

This paper will explore the dichotomy between the privacy concerns associated with the use of Body-Worn Cameras ("BWCs") by law enforcement agencies, and the benefits associated with this technology, such as the evidential value of the BWCs video, audio, and images as reliable forms of evidence assisting courts and criminal justice players in making substantiated decisions and reaching just verdicts. The paper will provide a background overview of BWCs and the approach to their use in some Canadian jurisdictions, followed by a discussion on Canada's struggles guarding the privacy of Canadians and the recent breaches of privacy conducted by the Royal Canadian Mounted Police ("RCMP"). Next, there will be a case-study section exemplifying the numerous flexible features and benefits of BWCs and produced digital evidence used in courts and police operations, followed by a section addressing the rule of law and the need for punishing police misconduct for mishandling highly sensitive information (such as that captured by BWCs). Lastly, the paper will reflect on its findings, discuss existing tensions, and propose a path forward for the safe and broad implementation of BWCs across Canada.

Keywords: Body-worn cameras (BWCs); privacy; evidence; justice; transparency; accountability.

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"Few things are as important to our way of life as the amount of power allowed the police to invade the homes, privacy and even the bodily integrity of members of Canadian society without judicial authorization."[1]

I. INTRODUCTION

BWCs are a highly effective tool assisting not only police operations but also the public and the judicial system in the pursuit of fairness, transparency, and justice. Analogous BWCs digital evidence-gathering policies and practices should be employed collaboratively across jurisdictions. With this new technology, however, there are hidden risks of compromising an individual's privacy. Therefore, to mitigate that risk, law enforcement agencies across the country must adhere to the highest standards of privacy protection and only gather the information needed for specific police encounters or investigations. Strict measures guarding the use of digital information collected through BWCs must be in place at each police agency, regulated and enforced internally and externally. Digital data is easily abused and disseminated. The content of the information gathered through BWCs is highly sensitive as it contains large amounts of private information about Canadians, often exposing them to vulnerable circumstances.

Canadians enjoy constitutionally protected freedoms and liberties worth stringent protection measures applicable uniformly across the country. Hence, police services equipped with tools capable of producing invaluable evidence and allowing respective courts to rely on a steady process when resolving criminal cases are key in ensuring that those rights and freedoms are consistently protected. BWCs also allow for transparency and accountability in the relationship between the police and the public, especially in cases involving complaints about the police's use of excessive force. In short, the diverse standards and policies of BWCs among law enforcement agencies across Canada yield unequal protection of fundamental rights and freedoms for Canadians and less substantiated and less reliable outcomes of criminal cases. To date, there are more Canadian law enforcement agencies without BWCs than ones that use them in their daily operations, and this should change. BWCs should become a regular component of the equipment of front-line police officers across the country, especially when policing urban and high-density population areas.

On the one hand, the RCMP's rollout of their BWCs implementation project could be viewed as an example of a crucial step in the right direction

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[1] The Honourable Justice Binnie in *R v Tessling*, 2004 SCC 67 at para 13.

towards achieving uniformity and consistency in policing across Canada. Now, all front-line RCMP officers will be equipped with BWCs. However, given that the RCMP is usually contracted in rural or remote areas within the provinces, this will likely lead to major differences in policing practices within the same provincial jurisdiction. Such disparity will be especially palpable in provinces like Manitoba, where BWCs are not widely adopted. Consequently, certain individual jurisdictions within the province, with their corresponding criminal justice players, will have access to and could benefit in their decision-making from the high-definition digital evidence BWCs are capable of producing, while others will not. This discrepancy in access leads to a concerning double standard of policing and decision-making within a province and across all Canadian jurisdictions. Hence, the ability of jury members, judges, and Crown prosecutors to hear and see the recording of disputed police interaction with an accused person, as opposed to assessing the credibility of *viva voce* evidence by each side in the dispute, will streamline court process and decision-making and lead to more transparent and reliable just outcomes.

Crown prosecutors, judges, juries, members of the public, and police officers in each part of Canada deserve equal access to the same effective tools assisting their work and the pursuit of justice. Therefore, BWCs should be widely implemented across Canada in a unified manner. It is speculative whether the RCMP's initiative will positively influence local police agencies to adopt BWCs in their operations to keep up with the federal policing standards embodying the values of transparency and accountability (and maybe even compete with them) or if it will have the opposite effect and discourage police agencies from BWCs adoption to avoid challenges the technology may present. Only time will tell how that trend progresses.

II. Body-worn Cameras (BWCs) Overview

A. General Background on BWCs

Regulating officer-citizen interactions via BWCs is founded upon the logic behind Jeremy Bentham's theory of the Panopticon, where (the prison) population's behavior is altered through transparent and constant monitoring as opposed to the use of force. However, such a modern technological surveillance strategy sacrifices privacy for everyone "under the gaze" – police officers and the public recorded on the BWC.[2] Hence, BWCs

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[2] Mary D Fan, "Privacy, Public Disclosure, Police Body Cameras: Policy Splits" (2016) 68:2 Ala L Rev 395 at 407.

"pit the two revered democratic values of privacy and transparency against each other."[3]

The United Kingdom ("UK") was the first nation to employ the use of BWCs in its front-line police operations in 2007 after allocating £6 million for the implementation of the project. The United States of America ("USA") was the second nation that mass deployed BWCs in its police forces. Under President Obama, the Department of Justice dedicated over $32 million to adopting BWCs across the USA.[4] This was in response to the eruption of protests over questionable police practices leading to the coalition of multiple civil rights groups, whose leaders called for BWCs implementation by police forces "to pierce opacity and improve accountability and transparency."[5] The first and most notable national protest that sparked the shift towards the mass adoption of BWCs in American policing was over the death of Michael Brown, an unarmed teenager shot in Ferguson, Missouri, by a police officer responding to a call for a convenience store theft. The protesting civil rights and liberties groups saw BWCs as "a way to monitor the police, promote accountability, and reduce the risk of injuries and death in police encounters."[6] Furthermore, police chiefs also recognized the benefits BWCs could provide, such as offering evidence, rebuilding trust, reducing unfounded complaints, and potentially exonerating police officers.[7] Hence, BWCs today have become part of the equipment of police officers in most developed countries, and Canada is still catching up.

Even before the significant shift of deploying over 2000 BWCs in the field, the UK had one of the world's most extensive video surveillance systems amounting to more than four million close-circuit cameras.[8] Originally in the UK, the direction for officers wearing BWCs was to conduct nearly continuous recording. However, there has been a departure from that practice towards BWCs recording based on the officer's discretion.[9] Today, one of the major worldwide BWCs policy debates is on this point – how much discretion should police officers wearing BWCs have in deciding when to record and when not to?[10] This discretion is directly related to the levels of police accountability and transparency the BWCs are meant to enhance.

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3 *Ibid* at 412.
4 *Ibid* at 399, 419.
5 *Ibid* at 398.
6 *Ibid* at 410.
7 *Ibid*.
8 *Ibid* at 419.
9 *Ibid* at 422.
10 *Ibid* at 426.

Another debate surrounding BWCs policies is who should bear the burden of asking for or allowing recordings. Should the officer be expected to ask for permission, or should the public – victims and witnesses interacting with the officer — request that recording ceases? Mary Fan argues that it is "unrealistic to expect the public to order a police officer to stop recording, especially after a traumatizing or high-stress experience."[11] Moreover, the public should be allowed to maintain control over whether an individual should be recorded by a BWC, as opposed to having the burden to speak out and express that they do not wish to be recorded.[12] Hence, as the author asserts, the hidden price of the benefit of BWCs should not be the infliction of further privacy harm on those who seek help.[13] The same tensions and issues live in Canada, where each police jurisdiction adopts its policies and takes an individual approach toward the degree of control and autonomy displayed within officer-citizen interactions. An overview of some BWCs policies follows in sub-section B.

So how effective, if effective at all, are BWCs in regulating officer-citizen interactions? Numerous studies have been conducted, mostly in the USA, exploring various issues and tensions arising from the use of BWCs and the community's perceptions of it. Some results are best described as inconclusive, whereas the findings of others widely vary. For example, the *Campbell Systematic Review* compiled and analyzed data from thirty previously conducted studies on BWCs (mostly in the USA) and concluded that BWCs could reduce the number of public complaints against police officers.[14] However, it is unclear whether this is a sign of improved interaction between the police and the public or a change in reporting. Furthermore, it was insufficient to conclude whether BWCs reduce officer use of force. The study also found that BWCs do not seemingly affect other police and citizen behaviours, including officers' arrest behaviours, self-initiated activities, dispatch calls for service, and assaults or resistance against police officers. Lastly, there is no firm conclusion regarding the overall expectations that BWCs might have an impact on officer or citizen behaviours.[15]

Another much narrower BWCs study conducted in two police districts in Florida aimed to gather participants' perceptions on potential benefits and privacy concerns surrounding the use of BWCs. Respondents highly

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[11] *Ibid* at 404.
[12] *Ibid* at 407.
[13] *Ibid* at 404.
[14] Cynthia Lum et al, "Body-Worn Cameras' Effects on Police Officers and Citizens Behaviour: A Systematic Review" (2020) 16:3 Campbell L Rev 1 at 3.
[15] *Ibid*.

agreed that BWCs are generally beneficial. More specifically, participants agreed that BWCs improve the following: officer's and resident's behaviour, views on police legitimacy, and the collection of quality evidence. Interestingly, respondents were not very concerned about privacy implications arising from the use of BWCs.[16] Hence, it is evident that the BWCs effects on transparency and accountability are unverified by concrete, substantial research statistics.

These inconclusive statistical results about whether BWCs affect officer's behaviour, improve officer-citizen interactions, and reduce the use of excessive police force are exemplified by the events surrounding the death of George Floyd on May 25, 2020, in Minneapolis, Minnesota, when he was reported to have used a counterfeit $20 bill at a convenience store.[17] Unfortunately, all six police officers responding to the complaint call were wearing BWCs, yet that did not alter their behaviour nor prevent them from committing a series of steps in violation of Minneapolis Police Department policies when responding to the incident and ultimately caused Mr. Floyd to suffocate and die while in police custody.[18] Nonetheless, even though BWCs did not prevent the officers, Derek Chauvin in particular, from applying continuous excessive force over a long period of time over Mr. Floyd, their footage assisted in the investigation of the incident and provided a neutral, observational lens allowing the internal investigation and subsequently the court to comprehend how the events unfolded. Hence, BWCs were of great assistance in the legal proceedings as reliable pieces of evidence, and their existence and use embodied the values of police transparency and accountability.

Lastly, a 2018 study on the public's perception of police conduct depicted in BWCs footage posted on a specific American YouTube channel found that media's labeling and description of incidents, as well as embedded video comments and voice narration, can have an impact on public's perception of police conduct and the specific police-citizen interaction captured on the BWC video. The effects of the embedded comments and narration in the BWC video are subsequently reflected in the viewers' comments attached to that YouTube post.[19] While in Canada,

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16 Matthew S Crow et al, "Community Perceptions of Police Body-Worn Cameras: The Impact of Views on Fairness, Fear, Performance, and Privacy" (2017) 44:4 Criminal Justice and Behaviour 589 at 600.

17 Evan Hill et al, "How George Floyd Was Killed in Police Custody" (31 May 2020), online: *The New York Times* <www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [perma.cc/3A83-N9LV].

18 *Ibid.*

19 Christopher J Schneider, "An Exploratory Study of Public Perceptions of Police Conduct Depicted in Body Worn Camera Footage on YouTube" (2018) 7 Annual Rev

BWC videos are subject to strict privacy regulations and are not posted on social media platforms, it is important to note the findings of that study and attribute the influence of social media in shaping the narrative about BWCs and police-citizen interactions.

B. BWCs in Canada

In Canada, following the 2007 RCMP in-custody death of Robert Dziekanski, who was an immigrant detained at the Vancouver airport, and who was tasered and allegedly died from it, a conversation about BWCs began by acknowledging the need "to see and hear the event unfold through the eyes and ears of the officer at the scene."[20] It is important to note, however, that while it is true that there is a need for an objective and neutral lens in a circumstance like this, which the BWCs can provide, the advancement of technology since that statement was made has led to concerns that one should keep in mind when viewing a video and audio recording captured via a BWC. More particularly, in June 2021, the Information and Privacy Commissioner of Ontario issued a Model Governance Framework for Police Body-worn Camera Programs in Ontario, where it was highlighted that "[p]olice services need to determine the appropriate video resolution and audio quality being captured by the BWCs. The video and the audio of some cameras can substantially outperform what the human eye and ear can perceive."[21] Therefore, two major concerns arise from this high capability of some BWC devices. One, there are apprehensions regarding breaching the privacy of individuals not related to the incident but are captured without providing consent simply because of their mere presence in the vicinity of the BWC recording. Hence, the BWC devices and supporting software chosen by the police force should provide features allowing management and manipulation of the digital data: such as blurring and voice distortion, to protect individuals' privacy.[22] The other major concern regarding reviewing recordings captured by a high-

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Interdisciplinary Justice Research 118.

20 Canada, Home Office (Police and Crime Standards Directorate), *Guidance for the Police Use of Body-Worn Video Devices*, (Chair of the Civilian Review and Complaints Commission for the RCMP in 2009 Report Following a Public Interest Investigation into a Chair-Initiated Complaint Respecting the Death in RCMP Custody of Mr. Robert Dziekanski) at 5.

21 Information and Privacy Commissioner of Ontario, "Model Governance Framework for Police Body-worn Camera Programs in Ontario" (2021) at 5, online (pdf): <www.ipc.on.ca/wp-content/uploads/2021/07/model-governance-framework-police-body-worn-camera-programs.pdf> [perma.cc/3SG6-MDPF] [Model Governance Framework Ontario] [emphasis added].

22 *Ibid*.

definition BWC device is the incorrect assumptions that may be made by the viewers, who will likely equate what is heard and seen on the recording with the human perception of the officer wearing the BWC, which may differ from that of the actual recording.[23] Therefore, the safest route to address these two concerns is to use devices that resemble human capabilities more closely, as opposed to very high-definition BWCs.

The need for police forces to equip themselves with BWCs was also addressed in a 2014 report completed for the Toronto Police Service on the issues surrounding police responses to mental health calls and encountering people in crisis. Justice Iacobucci recommended the implementation of BWCs in the operations of the Toronto Police Service by stating that they should be issued to "all officers who may encounter people in crisis to ensure greater accountability and transparency for all concerned."[24] Additionally, the usefulness of video evidence generated by police had, at the time, also been addressed by Canadian courts. In *R v Hughes*, the Ontario Court of Justice relied on ICDV evidence in a case involving drinking and driving charges.[25] The court stated that "[s]imply put, the [in-car] camera video is the best evidence of the offence, essential not only to possible *Charter* motions but also to the applicant's ability to make full answer and defen[c]e."[26] In its decision, which granted a stay of proceedings remedy due to an unreasonable delay of the Crown's disclosure to the defence and the difficulties the defence faced with the format of the digital recording, the court also acknowledged the following:

> The police have elected to improve their methods of investigation through the use of technological advances. This is laudable and consistent with the public interest that the Court has before it the best evidence capable of exonerating or inculpating an accused person. That being said with these advances, comes the responsibility of the State to insure that the accused has proper access to the disclosure.[27]

Lastly, the implementation of BWCs in police force operations requires the planning and development of a Digital Evidence Management System ("DEMS"), which is defined as a "software application that allows for the secure uploading, storage, and retrieval of digital files in various data

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[23] *Ibid.*

[24] Ontario, Toronto Police Service, An Independent Review Conducted by the Honourable Frank Iacobucci for Chief of Police William Blair, "Police Encounters with People in Crisis", (July 2014) at 263.

[25] *R v Hughes*, 2014 ONCJ 105 [*Hughes*].

[26] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]; *Ibid* at para 44.

[27] *Hughes*, *supra* note 25 at para 54.

formats."[28] DEMS are offered by private sector vendors and includes cloud-based platforms.[29]

C. BWC Regulations in British Columbia ("BC")

BC was one of the first Canadian provinces to conduct pilot projects on BWCs, dating back to 2009. The most known pilot project was with the Victoria Police Department, where 20 officers were involved in testing two different types of BWC devices. Although mixed and inconclusive, the results supported the further use of BWCs and summarized BWCs as well-received technology by police officers, the public, and the Crown.[30]

Prior to BWCs being "deployed" in the police operations field, a privacy impact assessment must be conducted and approved by the "appropriate head of the public body."[31] This has been the practice in all Canadian jurisdictions where BWCs have been tested and/or launched. An appropriate policy needs to be implemented to address issues such as the purpose of the program, the circumstances that BWCs will be turned on and off, the amount of time to retain the BWC videos, and the accessibility of BWC videos. Furthermore, the policy must also specifically address the procedures for processing, storing, accessing, and reviewing BWC videos, as well as specific procedures surrounding the access requests for BWC videos and ensuring adherence to applicable provincial or federal privacy legislation if the BWC video is disclosed.[32]

Moreover, training must be provided to officers on how to use the BWCs properly. Full, automatic, and continuous recording is discouraged according to the BC BWC Provincial Policing Standards. The same direction is also exhibited in the current RCMP BWC Policy and the Calgary Police Service BWC policy and Standard Operating Procedures ("SOPs").[33] The caveat to that is the mandatory recording of police use of

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28 Model Governance Framework Ontario, *supra* note 21 at 2.

29 *Ibid*.

30 Edmonton Police Service, "Body Worn Video: Considering the Evidence: Final Report of the Edmonton Police Service Body Worn Video Pilot Project" (June 2015), online (pdf): <bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/EdmontonPS_Canada_BWVFinalReport.pdf> [perma.cc/MR8Y-GUQK].

31 British Columbia, "Equipment and Facilities: Body Worn Cameras" (01 July 2019) at s 1, online (pdf): *Provincial Policing Standards* <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/4-2-1-body-worn-cameras-equipment.pdf> [perma.cc/DWP6-Q6FP] [BC BWCs policy].

32 *Ibid*, s 3.

33 *Ibid*, s 5; Canada, Royal Canadian Mounted Police, OM – *ch 25.5 Body-Worn Camera*, (Policy) (Ottawa: RCMP 2022, retrieved via email:

force and violent or aggressive behaviour encounters. Single incidents are to be recorded in their entirety subject to exigent circumstances requiring the deactivation of the camera, and officers must not delete BWC videos.[34] Reasons for the failure to record an incident or to deactivate the BWC prior to the conclusion of the incident must be articulated in the officer's notes or report within 12 hours after the shift ends.[35] The BC Provincial Policing Standard also emphasizes that BWC videos do not replace officers' notes and reports, and police officers using BWCs should continue to write in accordance with existing policies.[36] The same approach is also adopted by the RCMP and Calgary Police Service ("CPS"), where it is explicitly emphasized that BWC recordings do not replace existing officer note-taking practices. Security and access to BWC videos is another important aspect of the BC Provincial Policing Standard, and it is limited to only authorized persons having access to them for investigative, training, or internal audit purposes.[37] Officers in the field cannot alter BWC videos.[38] BWC videos are also subject to internal audits where a random sample of BWC videos is selected to ensure compliance with the implemented policies and procedures pertaining to secured storage, deletion of videos, and unauthorized viewing.[39]

D. RCMP's BWC Operational Policy

In October 2022, the RCMP rolled out a policy to implement BWC in their operations at each service location.[40] Between 10,000 – 15,000 RCMP members, who interact with communities across rural, urban, and remote locations in Canada, will be equipped with BWCs. The project aimed at strengthening transparency, accountability, and the public's trust in the federal police, in the improvement of police and public behaviour, in evidence gathering, and in resolving public complaints.[41] Alberta, Nova Scotia, and Nunavut are the first three RCMP divisions where field tests

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BWC_policy_politique_CVC@rcmp-grc.gc.ca) [RCMP BWCs policy]; Alberta, Calgary Police Service, *Body Worn Cameras Ref #IN-007-1*, (Policy) (Calgary: CPS Bureau of Community Policing, September 2015) [CPS BWCs policy].

34 BC BWCs policy, *supra* note 31, s 10.
35 *Ibid*, s 13.
36 *Ibid*, s 14.
37 *Ibid*, ss 15, 17.
38 *Ibid*, s 16.
39 *Ibid*, s 25.
40 Royal Canadian Mounted Police, "Body Worn Cameras" (27 October 2022), online: *Royal Canadian Mounted Police* <www.rcmp-grc.gc.ca/en/body-worn-cameras> [perma.cc/PGH7-6LMM].
41 *Ibid*.

have been conducted, followed by the implementation of BWCs across Canada in the subsequent 18 months.[42]

According to the RCMP BWC policy, a BWC is "an approved RCMP device that is worn on a designated member's uniform in an overt capacity for the main purpose of recording audio and/or video."[43] The general purposes of RCMP BWCs are to capture an accurate record of the members' interaction with the public, enhance public safety and officer safety, provide improved evidence for investigative, judicial, and oversight purposes, and enhance bias-free service delivery.[44] The RCMP BWC devices will be equipped with audio and video indicators (lights), which serve as visible signals to individuals the officer interacts with and the public that they are being recorded.[45]

Nevertheless, the BWC also has a feature of operating in "covert mode," which disables these indicators and allows the BWC to record events in secret.[46] While it is questionable whether a BWC can be operated in "covert mode "without a "one-party" consent judicial authorization under s. 184.2 of the *Criminal Code* or when it is used for officer safety purposes under s. 184.1; it is possible the RCMP takes the position anyone talking with a police officer should not consider their communications private. Therefore, the officers have the sole discretion in enabling the covert mode, but if done often, this may undermine the public's trust in police, not enhance it. Additionally, RCMP BWC videos are subject to redactions, which is "[the] deliberate omission or concealment of information in a multimedia recording. Redaction involves removing sensitive or personal information from data, such as documents, audio files, and videos."[47]

Furthermore, as specified by the Information and Privacy Commissioner of Ontario, the methods of BWC activation are another important consideration when implementing BWC policy and police operations. Such activations can be manual or triggered upon the activation of a sensor.[48] Sensors can be placed in the police vehicle's light bar or siren or the officer's firearm holster, and the activation of the camera can be automatic each time the sensor is triggered upon turning on the lights or sirens of the police vehicle or each time the officers draw their weapons. Additionally, BWC has the "capacity to record the exact date, time, and

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42 *Ibid*.
43 RCMP BWCs Policy, *supra* note 33, s 1.1.
44 *Ibid*, s 2.1.
45 *Ibid*, ss 1.6, 4.3.
46 *Ibid*, ss 1.6, 4.2.
47 *Ibid*, s 1.14.
48 Model Governance Framework Ontario, *supra* note 21 at 6.

location of when and where they begin recording."[49] The RCMP BWC Policy does not address any of these aspects of BWCs. At this moment, it is unclear whether any of these features would be utilized. The current policy only specifies that RCMP officers have the discretion to start and stop recording manually and determine whether to use covert mode.

The RCMP BWCs will also utilize a pre-event video recording function, allowing the device to capture the 30 seconds before its activation and attach it to the subsequent video.[50] The Information and Privacy Commissioner of Ontario points out that the capability of some BWCs pre-event recording allows for a better context of the video and audio recording by capturing the events leading to the activation of the camera.[51] On the one hand, this is a great safety feature of a BWC device, allowing for a better context of events and enhancing transparency and accountability in the interaction between an officer and a member of the public. On the other hand, however, the mechanism behind that feature raises privacy concerns since the BWC is constantly passively recording, regardless of whether it is on or off. This raises the question of what happens to the passively captured data while the BWC is off. Such recording would likely not end up on the cloud-based storage or DEMS since it is not part of actual footage. Does the vendor then store this information, and if yes, what does the vendor do with it? Is this potential use of private information and breach of privacy regulated, and if yes, how?

Next, the RCMP BWC Policy outlines that only trained RCMP officers are authorized to wear BWCs, and they can exercise their discretion as to where, when, and how to record. More specifically, the policy outlines that officers may choose to record only in audio, video, or covert mode. In such instances, a reasonable explanation detailed in the officer's notes is required.[52] Furthermore, RCMP officers are expected to respect the reasonable expectations of privacy at dwellings, hospitals, and religious places.[53] When entering private spaces with consent (as opposed to a search warrant or exigent circumstances), RCMP officers are to advise the owners or occupants of the recording and provide them with a "reasonable opportunity to refuse or consent to being recorded."[54] Interestingly, the BWCs policy directs RCMP officers to "when possible, avoid unnecessary recording audio and/or video data."[55] Arguably, this direction unnecessarily

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49 *Ibid.*
50 RCMP BWCs policy, *supra* note 33, s 1.13.
51 Model Governance Framework Ontario, *supra* note 21 at 6.
52 RCMP BWCs policy, *supra* note 33, s 4.3.
53 *Ibid*, s 1.11.
54 *Ibid*, s 4.2.2.
55 *Ibid*, s 3.1.6.

broadens the scope of an officer's discretion. How does an RCMP officer assess what is necessary and unnecessary in the field, especially in fast-paced situations? Will this lead to the omission of significant events and interactions that should have been captured on the BWC but were not? It is also important to note that according to the RCMP BWCs policy, BWCs videos "are not subject to biometric analysis including, but not limited to, facial recognition."[56] Other BWC policies and guidelines are silent on this point. Does that mean that in those jurisdictions, the BWCs videos <u>are subject to biometric analysis</u>?

Additionally, the RCMP policy calls for close supervision of officers equipped with BWCs and emphasizes that the BWC video and audio footage "does not replace proper note taking or reports."[57] Moreover, supervisors are directed to "[i]nspect members' notebooks regularly to ensure the continuing quality of note-taking with the use of the BWC."[58] Additionally, prior to reviewing BWC recordings, RCMP officers are required to submit a written request, and upon review of the video, if there is an additional detail not previously observed yet now added to the officer's written notes, a notation for the inclusion is supposed to be made.[59] As a general rule, the RCMP BWC policy points out that videos should "complement, but not replace, evidence from other sources, such as police officers, witnesses, or evidence that is not normally captured by Forensic Identification Services."[60] Furthermore, the BWC video "does not replace existing requirements, procedures, or policy obligations, such as recording admissions, statements, or declarations."[61] Curiously, an RCMP BWC is not used as a "routine performance evaluation tool."[62] Perhaps, this technology could be better utilized in future practices towards evaluating officers' performance and addressing gaps in training.

It must be stressed that the government cannot unilaterally collect and manage the private information of Canadians. Hence, federal statutes applicable to the RCMP BWC policy exist to allow private citizens and permanent residents to request and view the information gathered via BWCs worn by RCMP members when the interaction in question occurred. Similar provisions and policies assisting private citizens and permanent residents in accessing BWC video and audio recordings from any local

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56 *Ibid*, s 2.9.
57 *Ibid*, s 5.1.
58 *Ibid*, s 3.2.4.
59 *Ibid*, ss 5.2–5.3.
60 *Ibid*, s 5.4.
61 *Ibid*, s 5.5.
62 *Ibid*, s 3.2.

police service can be found in provincial legislations. The two pieces of federal legislation providing mechanisms for access to BWCs video and audio recordings are *The Access to Information Act* and *Privacy Act*.[63] They are also referenced in the RCMP BWC policy under section 3.4.

As outlined in the *Access to Information Act*, any Canadian citizen or permanent resident can submit a request to access the BWCs video, as per sections 4(1) and 6. However, access is not guaranteed as per the statute, and the "head of the government institution" has discretion and can "decline to act in the person's request if, in the opinion of the head of the institution, the request is vexatious, is made in bad faith or is otherwise an abuse of the right to request access to records."[64] Moreover, s. 12(1) of the *Privacy Act* addresses the right of access of every Canadian or permanent resident to personal information about the individual contained in an information bank or in any government institution subject to the individual pinpointing the location of the information to assist the government in locating and retrieving it.[65] The requests to access personal information must be submitted in writing to the government institution containing it.[66] This requirement places a high burden on the individual applying for access to the information to know and list which government department has or may have the relevant personal data, which may potentially lead to incomplete disclosure due to the applicant's gaps in knowledge, especially in instances where more than one department may contain it.

In response to a written application for access to personal information by a private citizen (or a permanent resident), the head of the government institution in possession of the information should, within thirty days from the submission of the written request, provide a written notice outlining whether or not access will be granted, and if approved, share the information.[67] Yet, similarly to the administrative procedure surrounding access to personal information as per *The Access to Information Act*, the head of the government institution has the discretion and may refuse to grant access upon stating the reasons for such refusal.[68] In such cases, the private citizen (or permanent resident) has the right to file a complaint to the Privacy Commissioner of Canada.[69]

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[63] *The Access to Information Act*, RSC, 1985, c A-1 [*The Access to Information Act*]; *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*].
[64] *Ibid*, *The Access to Information Act*, s 6.1(1).
[65] *Privacy Act*, *supra* note 63, s 12(1).
[66] *Ibid*, s 13(2).
[67] *Ibid*, s 14(a) and (b).
[68] *Ibid*, s 16(1).
[69] *Ibid*.

E. BWCs and Privacy Concerns in Calgary

In September 2015, CPS undertook and published a privacy impact assessment ("PIA") for the project of adopting the use of BWC and In-Car Digital Video ("ICDV") technologies in their day-to-day operations. In 2019, all front-line CPS officers and marked police vehicles were equipped with these new pieces of technology. Prior to this project, CPS worked collaboratively with the other UK and US jurisdictions that had already successfully implemented the use of BWC and ICDV. From the start, the PIA acknowledged that "[t]he use of this technology can be privacy-invasive."[70] Consequently, since CPS is a public and provincial body, it must comply with provincial privacy legislation, specifically the *Freedom of Information and Protection of Privacy Act (FOIP)*, and the Alberta Information and Privacy Commissioner oversees this compliance.

The main goal of the PIA was to address risks and privacy issues flagged by Privacy Commissioners across the country and illustrate the appropriate measures for CPS to undertake to mitigate those concerns.[71] Some of the previously raised privacy issues with BWC and ICDV technology included the following: whether they were the least privacy-invasive alternative for effective policing; the availability of appropriate general notification to the public, specifically to individuals recorded by the BWCs; constant recording vs. recording only for specific police-citizen interactions; implementation of appropriate measures to record bystanders; the availability of proper safeguards pertaining to the collection, use, and disclosure of personal information and regarding retention, storage, and destruction of BWC recordings; whether the captured BWC data will be subject to any CPS internal analysis and if yes, what type; will recorded individuals have proper access to BWC records; and will CPS have the appropriate policies and procedures to implement the project.[72]

When conducting their research and assessing the pros and cons of the new technology, CPS relied on data gathered from the UK Home Office. The data demonstrated that the use of BWCs has increased the following: the number of domestic conflict resolutions, appropriate custodial sentences, public confidence, and the number of citizen complaints.[73] The storage media is securely stored within the BWC device and cannot be directly accessed by the officer wearing it.[74] There is also a centralized Court

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70 Alberta, Calgary Police Service, *Body Worn Cameras (BWC) and In Car Digital Video (ICDV)* (Privacy Impact Assessment), (16 September 2015) at 1 [*CPS PIA*].

71 *Ibid*.

72 *Ibid* at 1–2.

73 *Ibid* at 5.

74 *Ibid* at 15.

Disclosure Unit, and "only specially trained individuals will have access to the video for the purpose of creating a Disclosure package for the Crown."[75] It is recommended that members continue to record "notwithstanding the objection as consent is not required when the recording occurs in the context of law enforcement and policing activities."[76] This conservative and rigid approach to the continuous use of BWCs persists as per CPS policies and guidelines, even in private dwellings and places of worship and religion, and in response to calls involving highly sensitive matters such as domestic violence and sexual assault.[77]

As noted in the CPS's PIA, there are four key considerations concerning what constitutes a reasonable expectation of privacy: necessity, proportionality, effectiveness, and minimal intrusiveness. In the privacy analysis conducted by CPS prior to launching the use of BWCs and ICDV, these four privacy characteristics were addressed, along with how their BWCs policies can take steps towards mitigating such potential breaches. The rationale was that "[t]he use of officer notes and reliance on memory has been the long-standing reporting system for police officers."[78] However, it is noted that an officer's memory can be "seriously flawed," as it was in Robert Dziekanski's case. In such circumstances, there is no better alternative to a BWC video that reveals the perspective and point of view of the officer involved.[79] Moreover, CPS undertook the approach of limiting the use of BWC to instances of public interactions invoking the discharge of their law enforcement and policing duties, as opposed to unnecessarily recording each public interaction.[80] BWCs are also not to be used when strip searches are conducted.[81] Furthermore, the use of BWCs provides an opportunity for an alternative and neutral perspective on an officer-citizen interaction, as opposed to relying on potentially biased, one-sided officer's notes.[82] Officers would consider recording with their BWCs "when safe and practicable to do so" in circumstances involving youth interactions or where the setting is bathrooms, changerooms, and other private spaces, and the occupants have a reasonable expectation of privacy.[83] Therefore, CPS took into account all aforementioned privacy issues and concerns related to BWCs (and ICDV) technology and concluded that there is no less intrusive

[75] *Ibid* at 16.
[76] *Ibid* at 10.
[77] *Ibid* at 10–11.
[78] *Ibid* at 22.
[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.

alternative to achieving enhanced transparency and accountability in the relationship between the police and the public than the implementation of these new tools into front-line police operations.[84]

F. 2021 Model Governance Framework for Police BWCs in Ontario

In June 2021, the Information and Privacy Commissioner of Ontario issued a BWC Model Governance Framework recommending that BWCs videos not be subject to artificial intelligence (AI) or biometric technology (including facial recognition), as well as used in conjunction with live streaming capabilities "until lawful authority for doing so is clearly established."[85] This, however, implies that the direction for the use of BWCs videos is headed towards it being subject to AI and facial recognition software. Therefore, the data gathered by BWCs may be easily cross-referenced with other databases (i.e., mug shot databases) and can be used to gather metadata and behavioural data on everyone captured in the field of view and sound of the BWC camera.[86] Further discussion on privacy concerns follows in Part III.

III. CANADA'S STRUGGLES WITH PRIVACY

Privacy can be defined as:

> The state of desired "in access" or as freedom from unwanted access, with "access" meaning perceiving a person with one's senses, including hearing them or obtaining information about them. Thus, speaking theoretically, a person's privacy will be interfered with if another obtains, listens to, or finds out information about them against their wishes or enables others to do the same.[87]

In February, 2021, the Office of the Privacy Commissioner of Canada and the Privacy Commissioners of Quebec, British Columbia, and Alberta conducted a joint investigation of Clearview AI, Inc. ("Clearview") and concluded that "Clearview engaged in the collection, use, and disclosure of personal information through the development and provision of its facial recognition application, without consent" and for inappropriate purposes.[88]

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84 *Ibid*.

85 Model Governance Framework Ontario, *supra* note 21 at 2.

86 *Ibid* at 1–2.

87 John Burchill, "Special Issue: Criminal Law Edition (Robson Crim) Tale of the Tape: Policing Surreptitious Recordings in the Workplace" (2017) 40:3 Man LJ 247 at 278 [Tale of the Tape].

88 Office of the Privacy Commissioner of Canada, "Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à

Clearview failed to comply with a number of federal, provincial, and territorial privacy statutes and pieces of legislation and used "biometric information for identification purposes without the express consent of the individuals concerned and by not disclosing the database of biometric characteristics and measurements to the Commission."[89] The investigation recommended that Clearview stops offering facial recognition services to clients in Canada subject to the investigation; stops collecting, using, and disclosing images and biometric facial data from Canadians; and deletes images and biometric facial data collected from Canadians.[90]

The events leading to this investigative report and recommendations are founded upon the revelations in 2020 that Clearview was expanding its facial recognition database by using images from public websites, among which Facebook, YouTube, Instagram, and Twitter, in violation of those websites' terms of service and without consent of individuals.[91] Over three billion images with their corresponding biometric identifiers were obtained into Clearview's database - a large number of those images were of Canadians, including children.[92] Additionally, at that time, reports confirmed that several Canadian law enforcement agencies and private organizations have used Clearview's services to identify individuals.[93]

In June 2021, The Privacy Commissioner of Canada submitted a letter to the Speaker of the Senate addressing the findings from the earlier investigation on RCMP's use of Clearview services, specifically facial recognition technology ("FRT"), and drafted joint guidance for law enforcement agencies considering the use of facial recognition technology.[94] The commissioner acknowledged that FRT could have an effect on an individual's privacy and undermine rights, liberties, and freedoms, among which are freedom of expression and peaceful assembly.[95] Moreover, FRT

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l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information Privacy Commissioner of Alberta" (2 February 2022), online: *Office of the Privacy Commissioner of Canada* <priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2021/pipeda-2021-001/> [perma.cc/CH24-YWB6].

89 *Ibid* at para 120.

90 *Ibid* at para 121.

91 *Ibid* at para 3.

92 *Ibid*.

93 *Ibid* at para 4.

94 Daniel Therrien, "Police Use of Facial Recognition Technology in Canada and the Way Forward" (10 June 2021), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/202021/sr_rcmp/> [perma.cc/9PCM-EJ49] [Police Use of FRT].

95 *Ibid*.

has emerged as a powerful tool posing serious privacy risks.[96] Privacy is fundamental to "dignity, autonomy, and personal growth," and it is a requirement to "free and open participation" of society's members in a democracy.[97] Hence, when surveillance increases, individuals can be deterred from meaningfully exercising their rights and freedoms.[98] Additionally, the Commissioner points out that:

> The freedom to live and develop free from surveillance is a fundamental human right. In Canada, public sector statutory rights to privacy are recognized as quasi-constitutional in nature, and aspects of the right to privacy are protected by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the Charter). These rights dictate that individuals must be able to navigate public, semi-public, and private spaces without the risk of their activities being routinely identified, tracked and monitored.[99]

Thus, what exactly is facial recognition ("FR") and how does it work? The Office of the Privacy Commissioner of Canada describes the use of FR as involving:

> . . . the collection and processing of sensitive personal information: biometric facial data is unique to each individual, unlikely to vary significantly over periods of time, and difficult to change in its underlying features. This information speaks to the very core of individual identity, and its collection and use by police supports the ability to identify and potentially surveil individuals.[100]

More specifically:

> FR technology is a type of software that uses complex image processing techniques to detect and analyze the biometric features of an individual's face for the purposes of identification or verification (also known as "authentication") of an individual's identity. While early versions relied on humans to manually select and measure the landmarks of an individual's face, today the process of creating a facial template or "faceprint" is fully automated. Using advanced, "deep learning" algorithms trained on millions of examples, FR technology is able to create three-dimensional faceprints consisting of close to a hundred biometric features from two-dimensional images.[101]

Hence, the fact that there is no specific and stringent legal framework governing the scope of FR use in Canada is alarming. The current legal framework consists of a "patchwork of statutes and the common law," more

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96 Office of the Privacy Commission of Canada, "Privacy Guidance on Facial Recognition for Police Agencies" (2 May 2022), online: *Office of the Privacy Commissioner of Canada* <priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/gd_fr_202205/> [perma.cc/3WYK-CHRA] [Guidance on FR].

97 *Ibid* at para 12.

98 *Ibid*.

99 *Ibid* at para 11.

100 *Ibid* at para 8.

101 *Ibid* at para 19.

specifically, federal and provincial privacy laws, "statutes regulating police powers and activities and *Charter* jurisprudence."[102] Hence, Canada's federal, provincial, and territorial privacy commissioners are of the opinion that the current legislative context for police use of FR is "insufficient" and "there remains significant uncertainty about the circumstances in which FR use by police is lawful."[103]

Based on the results from the previously commenced investigation on the RCMP's use of Clearview's FRT in February 2021, the Privacy Commissioner of Canada pointed out that "billions of people essentially found themselves in a "'24/7' police line-up."[104] When the RCMP collected personal information from Clearview, it contravened the *Privacy Act* because, as a government institution, the police cannot collect personal data from a third party if that third party initially collected the information unlawfully.[105] Erroneously, when the RCMP was initially asked by the joint investigating Privacy Commissioners whether it was using Clearview's services, it denied it. Later, it admitted to using it but only for limited purposes, such as identifying and rescuing children who are victims of online sexual abuse.[106] Moreover, the Commissioner pointed out that the RCMP "has serious and systemic gaps in its policies and systems to track, identify, assess and control novel collections of personal information. Such system checks are critical to ensuring that the RCMP complies with the law when it uses new technology such as FRT, and new sources, such as private databases."[107]

Although the RCMP is no longer using Clearview's services, the Commissioner remains concerned with the fact that the RCMP did not agree with the findings of the investigation and tried to defend itself by arguing that s. 4 of the *Privacy Act* does not impose a duty on the RCMP to confirm the legality of the collected personal information it obtains from the third-party vendor (Clearview).[108] Despite this, the Commissioner acknowledged the RCMP's effort in launching a National Technology Onboarding Program unit in March 2021 and its commitment to implementing the recommendations made by the Commissioner.[109] These recommendations can be summarized as follows: the police need specific

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[102] *Ibid* at para 41.
[103] *Ibid* at para 2.
[104] Police Use of FRT, *supra* note 94, Overview of Investigation into RCMP's use of Clearview AI.
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid* [emphasis added].
[108] *Ibid.*
[109] *Ibid.*

reasons based on evidence to justify the use of FRT, as well as adhere to the critical principles of accuracy, data minimization, accountability, and transparency prior to FRT use.[110]

The Commissioner points out that when considering the use of FR technology, police agencies must not only ensure they have a lawful authority for the proposed use, but they must also apply standards of privacy protection proportionately to the potential harms involved.[111] Police agencies must have the legal authority to use FR and use it in a manner that respects the privacy rights of Canadians.[112] Furthermore, the collection of personal information must be limited to what is directly relevant and necessary "for the specific objectives of an FR initiative."[113] The Privacy Commissioner of Canada strongly recommends personal information be protected "by appropriate security measures relative to the sensitivity of the information."[114] To stress the significance of police's work and the inherent balance it must strike with individual human rights and constitutionally protected rights and liberties, the Commissioner states that "[p]olice agencies have a crucial role in furthering public interests such as the preservation of peace, the prevention of crimes, and the administration of justice. The common law, like statutory authorities, can authorize police actions that infringe on individual liberties in the pursuit of these societal goals."[115] To achieve that necessary balance, The Commissioner mandates open public access to the formal FR agency's policy setting out the circumstances in which the agency will and will not engage in FR use and how personal information will be handled.[116]

Next, as addressed by the House of Commons Standing Committee on Access to Information, Privacy and Ethics ("ETHI") meeting in August 2022, the RCMP has also admitted to its use of spyware – on-device investigative tools ("ODITs") hacking cellphones.[117] Spyware intrudes on mobile devices and collects personal data. It also has the capacity to remotely turn on and off the microphone and cameras of a suspect's phone or laptop.[118] The RCMP has done so since 2017 without even preparing a

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110 *Ibid*.

111 Guidance on FR, *supra* note 96 at para 34.

112 *Ibid* at para 37.

113 *Ibid* at para 103.

114 *Ibid* at para 121.

115 *Ibid* at para 46.

116 *Ibid* at para 128.

117 House of Commons, *The RCMP & Spyware: A Privacy Predicament of Profound Proportions*, Privacy and Ethics (ETHI), 44-1, No 32 (09 August 2022) at 15 [ETHI].

118 *Ibid*.

PIA.[119] Although not mandatory, PIAs are recommended by Privacy Commissioners, and as previously discussed in Part II, they are prepared by various police agencies across Canada prior to launching new procedures involving the implementation of technology, such as BWCs. Unfortunately, the Commissioner "cannot compel any department to produce a PIA, and has no authority to sanction any department or agency for failing to prepare a PIA."[120] Hence, as ETHI states, "allowing police to police themselves offers little in the way of genuine transparency, and that is inadequate in a democracy that relies on transparency to foster trust in government, the public sector, and the judicial system."[121] Additionally, ETHI states that police operational independence is important, but without being effectively overseen "it easily leads to policing in the shadows."[122]

To demonstrate how the privacy concerns surrounding subjecting BWCs videos to FRT play out in practice, a comparison of FRT and Automated License Plate Reader ("ALPR") technology will be helpful. ALPR is a camera installed at intersections or in police patrol cars with built-in technology, allowing it to photograph license plates of passing vehicles in its frame and screen them against police internal database lists for vehicles linked to crimes.[123] With the help of ALPR, police is able to track the movements of the vehicle throughout the city and create a "pervasive account of a car's location."[124] While it is public knowledge that ALPR and FRT exist, the specific methods of their use and deployment are not disclosed and may be "invisible" even to "oversight institutions."[125] In the eyes of the courts, the use of ALPR does not constitute a search; hence the accused persons are unable to exclude evidence obtained with the assistance of ALPR.[126] Furthermore, drivers may never know they are being tracked unless they are charged with a crime and ALPR evidence is disclosed.[127] These same principles and concerns apply to the police's use of FRT. Hence, as Hannah Bloch-Wehba outlines, "law enforcement techniques that rely on advanced technologies are often less visible to individual targets, the judicial branch, and the public than their physical counterparts."[128]

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119 *Ibid* at 14—15.
120 *Ibid* at 14.
121 *Ibid* at 3.
122 *Ibid*.
123 Hannah Bloch-Wehba, "Visible Policing: Technology, Transparency, and Democratic Control" (2021) 109 Cal L Rev 917 at 919.
124 *Ibid*.
125 *Ibid* at 920.
126 *Ibid*.
127 *Ibid* at 320.
128 *Ibid* at 921.

Moreover, there is mixed evidence about the accuracy of FRT and the "high potential cost of error" it sometimes generates.[129] FRT misidentifies people of colour more frequently as potential matches than Caucasian faces.[130] Such errors lead to the perpetuation of differential treatment of people of colour and discriminatory practices of authorities – the exact opposites of the values of transparency and accountability BWCs are meant to promote. Coupled with the ability to covertly track an individual's movements across town, BWCs footage subjected to FRT could easily turn into a police tool of total control over the individual and not only violate one's privacy but also disregard an individual's liberties.

To sum up, knowing about the RCMP's infractions with privacy laws and its tendency to unilaterally employ recent technology and practices into its operations with little or no regard to how an individual's privacy may be negatively affected or entirely compromised, Canadian society and Privacy Commissioners across various jurisdictions must be vigilant about the RCMP's BWCs implementation project. Although their BWCs policy explicitly states that BWCs data will not be subject to FRT, there is no guarantee that the RCMP will not covertly subject the data to FRT or that the vendor company contracted to supply and maintain their software and the DEMS will not misuse the gathered information similarly to how Clearview did. Moreover, the fact that the RCMPs BWCs are constantly recording elevates the concern that large amounts of data lacking third-party consent is being gathered and easily abused or exploited for alternative gains. Equivalent concerns about the use of FRT of BWCs footage and the misuse of digital data captured via BWCs apply to other police agencies across the country.

Conversely, the RCMP's BWCs rollout could lead to more unified, streamlined, transparent, accountable, and progressive policing in Canada if properly implemented and maintained. As discussed, the current statutory framework has gaps in privacy protection and in holding police responsible for their wrongdoings where privacy infractions ensue. Nevertheless, laws are not static but evolve as society progresses. Therefore, there is the possibility to develop an effective legal framework to capture these new advancements in policing and ensure the safe employment of technology with sufficient planning and collaboration across all levels of government.

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[129] *Ibid* at 956.

[130] *Ibid* at 956–957.

IV. CASE STUDIES: THE USEFULNESS AND FLEXIBILITY OF BWC PRODUCED DATA AS EVIDENCE IN COURT PROCEEDINGS

The most effective way to illustrate the usefulness and advantages of evidence obtained via BWCs is through real-life examples. What follows is an overview of eight criminal cases from the jurisdiction of Calgary, Alberta, demonstrating the reliability and flexibility of evidence obtained via BWCs. Calgary is currently the only large urban municipality in the prairie provinces that has invested in and fully equipped its front-line officers with BWCs. The cases are selected based on various legal issues before the court, including the analysis of Charter rights. In addition, there are numerous different settings and circumstances in the cases showcasing the assistance BWCs footage can provide not only to police officers on the scene of an incident but also to Crown prosecutors, defence counsels, accused persons, judges, juries, and other players within the criminal justice system.

A. *R v Saunders*[131]

R v Saunders is a case involving drug trafficking charges and a *Charter voir dire*. The accused had been under police observation for some time before a search warrant for the search of his apartment was granted. An unmarked police vehicle was asked to follow Mr. Saunders while driving on a highway and conduct an arrest of him. Interestingly, one of the arresting officers did not know that his BWC was already activated as soon as Mr. Saunders was directed to pull his vehicle over. The officer noticed that his camera was on after the interaction concluded, and the accused was being transported to the arrest processing unit. The same officer exercised excessive force and hit the accused before informing him about the reasons for the pullover and the arrest. Also, the BWCs captured how the other arresting officer proceeded to search Mr. Saunders' cell phone for information that might assist the ongoing investigation without having formal authorization to do so.

The defence brought an application for violation of Mr. Saunders' sections 7, 8, 9, 10, and 11(d) *Charter* rights and sought a section 24(2) *Charter* remedy. The court found that sections 7, 8, 10 (a), and 10(b) were violated and excluded from trial the drugs obtained from the search of Mr. Saunders's apartment. This finding was possible because of the captured interaction between Mr. Saunders and the arresting officers on their BWCs and the amount of undisputable detailed evidence it provided to the judge in favour of most of the alleged *Charter* violations. Hence, the BWCs footage

131 *R v Saunders*, 2021 ABPC 77 [*Saunders*].

assisted the court in substantiating the judge's decision and in providing details for the application of corresponding legal tests, which are highly context specific. The presiding judge was able to see and hear the interaction between the arresting officers and the accused, the language used by the officers, and the amount of force exerted unnecessarily over the accused, as opposed to simply reading a police report and hearing the one-sided statements of the officers backed up by their written notes when questioned on the witness stand. Additionally, it is important to note that the values of accountability and transparency were upheld through the production of the footage as part of the disclosure to the Crown. Even though the BWCs evidence did not support the Crown's case, the system is working properly, as it should, by neutrally disclosing that evidence and allowing the trier of fact to make their determination about its weight and the outcome of the case.

B. *R v Henderson*[132]

This case outlines a blended *voir dire* hearing and is an example of the escalation of charges as the interaction between officer-citizen develops in instances of a car accident. Ms. Henderson was the driver of a vehicle involved in a car crash. Initially, the responding officer did not suspect that alcohol was involved. As the responding officer approached Ms. Henderson closely while handing her the paperwork for the incident, he smelled alcohol coming from her direction. However, the officer was uncertain whether the smell of alcohol came from Ms. Henderson. Ms. Henderson also exhibited strange behavior as she kept turning away from the officer while speaking with him. This raised his suspicion, and he proceeded with an ASD demand. The result from the ASD test substantiated the need for a breath demand.[133] The officer advised Ms. Henderson of her right to counsel pursuant to section 10(b) of the *Charter* and cautioned her. At the police station, the officer provided Ms. Henderson with the phone number for legal aid and the phonebook where she could locate phone numbers for other lawyers.

Then, Ms. Henderson sought to exclude the breath sample she provided at the police station, alleging that her sections 8, 10(a), and 10(b) *Charter* rights had been violated. Because the entire interaction between Ms. Henderson and the arresting officer was recorded on his BWC, the court was able to see Ms. Henderson acknowledging that she understood her caution and right to counsel with her boyfriend at the scene. The BWC also

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132 *R v Henderson*, 2020 ABPC 60 [*Henderson*].

133 *Ibid* at para 14.

captured the interaction between Ms. Henderson and the arresting officer at the police station when she was provided the opportunity to contact legal counsel. Additionally, the BWC video and its built-in date and time feature assisted the court in applying the "as soon as practicable" test and the "reasonable suspicion" test. Time is of the essence for impaired driving charges because there is a limited window to obtain a proper breath sample.

This case demonstrates that relying only on the BWC footage might lead to misleading information provided to the court, which is why it is important to always have the *viva voce* evidence of (ideally) the officer, who was wearing the BWC, who can articulate the contextual meaning of his words in the totality of the situation captured on the BWC. Therefore, BWCs videos and images should not replace the officer's written notes and oral testimony but complement them. In conclusion, the court found no breach of Ms. Henderson's *Charter* rights, and the Certificate of Analysis of her breath sample was admitted into evidence.

C. *R v Daytec*[134]

R v Daytec is another driving while intoxicated case, which also has a charge of failing without reasonable excuse to comply with a proper demand for a breath sample. Video footage obtained from the police cruiser and the BWCs of the involved officers exhibited to the court the irregular driving pattern of Mr. Daytec, as well as his appearance (reading glasses were sideways) and behaviour when he was pulled over. The entire interaction between the accused and police officers was recorded on BWCs and provided to the Crown. Mr. Daytec testified at his trial that he was confused about the directions one of the officers was providing him with regarding how to blow into the breathalyzer. Hence, Mr. Daytec was unable to provide a proper second breath sample, which resulted in his additional criminal charge.

Based on the BWC video played in court, the defence counsel was able to pinpoint flaws in the officer's instructions and those provided as per the device's manual. Defence counsel also pointed out that the manual prescribes three sets of three breath sample attempts, while the officer only allowed Mr. Daytec seven attempts; hence depriving him of two more tries. Notably, the BWC video demonstrated a power dynamic between the officer trained to use the device and another officer nearby, who, without proper training on the operation of the breathalyzer, interfered with Mr. Daytec. The court deemed improper the interference of the untrained officer with the breath sample of Mr. Daytec. Hence, the court found Mr.

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[134] *R v Daytec*, 2021 ABPC 48 [*Daytec*].

Daytec not guilty on the charge of failing without reasonable excuse to comply with a proper demand for a breath sample and guilty of the driving while intoxicated charge. To sum up, BWCs footage can help accused persons achieve just verdicts by having solid evidence in their defence as opposed to relying on the court to assess the weight of accused vs. officer oral testimony. Also, BWCs provide undisputable evidence about driving patterns, appearances of the accused, and other contextual factors assisting decision-makers in their deliberation and weighing of facts.

D. *R v Saddleback*[135]

R v Saddleback is a domestic violence case involving sexual assault, assault, assault with a weapon, unlawful confinement, and threat to cause death or bodily harm charges. It demonstrates the struggle the police and courts face when dealing with domestic violence cases. Often, there are inconsistencies in the victim's statements at the time of the incident and later in court, which is utilized by defence counsel as a means to undermine the victim's credibility and persuade the trier of fact to draw negative inferences about the victim. The BWCs videos from the officers responding on the scene provided fresh evidence of the statements and behaviour of the victim at the time of the incident. In that sense, the BWCs were used to substantiate and perpetuate defence's methods of questioning and undermining the victim's credibility. However, the issue here is not with the BWC evidence or its quality but the way it is used. In addition, there was missing physical evidence alleged to have been used in the commission of some of the alleged offences (duct tape and metal bar), which further undermined the victim's credibility. In this case, BWCs were also used to capture the injuries of the victim at the time of the incident. However, it is important to note that bruises may take up to several days to appear on the skin, and, in this regard, BWCs images may be improperly relied on as evidence of bodily injuries at the time of incidents. In the end, due to the inconsistencies in the victim's testimony, the accused was only convicted on two of the charges faced by him– assault and sexual assault.

E. *R v YK*[136]

R v YK was another domestic violence case involving serious aggravated assault and strangulating charges. The victim refused to testify in court, although she was subpoenaed. At *voir dire*, the BWCs footages from the officers responding to the incident at the time it occurred was the only piece

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135 *R v Saddleback*, 2020 ABPC 168 [*Saddleback*].

136 *R v YK*, 2019 ABPC 249 [*YK*].

of evidence that could be presented in court, and it was tested under both traditional and principled approaches of the hearsay evidence rules. The BWCs videos were divided into three parts, and only part one captured the victim and her statements immediately after the incident was admitted into evidence. There was a high degree of detail about the victim's statements and appearance at the time, which may be easily missed or omitted in the officer's written notes. Likewise, the change in the victim's behaviour in the ambulance can best be demonstrated through video footage vs. written notes. The flexibility and reliability of BWCs footage are evident here again. Moreover, its usefulness to the Crown in determining the likelihood of conviction and guarding the public interest in the pursuit of justice and community safety is undeniable. Had there been no video evidence obtained via BWCs, the case would likely have proceeded without the key witness.

F. *R v Chernoff*[137]

R v Chernoff was a sentencing case regarding criminal charges arising from a domestic incident with mischief and damage to property charges. The parties had already agreed to the facts. The judge relied on the BWC video of a responding officer to account for details regarding the remorse and admission of guilt by the accused after his arrest and while he was transported to the hospital. The entire officer-accused interaction was captured on the BWC of the officer, and it showed the behaviour of the accused that led to the deployment of a taser and his subsequent arrest. The exact moments of deploying the taser, cautioning, and arresting the accused were time stamped because of the BWC capabilities. Also, it was easy for the judge to see the condition of the home and the extent of property damages inflicted on the victim. In addition, the BWC recorded the officer serving the accused with an Emergency Protection Order (EPO) the following morning as he was released from the hospital. BWC video can easily verify the service of the EPO with certainty and eliminate the possibility of the respondent claiming that (s)he was never served and did not know about the existence of it, which is common.

G. *R v Wol*[138]

In *R v Wol*, two co-accused were charged with unlawful possession of a prohibited or restricted weapon and breaking and entering a dwelling home with the intent to commit an indictable offence. Witnesses' testimony was

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137 *R v Chernoff*, 2021 ABPC 16 [*Chernoff*].

138 *R v Wol*, 2019 ABPC 304 [*Wol*].

inconclusive and discredited by the defence counsel at cross-examination. The identity of one of the co-accused was also at issue before the court. The piece of evidence that helped the judge to identify the two co-accused and conclude beyond a reasonable doubt that they owned a prohibited or a restricted firearm was an exhibit with a still image of both co-accused in an SUV outside the home as they were trying to drive off upon police's arrival. This image was captured by the BWC of one of the officers responding to the incident. Notably, the judge stated that "[t]hese photographs coupled with the evidence of Cst. Harris lead me to the conclusion that Mr. Wol had possession of the sawed-off shotgun at the time it was discharged."[139] This illustrates one of the multiple useful features of BWCs and their ability to transform videos into clear images. If Cst. Harris had not worn a BWC, or if his BWC had been turned off, it would have been very difficult, if not impossible, for the Crown to meet its burden of proof beyond a reasonable doubt in identifying one of the co-accused. Moreover, because the BWC footage transformed into a clear image of the co-accused together in the SUV and Mr. Wol holding the firearm while his hands were in the air, the court was also able to convict the co-accused of possession of a firearm and a subsequent count of breaching previous court orders, since there were weapons and firearm prohibition orders in effect.

H. *R v Callaghan*[140]

R v Callaghan involves an accused being pulled over for driving while intoxicated just as he was parking at the driveway of his home. One of the issues raised by the defence counsel at the blended *voir dire* was that the Crown had failed to identify the accused properly. The police officer who conducted the arrest testified as one of the witnesses at trial and identified the accused at the dock based primarily on his interaction at the time of the arrest and at the subsequent serving of court documents, including a Promise to Appear. The interactions between the arresting officer and the accused were recorded on the BWC of the arresting officer and were relied upon at trial. The judge regarded the BWC video as highly reliable, good quality, and detailed evidence, which helped reveal the physical appearance of the accused – body type, height, facial features, and visible tattoos – and assisted the judge in refuting the arguments raised by the defence counsel. The judge found that the accused in the courtroom is the same person depicted on the BWC and is the person who should hence be charged with

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139 *Ibid* at para 55.

140 *R v Callaghan*, 2020 ABPC 208 [*Callaghan*].

the offence of driving while intoxicated. Although not applicable in this case since the accused refused to testify, BWC videos also record high-quality sound. Therefore, the voice of the accused is another unique characteristic that could help identify the accused before the court. However, the issue is that the Canadian justice system does not require the accused to testify at their trial. Hence, maybe a change is needed for a new approach or a legal rule requiring the accused to read a neutral script (as opposed to answering questions asked on the stand), which can help the judge and jury identify him. This will be another step towards better utilization of the features of BWCs. This will also help the Crown to meet its onerous burden of proof beyond a reasonable doubt.

I. Summary of features and usefulness of evidence obtained via BWCs

As illustrated through the eight preceding cases, evidence produced by BWCs is objective, reliable, and has numerous practical applications in the criminal justice system. For example, as seen in *Saunders*, it can assist the accused in proving alleged *Charter* violations by arresting officers and use of violence and excessive force. The fact that the trial judge noted the officer's misconduct proves that BWCs enhance trust and transparency in the police and can be utilized as accountability tools for police conduct. Furthermore, BWCs provide clear timelines and time stamps of the officer's interactions with an individual and capture the language used and the context in which certain words are used so that a trier of fact has a complete picture of the accident and the interaction in question. Therefore, BWCs easily prove the timeliness of police caution, instructions, and reading of *Charter* rights. However, as seen in *Henderson*, relying only on BWCs footage should be avoided, and officers' notes and court testimony must be considered in conjunction with the digital evidence. Next, BWCs footage can demonstrate a person's driving patterns and appearance in cases involving impaired driving, as shown in *Daytec*. In addition, the same case illustrated how BWC footage assisted the defence counsel in pinpointing gaps in the officer's training in providing instructions to the accused on how to submit a proper breathalyzer test. This resulted in an acquittal for the accused on one of his charges.

Unfortunately, as illustrated in *Saddleback*, BWCs are used as tools to undermine victims' credibility in sexual assault cases. It is important to note, however, that the issue is not with the technology or the quality of the evidence produced by the BWCs, but in the way the system applies and turns it against the victims by hinging on inconsistencies in their testimony provided immediately after the alleged incident and later in court.

Moreover, in assault and domestic violence cases, BWCs are useful for capturing injuries, but it is crucial to note that bruises may take several days to become visible, so one should not rely solely on the BWCs footage and images generated from them. Also, in domestic violence cases when the victim, which is often the main Crown witness, refuses to testify in court (usually out of fear), BWCs footage is extremely helpful evidence for the court and for the Crown prosecutor, who can proceed with the case in the public interest even without the victim's court testimony. These were the circumstances in *Y.K.* Likewise, evidence produced by BWCs in the domestic violence context is also useful for capturing the extent of property damages as seen in *Chernoff* and proving service of an EPO upon the respondent. Also, since the same case required the officer's deployment of a taser, the entire interaction between the officer and the accused was captured, which provides insurance for both the officer and the accused should the events escalate or if complaints against the officer are filed.

Wol demonstrated the use of BWCs footage to prove the identity of the accused and his ownership of a firearm at the time of the incident while subject to an active firearm prohibition order. Lastly, *Callaghan* reiterated the usefulness of BWCs in proving the identity of the accused in court in very different circumstances than in *Wol*, and it left the door open for a potential evolution of court proceedings, where the voice of a suspect can be authenticated with the use of a BWC recording. *Callaghan* is also an example of the transparent and unbiased police and criminal justice system, where regardless of the status of the accused as an off-duty police officer, he was charged with driving a motor vehicle while intoxicated by his colleague.

V. Digital Data, Police Misconduct in Public Office, and Upholding the Rule of Law

A. *R v Collins*; *R v Lewis and Jaffer*[141]

In May 2022, the Court of Appeal (Criminal Division) in London, Britain, refused to grant leave to appeals regarding the sentencing of two police officers and one civilian police staff member found guilty of misconduct in public office for the creation, possession, and misuse of crime scene photographs. A Canadian scholar states that as a highly regulated profession, police officers should be held accountable to the same high standards applicable to other highly regulated professions, such as the

[141] *R v Collins; R v Lewis and Jaffer*, [2022] EWCA Crim 742 [*Collins*].

legal profession, in ensuring public trust and confidence.[142] Furthermore, the court highlighted that civilian police staff must also be held accountable to the same standards police officers are. Collins worked as a Digital Forensics Expert and transferred thousands of crime scene and murder victims' images onto a flash drive and subsequently to his personal computer. He did not disseminate the images any further. He was sentenced to three years in prison. Lewis and Jaffar were two police officers assigned to preserve the integrity of a crime scene where two women had been murdered in a public park, and their bodies remained at the scene. Both officers failed to continuously secure access to the scene, as they left their assigned posts and took images of the crime scene, including of the dead bodies, which they disseminated with social media friends. They might have also easily contaminated the crime scene and negatively interfered with the investigation and the gathering of DNA. Their actions handed leverage to the defence counsel in making an argument in favour of his client, alleging that the contamination of the crime scene may have interfered with the results of the DNA obtained. Luckily, the jury still found the accused guilty, but depending on the circumstances, this may have had a different unjust outcome. Both accused were sentenced to two years and nine months in jail.

The court pointed out the importance of the work police do, the need for public confidence in it, and the principle of upholding the rule of law. The following paragraphs directly quoted from the case capture the essence and interplay of those issues within the day-to-day police operations and society at large. While this case does not involve a direct discussion on the topic of BWCs use in these circumstances, it demonstrates the vulnerability of digital data gathered and stored by police depicting highly sensitive personal information and its easy manipulation and dissemination. Furthermore, the below-outlined principles and values are equally applicable in Canada.

> [9] . . . . It is essential that the public should be able to trust the police to play their proper part in ensuring that those who commit crimes are brought to justice. Conversely, the rule of law means that those who are not guilty of crimes should have the opportunity to exculpate themselves. Misconduct that undermines public trust in the process of bringing those guilty of serious offences to justice, or the process of preventing innocent people from early exculpation, must be punished severely.
> [10] The retrieval, examination and storage of data in electronic formats has become essential to the investigation and prosecution of crime. Whether in the form of text or images, the collection and storage of data is an essential tool of contemporary policing and is now fundamental to the administration of justice.

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142 Tale of the Tape, *supra* note 87 at 292.

As the case of Collins demonstrates, electronic databases may hold vast amounts of personal and sensitive material. Those who work for the police may be entrusted with privileged access to large amounts of data that may touch on the personal lives of victims, suspects and members of the public alike. In *R v Kassim* [2005] EWCA Crim 1020, [2006] 1 Cr. App. R. (S.) 4, para 19, this court (Lord Justice Rose VP, Bodey and Owen JJ) held:

> "It seems to us that, especially nowadays, the preservation of the integrity of information regarding members of the public held on databases like those maintained by the police is of fundamental importance to the well-being of society. Any abuse of that integrity by officials including the police is a gross breach of trust, which, unless the wrongdoing is really minimal... will necessarily be met by a severe punishment, even in the face of substantial personal mitigation."

[11] If data is copied or disseminated other than in lawful ways for lawful purposes, it carries the inevitable risk that neither the police nor the victims of crime nor their families will be able to control who sees it or the circumstances in which it is viewed. In the cases before us, the statements that we have read from family members movingly describe the deep distress caused by their loss of control of the treatment of those for whom they grieve.

[12] The harmful effects of the misuse of electronic images may be impossible to rectify. The ease with which images may be disseminated by electronic means (via phones, laptops and other devices) and the difficulty in controlling their spread is an important aspect of the harm caused by offences of this kind.[143]

B. Police Misconduct in Public Office in Canada

In Canada, there has been a recent case of an internal breach of highly sensitive information. In September 2019, Mr. Cameron Ortis, the Director General of the RCMP's National Intelligence Coordination Center (a civilian position), was charged with a number of offences under the *Security of Information Act* and the *Criminal Code*.[144] Between January 01, 2014, and September 12, 2019, Mr. Ortis leaked information to foreign entities for allegedly personal gain and compromised national security and Canadian international relations.[145] His trial, initially scheduled for September 2022, has now been postponed for a year due to a change in his defence counsel.[146] Due to the sensitive nature of the proceedings surrounding this high-profile case, a Federal Court order is in place that prohibits the publication or broadcasting of the evidence that the Public Prosecution Service of Canada

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143 *Collins, supra* note 141 at paras 9—12.

144 *Canada (Attorney General) v Ortis*, 2021 FC 737 at paras 1, 12 and 13.

145 The Fifth Estate, "The Smartest Guy in the Room" (2021), online (video): *YouTube* <www.youtube.com/watch?v=2ni9c23aHDA&t=468s> [perma.cc/6CPZ-P9FV].

146 The Canadian Press, "Trial of RCMP Employee Accused of Leaking Secrets Delayed by 1 year" (1 September 2022), online: *Global News* <globalnews.ca/news/9099504/rcmp-secrets-leak-trial-delayed/> [perma.cc/Y2NL-L2GH].

will present in the criminal trial pursuant to section 38.04 of the *Canada Evidence Act*.

This example, although again not directly involved with BWCs, illustrates the importance of proper safeguard measures built within the RCMP and other police forces so that access to digital information is highly restricted and frequently monitored. Digital data could be easily abused and mismanaged if placed in the hands of a malicious handler. Therefore, since BWCs produce a high volume of sensitive personal information in the form of digital data, the strictest measures of its collection, storage, access, archiving, and reproduction must be enforced. In addition, cases involving police or civilian police staff misconduct must be publicized, and accused persons found guilty of police misconduct in public office must be subject to severe penalties and lengthy sentences. Furthermore, as discussed in Part III of the paper, the current legal framework navigating police agencies' relationships with third-party vendors supplying and maintaining software and hardware for digital data gathering and storing must be strengthened so that incidents like the one with the RCMP and Clearview do not reoccur. If they do, there must be serious consequences for the police and the company. Consequently, all these measures must be in place for the Canadian criminal justice system to demonstrate to the public the seriousness of such misconduct and to uphold the principles of transparency, accountability, and applicability of the rule of law.

VI. NOW AND THE PROPOSED PATH FORWARD

The themes discussed in this paper reveal two major contradicting principles surrounding the police's use of BWCs. On the one hand, they can be very useful for evidence-gathering purposes and assist various players within the criminal justice system. For example, BWCs videos can often be the only effective tool providing members of the public with grounds to raise their voices and protect their *Charter* rights from infringements, especially in cases of alleged officers' use of abuse of authority or excessive force.[147] BWCs are regarded as means of improving officer-citizen relationships by enhancing the public's trust in the police. On the other hand, the digital data gathered via BWCs are highly sensitive, in large quantities, and easily manipulated and abused. Privacy is a serious concern in connection with managing the electronic recordings and images gathered via BWCs. As discussed in Parts II and IV, Canada, and the RCMP specifically, has recently experienced breaches of privacy and currently lacks

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[147] See *Saunders, supra* note 131.

effective preventative measures for addressing and preventing such breaches. Hence, there must be strict internal and external measures guarding DEMS and the manipulation of data obtained via BWCs, to protect the privacy of the individuals and the public depicted in those recordings or images. Furthermore, BWCs gathered data should not be subjected to FRT unless strictly regulated by an external governing body. Cases of misconduct should be publicized to demonstrate the seriousness of police misconduct and promote accountability and transparency in the public eye. The use of BWCs across Canada is scattered and lacks uniformity. Some police agencies have more "robust" BWCs policies than others.[148] Currently, in Canada, BWCs are mainly implemented in a few large cities – i.e., Vancouver, Calgary, and Toronto. This year, the RCMP will be adopting the use of BWCs in all their front-line operations and locations. This means that rural and remote areas of Canada will now enjoy the benefits of this technology, and so will local courts along with corresponding players in the justice system. Although speculative, the impact of such vast changes must be considered. As demonstrated, the use and value of BWCs-generated digital evidence in court are immense. Therefore, only some judges, Crowns, and juries in parts of the same province will be able to enjoy the benefits of that digital evidence and make more substantiated decisions, while others will not.

In addition, this lack of uniformity and availability of BWCs in each part of the same province may create tension between the RCMP and other police agencies. Moreover, different practices and technological features of the BWCs and DEMS and their corresponding policies and procedures will also contribute to various standards of policing across jurisdictions. For example, some jurisdictions allow officers to have access to the BWC video and/or can take notes within the digital recording, as well as augment their written notes with details upon viewing the BWC footage. Inevitably, a serious consideration of such practices must be given in the context of their potential impact on the Crown prosecutor's perception of the case when assessing the evidence before them. Since Crown prosecutors must evaluate the strength of the evidence and determine whether, on a balance of probabilities, there is a likelihood of conviction, having officer's notes within the BWC footage may impact that evaluation and decision-making. Therefore, standard practices of submitting BWC footage to Crown prosecutors without embedded officer notes should be adopted across all jurisdictions to ensure consistency and impartiality.

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[148] Tale of the Tape, *supra* note 87 at 249.

As previously discussed, each police agency relies on its external third-party vendor for the service provision, storage, and maintenance of the electronic data gathered via BWCs. Hence, as the Clearview example demonstrates, there are multiple risks associated with contracting those third-party vendors - often foreign companies. The safest alternative is to be self-sustained and not have to rely on a third-party vendor, but bringing the digital infrastructure of all police agencies up to date and continuously maintaining it may be an impossible task. Hence, strictly enforced measures and obligations should be imposed on those third-party vendors when they partner with a Canadian law enforcement agency.

As demonstrated in Part III, the RCMP has a dark history regarding breaches of privacy and its lack of protective measures within its practice. Even though the RCMP's BWCs policy explicitly states that BWC video and images will not be subject to FRT, their past behaviour raises reasonable concerns, especially when coupled with the fact that there is no effective supervision over the operations of the RCMP or the rest of the police agencies in Canada by another government department. Who polices the police? This question emerges when thinking about guarding privacy and effective police operations. Privacy Commissioners only issued guidelines and recommendations for police operations, but as discussed earlier, these are not binding. Hence, nobody knows what goes on internally within police operations. Therefore, it is safe to conclude that Canada has much larger issues that exceed the questions pertaining to the use of BWCs or FRT. That issue is related to a lack of consistency and control over police forces across the nation.

Additionally, as stated in some of the reviewed BWCs policies, not only should officers and police civilian staff be trained on the proper operation of digital data, but judicial and legal training about technology and digital data should also be adopted as a national goal among Benches and Bar Associations across the country.[149] As discussed by ETHI:

> "[M]embers of the Bench and Bar who use digital devices generally do so without understanding what the technology does and can do; about how malware and spyware work; about artificial intelligence and the surveillance economy; about personal and organizational privacy and access rights and responsibilities; and about the extent and severity of harms and unintended consequences that can result from digital technologies."[150]

Without such continuous training, judges and lawyers are left unsupported, and they must rely on their research when encountering cases with breaches of privacy issues or other issues arising from the mishandling

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[149] ETHI, *supra* note 117 at 21.

[150] *Ibid.*

of electronic data. Consequently, this leads to wide knowledge gaps among judges and lawyers, yielding to inconsistent levels of capable legal representation and sometimes perhaps ill-informed judicial decision-making.

If utilized well, BWCs can improve internal police operations. For example, as observed in *Daytec*, gaps in officer's training transpire through BWCs footage, and so can repeated patterns of officer misbehaviour and frequent use of force be tracked by supervisors. This may also be a sign of a training gap, an underlining issue such as PTSD, or another condition the officer may be suffering from. Hence, BWCs can provide a more proactive approach toward supporting officers' needs and minimizing instances of police use of excessive force. This requires time and resources to compile and analyze digital data to see the big picture. Unfortunately, police budgets are limited. Yet, if set as a goal, it could be achieved, and the technology allowing it exists.

Other ways of effective enjoyment of the BWC features may be the adoption of certain new practices by courts. For example, develop a new legal rule imposing a *prima facie* negative presumption against the case of the Crown in circumstances where BWCs should have been activated, but were not. Furthermore, the meaning and scope of the right against self-incrimination by testifying in court must be revisited and re-defined in light of this new technology. For instance, in cases where the defence alleges that the Crown has not proved the identity of the accused beyond a reasonable doubt, as the issue in *Callaghan* was, a judge should be allowed to request that the accused reads a neutral script, which will allow the trier of fact to hear their voice and compare it with the one recorded on the BWC.

The province of Manitoba deserves special consideration regarding BWCs implementation. BWCs are barely used in Manitoba. Currently, Winnipeg, as the largest city and the capital of the province, does not use BWCs – not because Winnipeg Police Service ("WPS") does not wish to implement them, but because of budget constraints preventing it from doing so.[151] This is a great paradox, especially knowing that WPS has in its arsenal drones, four-legged robots (Spot), and K9 dog armor technology equipped with the ability to attach cameras onto it – the same technology utilized in the US in the fight against terrorism.[152] Now, with the RCMP's initiative of rolling out BWCs, another disparity will surface in terms of

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151 City of Winnipeg, Executive Policy Committee, "Winnipeg Police Board Budget Referral – Capital and Operating for Body Worn Cameras and Digital Evidence Management" (Council Minutes) (24 June 2021).

152 CBC News, "K9 Camera to Give Winnipeg Police New Eyes on Crime" (2013), online: *CBC News* <www.cbc.ca/player/play/2416566079> [perma.cc/Q7KQ-N97M].

unequal protection of the rights of Manitobans depending on where they are located at the time of the commission of an offence. WPS is likely not the only police agency facing budgetary constraints, which is why decisions on a federal level should be made to put an end to such struggles and stop the further perpetuation of economic differences between Canadian provinces.

Based on all observations and information reviewed so far, two major propositions should be given consideration. First, the government of Canada should create a central governing body – a new institution – empowered with the task and legal capacity to effectively oversee and manage all law enforcement agencies, regardless of whether provincial or the RCMP. Let's utilize the spirits of sections 91(27), 92(14), and 92(15) of the *Canadian Constitution Act* to their fullest potential. These central police governing body will unify BWCs policies, practices, and other differences in police operations across jurisdictions. Therefore, Canadians at each point of the country will be subject to uniform methods of protection of their *Charter* rights. Moreover, this central government body will oversee contracting with third-party vendors and secure funding for BWCs and other police operations equipment for every jurisdiction in need, like Manitoba. This body should be allowed to set aside budgets for DEMS maintenance and upgrades, which are implemented at Crown locations across Canada, to assist the justice system's adaptation to any technological upgrades flowing from police operations. Additionally, it will also oversee privacy measure practices within each police department, conduct audits and ensure personal and digital information is protected to the highest available standards. Second, funding must be set aside for a Canadian study on BWCs and their effects, benefits, and the optimal utilization of their features. Collaboration among all provinces is needed to materialize such a project. Relying on foreign research is inadequate since Canada has a unique geographical and cultural landscape.

VII. SUMMARY OF MAIN POINTS

Part II of this paper discusses the motivations behind having BWCs as part of front-line police practices and the development and use of technology in the UK and USA. Improvement of officer-citizen interactions, transparency, and accountability are the main goals behind the purpose of BWCs. As illustrated, some studies show positive outcomes with respect to achieving these goals, while others do not. Privacy concerns with the use of the technology exist, and the second sub-section of Part II discusses the approaches adopted by several Canadian police agencies prior

to their implementation, as well as current policies in place for the proper use of BWCs in the field. With the mass deployment of BWCs by the RCMP this year, multiple questions and concerns arise regarding the various police practices within the same province, yielding unequal access to reliable digital evidence produced by BWCs in some jurisdictions. Consequently, Canadian *Charter* rights would be protected based on unequal substantiating evidence and standards across the country.

Part III is entirely dedicated to the topic of privacy. It outlines the more recent privacy breaches that Clearview AI – a foreign vendor contracted by the RCMP and several other Canadian police agencies providing database software and using FRT, committed by unlawfully obtaining over three billion images of Canadians from social media platforms to boost its database. Furthermore, the section describes what FRT is and how it operates. Issues such as the lack of enforceable measures of punishment to foreign vendors like Clearview AI and insufficient and inadequate legal framework governing the use of FR in Canada are also discussed. Most importantly, the RCMP's systemic gaps in its personal information gathering policies were flagged and connected with the potential dangers of BWCs generated digital data being subjected to FRT.

Part IV presents eight case studies of cases from Calgary, Alberta, illustrating the usefulness and flexibility of BWCs generated digital evidence. A summary of these BWCs evidence features and applications can be found on pages 38-39. Part V presents two British cases on the issue of police misconduct in public office by officers and civilian staff members due to their abuse and mishandling of digital data containing sensitive personal information. The decision outlines important principles of the rule of law quoted in the section. Everyone involved in these misconducts was sentenced to at least two years and nine months in prison. Following the examples from Britain, this part also presents a recent Canadian example of misconduct in public office by the former Director General of the RCMP's National Intelligence Coordination Center. While neither of these cases directly discusses BWCs generated evidence and its mishandling, the principles they establish are the focus. They demonstrate the vulnerability of digital data and its effortless manipulation and dissemination when placed in the wrong hands and not subjected to strict protective measures. Such cases must be publicized to foster transparency and accountability and enhance the public's trust in the police and other government institutions. Such wrongdoers must be subjected to severe punishments.

Finally, Part VI ties together the previously discussed topics and summarizes the two major contradicting principles associated with the use of BWCs, namely their usefulness for evidentiary purposes and means of

improving officer-citizen relationships and strengthening the public's confidence in the police versus the vulnerability of digital data and the easily committed breaches of privacy. The lack of uniform police practices and measures across the provinces is discussed. The upcoming changes flowing from the RCMP's adoption of BWCs in front-line operations among the provinces broaden the gaps between these different police practices within the same jurisdiction. Consequently, propositions for further improvements are made, such as the federal designation of budget for provinces like Manitoba and other jurisdictions struggling with limited budgets preventing them from implementing the use of BWCs. Additionally, education of not only police officers and civilian staff members but also the judiciary and members of Bar Associations across the country is necessary to provide meaningful services and have substantial knowledge when tasked with cases involving digital evidence and/or privacy breach stemming from it. Evolving court proceedings could be founded upon this new technology, such as drawing negative inferences about the Crown's case if/when a BWC should have been activated but was not. Also, the scope of the right against self-incrimination by not testifying in court should be re-defined to allow accused persons to read out loud a neutral script so that the trier of fact could compare their voice with that on a BWC recording in cases where the identity of the accused is an issue. Moreover, there is a dire need for a new government institution tasked solely with overseeing all police enforcement agencies in the country and their internal and external operations. Lastly, Canada lacks an extensive study on BWCs, and such a study should be undertaken collaboratively across jurisdictions.

VIII. CONCLUSION

BWCs are excellent tools in assisting the police in their day-to-day operations, and they strengthen the relationship between the community and the police, provide transparency and accountability, and protect *Charter* rights. BWCs assist lawyers, judges, and juries in their work and decision-making and help accused persons reach just verdicts by straightening the court record on specific details surrounding the circumstances of the offence and potential violations of their *Charter* rights. The usefulness and flexibility of BWC gathered evidence is indisputable. However, there are risks associated with the use of this technology. The largest risk is the invasion of privacy and misuse of the digital information BWCs generate. Those risks can be effectively mitigated with appropriate safety measures and vigorous supervision. There are more benefits from having BWCs than

not. Hence, they should be widely implemented across all law enforcement agencies in Canada.

"Like so many other things, technology is morally neutral. How its use is justified makes the difference."[153]

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[153] ETHI, *supra* note 117 at 9.

Les femmes autochtones victimes de violence sexuelle – leur réalité et les obstacles dont elles doivent faire face

CLAUDIA GUERTIN*

I. INTRODUCTION

L'histoire des peuples autochtones au Canada comporte de nombreuses parties sombres dont le Canada essaie de remédier à présent. « La Commission de vérité et réconciliation nous a enseigné que la réconciliation est impossible sans la vérité, la guérison et la justice »[1]. La vérité sur ce qui s'est passé au Canada envers les peuples autochtones soit la colonisation, et plus encore, les pensionnats. La guérison de ces événements traumatisants qui continuent quotidiennement de hanter les personnes autochtones. Celle-ci peut être faite par les excuses du gouvernement canadien et par un respect et une légitimation des coutumes autochtones.

Les femmes et les filles autochtones ne représentent que quatre pour cent de la population canadienne[2]. Pourtant, en 2015, elles représentaient 24 % des victimes d'homicide au Canada[3]. Autre statistique inquiétante : les femmes autochtones sont douze fois plus à risque que les femmes allochtones d'être assassinées ou de disparaitre[4]. Par conséquent, « [l]e simple fait d'être une femme et d'être autochtone constitue un risque »[5]. Elles ont un besoin distinct qu'il faut tenir en compte puisqu'elles subissent une combinaison de racisme et de sexisme[6]. Bref, les femmes

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1 Canada, *Rapport provisoire - L'enquête nationale sur les femmes et les filles autochtones disparues et assassinées – Nos femmes et nos filles sont sacrées*, Vancouver, Gouvernement du Canada, 2017 à la p 5.

2 *Ibid* à la p 7.

3 *Ibid* à la p 7.

4 *Ibid* à la p 7.

5 *Ibid* à la p 8.

6 *Ibid* à la p 12.

autochtones sont des personnes vulnérables dont il faut protéger et dont il faut porter une attention particulière lorsque des crimes sont commis contre elles[7]. Une attention particulière doit également être prise dans les cas de violence conjugale dont plusieurs femmes autochtones sont victimes[8].

Le présent travail portera ainsi sur les difficultés des femmes autochtones d'avoir accès à une justice prenant en considération leur intersectionnalité et leurs origines autochtones et historiques. Pour ce faire, le travail sera divisé en trois parties. Tout d'abord, la première partie sera un survol historique de la situation des femmes autochtones au Canada afin de comprendre les répercussions du colonialisme et des pensionnats. Par la suite, la seconde partie portera sur le contexte actuel canadien et les différents obstacles dont les femmes doivent faire face lorsqu'elles sont victimes de violence sexuelle et qu'elles décident de dénoncer. Finalement, la troisième partie analysera les stratégies mises sur pied par le Canada pour aider les femmes autochtones et ceux qui devraient être apportés également.

II. Partie I – Contexte Historique

« Le présent ne se comprend qu'en lien à un passé qu'il faut connaître, comprendre et accepter pour que l'avenir ait un sens »[9]. C'est pourquoi qu'afin de comprendre la situation dans laquelle les femmes autochtones vivent et les problèmes quant à la violence en découlant, il faut regarder le contexte historique des peuples autochtones. La colonisation a, en effet, eu de nombreuses répercussions sur les femmes autochtones et celles-ci persistent encore de nos jours façonnant « les conditions de vie actuelles des peuples autochtones »[10].

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7 Voir par ex *Code criminel*, LRC 1986, c C-46, art 718.04.

8 *Ibid*, art 718.201.

9 Kepek-Québec, *Rapport complémentaire de l'enquête nationale sur les femmes et les filles autochtones disparues et assassinée – Réclamer notre pouvoir et notre place*, volume 2, 2020 à la p 2.

10 Patricia Barkaskas et Sarah Hunt, *Accès à la justice pour les adultes autochtones victimes d'agression sexuelle*, Ministère de la Justice Canada, octobre 2017 à la p 3.

A. La Colonisation[11]

Tout commence en 1492, lors des premières aventures de Christophe Colomb découvrant l'Amérique, qu'il pense alors, à tort, être les Indes[12]. Débute alors l'ère de la colonisation allant des empires français, britannique et même russe[13]. Les Européens s'installent et s'approprient alors les terres ancestrales autochtones afin de pilonner la terre de ses richesses et développer des colonies. Au nom de leur « supériorité » autoproclamée, les Européens imposent leur mode de vie, leur religion et leurs coutumes aux peuples autochtones. Les peuples autochtones ont ainsi subi « un remplacement imposé de leurs structures et de leurs pratiques de gouvernance, ainsi qu'à des politiques éducatives oppressives et à la pauvreté »[14]. Pour les colonisateurs, les peuples autochtones ne représentaient qu'un problème face à leur colonisation. Leur solution ? L'isolement et l'assimilation[15]. « Pour isoler et assimiler les peuples autochtones, il faut séparer le statut d'Indien de la citoyenneté »[16]. Le régime colonial subsiste malgré les efforts du Canada de se décoloniser[17].

Les approches colonialistes diffèrent entre les Français et les Anglais. Les premiers avaient une approche entièrement assimilatrice visant à détruire la culture locale afin d'imposer celle française dite plus civilisée, tandis que les seconds avaient une approche principalement axée sur une « certaine autonomie » des peuples autochtones[18] et respectaient davantage la culture de ces peuples. Ce faisant, l'expérience coloniale peut ainsi quelque peu différer entre les peuples autochtones. Il reste que les deux

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11 Le présent article ne porte pas à relater l'histoire complète de la colonisation, mais seulement à mettre en contexte l'expérience des filles et des femmes autochtones au Canada. Ce faisant, cette section ne sera qu'un bref survol se concentrant uniquement sur certains points pertinents pour l'article.

12 Corvin Russell, « Le colonialisme canadien, d'hier à aujourd'hui » (2017) 17 Nouveaux Cahiers du socialisme 98 à la p 98.

13 *Ibid* à la p 98.

14 Entretien avec Hadley Friedland & Val Napoleon, « Face à la violence et à la vulnérabilité humaine Les réponses juridiques autochtones au Canada » (2017) 92 :4 Mouvements 105 à la p 108.

15 *Ibid* à la p 100.

16 *Ibid* à la p 100.

17 Pierre Trudel, « Peuples autochtones : colonialisme, néocolonialisme, décolonisation », *Nouveaux Cahiers du socialisme* (26 novembre 2020) en ligne : <https://www.cahiersdusocialisme.org/peuples-autochtones-colonialisme-neocolonialisme-decolonisation/> [**perma.cc/Z9TG-C9PS**].

18 Didier Lapeyronnie, *La France et la Grande-Bretagne face à leurs immigrés*, Presses Universitaires de France, 1993 à la p 130; Véronique Dimier, « Politiques indigènes en France et en Grande-Bretagne dans les années 1930 : aux origines coloniales des politiques de développement » (2005) 24:1 Politiques et Sociétés 73 à la p 73.

colonisateurs croyaient en leur supériorité et pensaient qu'ils étaient de leur devoir que de civiliser davantage ces populations[19].

La *Loi sur les Indiens* et son prédécesseur, l'*Acte des Sauvages* de 1876 ont longtemps imposé un statut de mineur aux personnes autochtones. Deux des façons de s'émanciper de ce statut et ainsi obtenir certains droits réservés aux Canadiens étaient pour les femmes, de se marier avec un allochtone, ou pour les hommes d'obtenir un diplôme de droit ou de médecine[20].

Cette loi avait comme principal objectif d'assimiler ces peuples et a « eu pour effet d'entraîner l'abandon des traditions et de la culture autochtones, en interdisant leurs cérémonies et pratiques spirituelles et en amenant de force plus de 150 000 enfants autochtones dans des pensionnats où ils étaient victimes de maltraitance et privés du droit de parler leur langue »[21].

Bien que cette loi fût modifiée, les peuples autochtones « continuent d'être empreints de tendances racistes et patriarcales lourdes de conséquences »[22]. Un témoignage d'une femme autochtone démontre les tendances patriarcales qui perdurent. Cette femme, métisse, mère de cinq enfants, n'a pas le statut d'Indienne telle que définie dans la loi puisque sa mère a marié un homme blanc. Afin de protéger ses enfants à elle et de leur donner le statut d'Indien, cette femme devait obtenir la signature du père. Une telle obligation ne devrait pas exister et est injuste envers les femmes autochtones. En effet, comme elle le mentionne, une femme blanche n'aurait jamais à demander une telle autorisation écrite afin de donner la citoyenneté canadienne à ses enfants[23].

Les peuples autochtones sont ainsi devenus une minorité au sein de leur propre territoire[24]. Plusieurs lois imposées par le gouvernement fédéral mènent à l'appropriation du territoire autochtone, à la perte de leur statut, à l'imposition de conseils de bande, et ainsi de suite[25].

Dès les années 1980, le gouvernement met en place différents objectifs afin de « tuer le bison »[26]. Encore aujourd'hui, « [t]ous les aspects de la vie

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19 Laurence Guénette, Andréa Rousseau & Isabelle Sauriol-Nadeau, *Discrimination intersectionnelle et droit à l'identité*, Clinique internationale de défense des droits humains, Montréal, l'Université du Québec à Montréal,2012 à la p 4.

20 *Ibid* à la p 5.

21 *Ibid*.

22 *Ibid*.

23 *Ibid* à la p 8.

24 Corvin Russell, *supra* note 12 à la p 100.

25 *Ibid* à la p 101.

26 *Ibid* à la p 102.

des Premières Nations sont règlementés et bureaucratisés »[27]. Faisant en sorte que le gouvernement fédéral a une autorité entière sur les peuples autochtones et un pouvoir d'intervention pratiquement sans limites[28].

Au début de la colonisation, les femmes autochtones étaient considérées comme « sexuellement disponibles »[29] aux hommes européens. Découlant de ce mode de pensée datant de la colonisation, plusieurs femmes et filles autochtones sont victimes d'exploitation sexuelle et de la traite de personnes[30]. Plusieurs facteurs sont associés à leur vulnérabilité selon l'organisme Femmes Autochtones du Québec (ci-après, « FAQ ») :

> La vulnérabilité des femmes autochtones dans la traite des personnes est directement liée à la discrimination systémique et aux impacts intergénérationnels que subissent les Premières Nations suite à une longue histoire de colonisation et de tentatives d'assimilation. Les facteurs de risques qui y sont associés sont notamment des antécédents d'agressions sexuelles, des problèmes de violence conjugale, le placement durant l'enfance au service de la protection de la jeunesse, l'alcoolisme, la toxicomanie, la pauvreté, l'itinérance, le choc culturel en milieu urbain, ou des troubles de santé mentale. Ces facteurs accentuent la disparité des conditions de vie des femmes autochtones par rapport à celles de leurs homologues masculins, mais aussi du reste des femmes[31].

Les femmes autochtones sont les gardiennes de la culture et des traditions autochtones, jouant un grand rôle au sein de leur communauté[32]. En effet, l'appareil juridique canadien a tenté à maintes reprises d'opprimer les femmes autochtones. Il n'y a qu'à analyser la *Loi sur les Indiens* « structurée selon une vision patriarcale, genrée et coloniale de la société »[33], qui interdisait la place des femmes dans les conseils de bande ou qui leur faisait perdre leur statut d'autochtone lorsqu'elles se mariaient avec un non-autochtone.

En récapitulatif, la colonisation a eu plusieurs impacts sur les femmes autochtones. « L'héritage colonial du Canada a imposé aux femmes et aux filles autochtones des conditions socioéconomiques dangereuses et précaires qui ont accru leur vulnérabilité face à différentes formes de violence »[34]. Il y a entre autres eu la perte de leur statut d'autochtone

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[27] *Ibid* à la p 102.

[28] *Ibid* à la p 102.

[29] Association des femmes autochtones du Canada, *La traite des femmes et des filles autochtones au Canada*, Mémoire présenté au Comité permanent de la justice et des droits de la personne, 2018 à la p 3.

[30] Femmes Autochtones du Québec, à la p 5.

[31] *Ibid* à la p 6.

[32] Mélisande Séguin et Camille Varnier, « « Plus ça change, plus c'est – encore – pareil ? » Regard sur trois essais concernant la situation des femmes autochtones au Québec » (2020-2021) 50:3 Recherches amérindiennes au Québec 125 à la p 125.

[33] *Ibid* à la p 126.

[34] Association des femmes autochtones, *supra* note 29 à la p 3.

lorsqu'elles épousaient un homme non-autochtone en vertu de la *Loi sur les Indiens*.

B. Les Pensionnats

L'un des événements historiques les plus marquants et destructeurs envers les peuples autochtones fut le génocide culturel du système des pensionnats[35]. Les pensionnats ont sévi pendant plus de cent soixante ans au Canada, sur plus de cinquante mille enfants issus des Premières Nations, Inuits et Métis[36]. Ils sont même devenus obligatoires en 1920 en vertu de la Loi sur les Indiens pour tous les enfants autochtones âgés de sept à quinze ans[37]. Le dernier pensionnat ne fut fermé qu'en 1996[38].

Les enfants autochtones furent arrachés à leur famille dans le but d'éradiquer « l'Indien »[39] en eux et de les convertir à la religion chrétienne. Les pensionnats étaient obligatoires, les familles autochtones ne pouvaient ainsi se prononcer contre l'envoi de leurs enfants[40] sous peine d'être arrêtées[41]. Pour plusieurs enfants autochtones, les pensionnats devenaient le lieu d'apprentissage et de vie puisque ceux-ci y vivaient à temps plein et souvent à longueur de l'année[42].

Dès leur arrivée au pensionnat, les enfants se voyaient défaits de leur identité autochtone. Leurs cheveux étaient coupés, leurs vêtements jetés, leur langue interdite, perdant leur prénom pour devenir qu'un numéro[43]. Les enfants étaient pour la plupart mal nourris, exploités et ne recevaient que pas ou peu de soins de santé[44].

Les enfants autochtones furent non seulement victimes de mauvais traitements physiques et psychologiques dans les pensionnats pour les corriger[45], mais également à des agressions sexuelles.

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[35] Justine Monette-Tremblay, « La Commission de vérité et réconciliation du Canada : une étude de la sublimation de la violence coloniale canadienne » (2018) 31:2 Revue québécoise de droit international 103 à la p 105.

[36] *Ibid*.

[37] Marie-Pierre Bousquet, « La constitution de la mémoire des pensionnats indiens au Québec -Drame collectif autochtone ou histoire commune ? » (2016) 46 :2-3 Recherches amérindiennes au Québec 165 à la p 167.

[38] Sheilah L Martin, « La réconciliation : notre responsabilité à tous » (2020) 61:1 Les Cahiers de droit 559 à la p 564.

[39] Corvin Russell, *supra* note 12 à la p 100.

[40] Sheilah L Martin, *supra* note 28 à la p 564.

[41] *Ibid* à la p 566.

[42] *Ibid* à la p 565.

[43] *Ibid* à la p 566.

[44] *Ibid*.

[45] *Blackwater c Plint*, 2005 CSC 58.

Les conséquences des pensionnats sont nombreuses et se perpétuent encore aujourd'hui, tant pour les anciens pensionnaires que pour les générations subséquentes. Les enfants autochtones ont manqué d'amour, souffrant dans les pensionnats et ne vivant que la peur, la faim et la violence[46]. Lorsqu'il fut leur tour de devenir parents, certaines victimes autochtones des pensionnats ne savaient pas comment donner de l'amour, n'en ayant jamais reçu[47]. « Bon nombre d'anciens élèves ont témoigné que le fait de grandir dans les pensionnats leur a causé des séquelles physiques, psychologiques et émotionnelles permanentes »[48]. La seule solution envisageable pour plusieurs fut de se tourner vers l'alcool et la drogue pour alléger leurs souffrances[49].

De nombreux problèmes que vivent les peuples autochtones sont attribuables aux pensionnats canadiens. Cinq générations des peuples autochtones ont ainsi vécu l'expérience et les traumas des pensionnats[50] jusqu'à la fermeture du dernier pensionnat en 1996[51].

Encore aujourd'hui, les conséquences des pensionnats sur les peuples autochtones se font ressentir[52], donnant ainsi lieu aux « effets intergénérationnels ou le traumatisme intergénérationnel des pensionnats »[53].

Sujet autrefois tabou, ce n'est qu'en 1991 qu'émerge officiellement les premières excuses de l'expérience des pensionnats. Et c'est en 1996 que le rapport de la Commission royale sur les peuples autochtones demande une recherche sur l'expérience des pensionnats[54]. Deux ans plus tard, la Déclaration de réconciliation reconnait les sévices subis par les survivants autochtones.

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46 Sheilah L Martin, *supra* note 28 à la p 567.

47 *Ibid*.

48 *Ibid* à la p 568.

49 *Ibid* à la p 568.

50 Centre de recherche interdisciplinaire sur les problèmes conjugaux et les agressions sexuelles, *État des connaissances en recherche sur la violence sexuelle et les femmes autochtones au Québec*, mémoire déposé au secrétaire de la Commission des relations avec les citoyens dans le cadre du mandat d'initiative – Les conditions de vie des femmes Autochtones en lien avec les agressions sexuelles et la violence conjugale, janvier 2016, à la p 1 [en ligne] : <www.cripcas.ca/images/Publications/Mmoire-sur-les-femmes-autochotones-au-Qubec-du-CRIPCAS.pdf> [**perma.cc/ZRE6-PPEL**].

51 J.R. Miller, *Pensionnats indiens au Canada*, L'Encyclopédie canadienne, 2012, en ligne : </www.thecanadianencyclopedia.ca/fr/article/pensionnats#:~:text=Quand%20a%2Dt%2Don%20ferm%C3%A9,le%20gouvernement%20f%C3%A9d%C3%A9ral%20au%20Canada> [https://perma.cc/8W2M-MVQ5].

52 Association des femmes autochtones du Canada, *supra* note 29 à la p 3.

53 *Ibid* à la p 3.

54 Marie-Pierre Bousquet, *supra* note 37 à la p 167.

C. Les Répercussions

Bien que le colonialisme et les pensionnats sont des choses du passé, leurs répercussions sont encore très présentes. « Parmi le plus grand impact des pensionnats ont été la perte du respect de soi des peuples autochtones et leur fierté, et le manque de respect des non-Autochtones envers leurs voisins autochtones » [notre traduction][55].

À l'époque, les enfants autochtones devaient aller au pensionnat, et bien souvent y vivre puisqu'ils se trouvaient trop loin de leurs communautés. Comme cela, les liens avec leurs familles et communautés étaient souvent rompus, créant ainsi beaucoup de souffrance non seulement au moment de la séparation mais également lors de leur retour au sein de la communauté. Plusieurs enfants, étant obligés à parler soit l'anglais ou le français, oubliaient leur langue maternelle, leurs coutumes et créant ainsi un vide entre eux et leurs familles. Bien que les survivants et survivantes des pensionnats ont reçu le PEC (Paiement d'expériences Communes) ou le PEI (Processus d'évaluation indépendante), remis à ceux et celles ayant subis des sévices sexuels lors de la fréquentation du pensionnat[56], ce n'est pas un chèque compensatoire du gouvernement dont les choses vont s'arranger.

De plus, les effets des agressions sexuelles sont nombreux et multiples, en plus de perdurer et même s'intensifier pour les peuples autochtones « en raison du contexte socio-économique et politique et de l'éloignement géographique des grands centres urbains »[57]. Également, les mythes, les stéréotypes et la violence sexuelle envers les femmes autochtones perdurent aujourd'hui[58].

Le taux de violence plus élevé envers les femmes autochtones s'explique, entre autres, par les facteurs suivants, soit la colonisation, les répercussions des pensionnats, la mauvaise situation socio-économique, le racisme systémique et interpersonnel et la violence intergénérationnelle[59]. De plus, « [l]e patriarcat et le racisme instaurés par la Loi sur les Indiens et

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55 Kayla Cheeke, « Reconciling Crown and Indigenous Legal Orders: The Reciprocal Benefits of Reserving an Indigenous Seat on the Supreme Court of Canada » (2017) 22 Appeal: Rev Current L & L Reform 97 à la p 98.

56 Entrevue avec Katy, femme autochtone, « Vivre l'impact intergénérationnel des pensionnats » (2015) 21:1 Revue d'intervention sociale et communautaire 18 à la p 21.

57 Virginie Attard et al, « Prévenir les violences sexuelles en milieu autochtone : Retour sur la formation au Programme Lanterne|Awacic » (2021) 8:1 *Revue internationale de la résilience des enfants et des adolescents* 84 à la p 85.

58 *R c Barton*, 2019 CSC 33 au para 1 [*Barton*].

59 Ministère de la Justice Canada, *Rapport sur l'état du système de justice pénale : Accent sur les femmes*, 2020 à la p 32.

les pensionnats indiens ont joué un rôle essentiel dans la colonisation au Canada »[60] et continuent d'influencer les relations entre le Canada et les peuples autochtones.

Il y a une interconnectivité entre les femmes et leurs territoires. Les femmes autochtones sont connectées à la nature et ce qui les entoure et forme leur identité même. En déplaçant les peuples dans des endroits restreints, ou encore lors du début de la colonisation lorsque les femmes et enfants autochtones étaient envoyés en Europe comme objet de foire, il y a une rupture du sentiment d'appartenance qui porte atteinte à leur lien à la terre[61]. En perdant leur terre, les femmes autochtones peuvent entraîner des répercussions sur leur langue et les pratiques traditionnelles. En les privant de ces pratiques traditionnelles, les femmes autochtones se voient priver des valeurs qui se développent à l'intérieur de ces pratiques telles que « le partage, l'auto-identité et les systèmes holistiques de compréhension de la santé, du bien-être et du respect de soi »[62].

Bref, les répercussions de la colonisation touchent plusieurs sphères de la vie des femmes autochtones et à différents niveaux soit entre autres « de pauvreté, de scolarité, de chômage, de mauvaise santé physique et mentale et de manque de logement »[63]. Ces niveaux peu élevés dans ces sphères sont également un facteur de risque aggravant la violence envers les femmes autochtones. L'héritage colonial a eu un impact négatif « sur les rôles des genres dans les communautés autochtones »[64] puisqu'il a changé l'organisation sociale des communautés autochtones et a implanté le patriarcat. La voix des femmes autochtones est ainsi devenue de moins en moins importante et celle des hommes est devenue de plus en plus forte. La colonisation a ainsi eu comme répercussion de rendre les rapports inégalitaires, et ce, en défaveur des femmes autochtones.

Afin de réparer les impacts des pensionnats et des violences sexuelles subies par les femmes autochtones, les universités doivent se doter davantage de cours sur les communautés autochtones et sur leurs droits. Ces cours se doivent d'être donnés par des personnes autochtones, et non

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[60] Patricia Barkaskas et Sarah Hunt, *supra* note 10 à la p 3.

[61] Association des femmes autochtones, *Les femmes autochtones et l'évaluation d'impact – Rapport final*, Gouvernment du Canada, mars 2020 à la p 42.

[62] *Ibid* à la p 43.

[63] Association des femmes autochtones, *Fiche - Causes premières de la violence envers les femmes autochtones et répercussions de la colonisation* à la p 4.

[64] Moira-Uashteskun Bacon, « La décolonisation : vers une revitalisation égalitaire des traditions juridiques autochtones » (2021) Revue juridique étudiante de l'Université de Montréal – Blogue, <rjeum.openum.ca/2021/03/22/la-decolonisation-vers-une-revitalisation-egalitaire-des-traditions-juridiques-autochtones/> [perma.cc/HT4Z-KT5Z].

allochtones[65]. Et mieux encore, des personnes ayant acquis les connaissances selon les coutumes autochtones.

Par ailleurs, comme mentionné précédemment les femmes survivantes des pensionnats ne sont pas les seules victimes, il y a également les générations subséquentes. Dans un entretien avec une femme autochtone, celle-ci discute du fait qu'elle est un « produit des pensionnats ». C'est-à-dire qu'elle a été élevée par ses parents avec omission de plusieurs valeurs et stratégies autochtones puisque ceux-ci en avaient été privés[66]. À mon avis, ce passage dans l'entretien peut également s'appliquer à ceux ayant subi des sévices sexuels au sein des pensionnats et qui perpétuent ces sévices à leur tour, notamment sous l'influence des drogues et alcools consommés.

III. Partie II – Contexte Actuel et Obstacles Dont Font Face Les Femmes Autochtones

La *Charte canadienne des droits et libertés*[67] protège de nombreux droits afin de garantir à tous ses droits et libertés fondamentaux en plus d'assurer l'égalité de chacun, tant dans la société que dans le système de justice[68]. Ainsi, chacun a le droit à l'égalité devant la loi[69] et d'avoir un tribunal libre et impartial[70].

Au Canada, nous sommes censés être une société inclusive et égalitaire. Les résidents et citoyens viennent de tous les horizons et ont des cultures variées et distinctes. Chacun a le droit à leur liberté, leur sécurité, leurs croyances, du moins c'est que prévoit la *Charte canadienne*. Pourtant, si nous portons attention aux peuples autochtones, il est possible de constater que dans la réalité, l'égalité est loin d'être réelle et l'accès à la justice également.

Ces peuples, qui étaient là bien avant notre arrivée, qui ont pris soin de leurs territoires et ont accueilli cordialement les colonisateurs se voient retrancher dans des réserves, voler de leurs terres ancestrales et dépouiller de leur culture. Les personnes autochtones se voient ainsi victimes de

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65 Marie Léger et Anahi Morales Hudon, « Femmes autochtones en mouvement : fragments de décolonisation » (2017) 30:1 Recherches féministes 3 à la p 4.

66 Entrevue avec Katy, femme autochtone, *supra* note 56 à la p 24.

67 *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

68 *Barton*, *supra* note 58 au para 202.

69 *Charte canadienne*, *supra* note 51, art 15.

70 *Ibid*, art 11d).

racisme et discriminées encore et encore, et ce, tant par l'État que par ses citoyens, malgré les avancements au niveau de la réconciliation.

Afin d'assurer le respect des droits fondamentaux d'une personne, qu'elle soit autochtone ou non, il faut s'assurer d'un accès libre à la justice qui se doit d'être impartial et juste. Une attention particulière doit notamment être portée lorsqu'il s'agit d'une personne vulnérable, ce que sont les femmes autochtones.

Malheureusement, l'histoire, et encore plusieurs cas de nos jours, portent les personnes autochtones à douter du système de justice et à éviter d'y avoir recours. Ce même système qui continue d'ignorer leurs craintes et qui est responsable de nombreuses douleurs et de traumatismes. Le dilemme est ainsi immense.

Afin de mieux comprendre la réalité des femmes autochtones, il faut non seulement regarder l'histoire, mais également le principe d'intersectionnalité, notamment en ce qui concerne les facteurs du genre, l'identité autochtone, l'emplacement géographique et la situation familiale[71]. Cette intersectionnalité « met en évidence la façon dont diverses formes d'inégalité peuvent se combiner pour avoir des impacts de plus en plus négatifs »[72]. La violence envers les femmes autochtones est nombreuse et se forme dans différents contextes et environnements. Plusieurs faits sont saillants au Canada par rapport à la violence dont les femmes autochtones sont victimes. En voici deux : celles-ci sont plus à risque d'être victime de violence conjugale et à une plus grande gravité de violence; et les femmes autochtones sont cinq fois plus vulnérables que le reste des femmes à mourir d'une mort violente[73].

Par ailleurs, lors de tables rondes tenues par la Commission canadienne des droits de la personne en 2013 et 2014, les femmes autochtones y participant ont identifié vingt-et-une barrières « aux processus fédéraux, provinciaux et territoriaux de règlement des différends en matière de droits de la personne »[74]. Bien que ces barrières soient identifiées dans le cadre de discrimination, celles-ci peuvent également se situer dans le cadre de plainte d'agression sexuelle. Il y a tout d'abord la

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[71] Ministère de la Justice Canada, *Rapport sur l'état du système de justice pénale : Accent sur les femmes*, *supra* note 59 à la p 7.

[72] *Ibid* à la p 8.

[73] Laurence Guénette, Andréa Rousseau & Isabelle Sauriol-Nadeau, *supra* note 19 à la p 4; INSPQ, *Contexte de vulnérabilité : femmes autochtones*, Gouvernement du Québec, <www.inspq.qc.ca/violence-conjugale/comprendre/contextes-de-vulnerabilite/femmes-autochtones> [perma.cc/C4Z6-SC2P].

[74] Commission canadienne des droits de la personne, *Hommage à la résilience de nos sœurs : améliorer l'accès à la protection des droits de la personne pour les femmes et les filles autochtones*, 2013 et 2014 à la p 13.

conscientisation. En effet, les peuples autochtones, notamment les groupes plus vulnérables dont les femmes autochtones et celles exploitées sexuellement font partie, ne sachent pas leurs droits, la manière de les défendre ou encore les processus[75]. Il y a par la suite des barrières linguistiques puisque certaines femmes autochtones, notamment les plus âgées, ne parlent le français ni l'anglais[76]. Il y a également une situation similaire pour les femmes autochtones parlant seulement anglais vivant au Québec. En effet, au Québec, la langue de prestation de services est le français. Ce faisant, certaines femmes se font retourner de bord sans avoir reçu de services[77]. Une autre barrière est celle de la victimisation répétitive. Aussi, il y a la confidentialité et la compréhension interculturelle.

Il a été prouvé par des études que les femmes et filles autochtones subissent davantage de violence que les femmes allochtones[78]. En effet, elles sont trois fois plus à risque que les femmes allochtones d'être victimes de violence et d'agression sexuelle[79]. Malgré la problématique des agressions sexuelles dans les communautés autochtones, il y a encore peu de recherche sur le sujet[80]. Pour le moment, les études qui ont été menées démontrent qu'entre vingt-cinq et 50 % des adultes autochtones ont « vécu une expérience sexuelle non désirée pendant leur enfance ou leur adolescence »[81]. Les femmes autochtones sont ainsi malheureusement plus à risque de subir de la violence et sous formes plus graves que les femmes allochtones en plus de craindre davantage pour leur vie[82].

Les conditions favorisant ces faits problématiques sont des conditions socio-économiques précaires, « un isolement géographique et social, un taux élevé de consommation abusive d'alcool et de drogues et une structure des âges beaucoup plus jeunes »[83]. Il faut de plus ajouter certains

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75 *Ibid* à la p 13.

76 *Ibid* à la p 18.

77 *Ibid* à la p 18.

78 Femmes Autochtones du Québec, *Les femmes autochtones et l'exploitation sexuelle*, dans le cadre de la consultation du comité interministériel du gouvernement du Québec sur l'exploitation sexuelle, 2014, à la p 2; Radio-Canada, « Les femmes autochtones sont davantage victimes de violence, selon deux enquêtes fédérales », (29 avril 2022), [en ligne] : <ici.radio-canada.ca/nouvelle/1879915/violence-conjugale-femmes-autochtones-etude> [perma.cc/KMU8-3AGE].

79 *Ibid* à la p 2.

80 Virginie Attard et al, *supra* note 57 à la p 85.

81 Centre de recherche interdisciplinaire sur les problèmes conjugaux et les agressions sexuelles, *supra* note 50 à la p 3.

82 Patricia Bourque, Mylène Jaccoud et Ellen Gabriel, « Stratégies adoptées par les femmes autochtones dans un contexte de violence familiale au Québec » (2009) 42:2 Criminologies 173 à la p 175.

83 INSPQ, *supra* note 73.

facteurs tels que le racisme, l'exclusion sociale et le traumatisme intergénérationnel.

Dans les contextes de projets d'extraction de ressources naturelles, les femmes autochtones sont souvent victimes « de harcèlement genré, sexualisé et racialisé et de violence en milieu de travail »[84]. Dans ce contexte, les travailleurs qui viennent d'autres régions peuvent décider de payer les femmes autochtones en échange de faveurs sexuelles. Il y a alors une hausse du travail sexuel de ces femmes et ainsi de la violence sexuelle, notamment en raison du racisme, l'absence de lien et les stéréotypes de la femme autochtone comme personne sexualisée[85].

D'ailleurs, les femmes autochtones sont parfois obligées de se tourner vers le commerce du sexe afin de trouver un emploi, puisque les opportunités leur sont rares et qu'elles doivent subvenir aux besoins de leur famille[86]. Ainsi, lorsque des camps industriels majoritairement masculins commencent des travaux dans leur région, les femmes ont des opportunités de gagner quelques sous, et ce, malgré les dangers inhérents. C'est sans compter que certaines femmes autochtones sont victimes de trafic d'êtres humains, plus « particulièrement celles qui vivent dans la pauvreté ou qui sont aux prises avec des problèmes de santé mentale ou de toxicomanie »[87].

A. Accessibilité du système de justice pour les femmes autochtones

Plusieurs facteurs influencent sur la violation des droits à la justice et à la sécurité des femmes autochtones. Au niveau de la justice, les stéréotypes et préjugés, datant de la colonisation, perdurent et portent atteinte aux droits des femmes autochtones. Ces stéréotypes sont même véhiculés par l'application de la loi. Au niveau de la sécurité, « le manque absolu de possibilités d'éducation et d'emploi, et l'incapacité de fournir un niveau de vie de base découlent, en particulier, des interventions coloniales dans le mode de vie des Autochtones et du fait que ces derniers ont été chassés de leurs terres natales ou ancestrales »[88].

Le système judiciaire a aussi un manque lorsqu'il est question de rendre justice pour les violences infligées aux femmes et aux filles autochtones assassinées, comme le rapporte l'Enquête nationale sur les

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84 Association des femmes autochtones, *supra* note 61 à la p 33.
85 *Ibid.*
86 *Ibid à* la p 34.
87 *Ibid.*
88 Enquête nationale sur les femmes et les filles autochtones disparues et assassinées, à la p 248.;

femmes et les filles autochtones disparues et assassinées. Plusieurs familles de personnes disparues ou assassinées remplissent elles-mêmes « un mandat qui incombe, à la base, au système de justice pénale. Ce système, qui bafoue depuis toujours (et qui continue de bafouer) le droit à la justice des familles autochtones »[89].

L'enquête nationale déclare même que le système de justice canadien « n'accorde pas la moindre valeur à la vie d'une femme autochtone »[90]. Pourtant, les femmes autochtones représentent 40 % des femmes qui purgent une peine de prison. Avec un nombre aussi élevé, considérant qu'elles ne représentent que quatre pour cent de la population canadienne[91], les femmes autochtones seraient plus qu'en droit de s'attendre à être traitées de façon juste et impartiale et avec dignité.

En 1999, la Cour suprême du Canada a reconnu l'échec du système de justice pénale envers les peuples autochtones[92] dans l'arrêt *Gladue*[93]. Dans son jugement, la Cour reconnait ainsi que le système est inapproprié « sur le plan culturel et qu'il exerce une discrimination systématique »[94] et qu'il faut tenir en considération le contexte historique lors de l'imposition de la peine[95].

Les femmes autochtones victimes de violence sont moins susceptibles de reporter les agressions sexuelles à cause des préjugés envers les personnes autochtones qui peuvent mettre en doute leur crédibilité, menant à la négligence de leur demande d'aide ou un appui moindre de la part de la justice[96]. Ce même système de justice censé protéger les femmes autochtones est souvent la source de leur incarcération[97]. Ne pouvant compter que sur elles-mêmes, les femmes autochtones se protègent elle et leurs enfants contre la violence portée envers elles. Ironie du sort : la justice les punit d'avoir tenté de se protéger alors que le système les avait laissés à elles-mêmes[98].

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89 *Ibid* à la p 686.

90 *Ibid* à la p 686.

91 *Ibid* à la p 690.

92 Ministère de la Justice Canada, *La lumière sur l'arrêt Gladue : défis, expériences et possibilités dans le système de justice pénale canadien*, Septembre 2017, à la p 14.

93 *R c Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC).

94 Ministère de la Justice Canada, *La lumière sur l'arrêt Gladue : défis, expériences et possibilités dans le système de justice pénale canadien*, *supra* note 92 aux pp 17-18.

95 *Ibid* à la p 18.

96 Ministère de la Justice Canada, *Rapport sur l'état du système de justice pénale : Accent sur les femmes*, *supra* note 59 à la p 30.

97 Enquête nationale sur les femmes et les filles autochtones disparues et assassinées, *supra* note 88 à la p 691.

98 *Ibid* à la p 691.

La Cour d'appel de l'Alberta, dans l'affaire *Barton*, a soulevé les lacunes du « modèle national d'exposé fait aux jurés relativement aux infractions d'ordre sexuel qui favorise les stéréotypes, [et qui] compromet constamment l'analyse et l'application des règles de droit et exacerbe les inégalités »[99].

Malgré les changements apportés au *Code criminel* énonçant qu'il n'est pas admissible d'apporter la preuve que la plaignante a déjà eu des activités sexuelles avec l'accusé ou un tier pour rendre probable l'activité sexuelle dont il est question[100], l'usage de mythes et stéréotypes lors de poursuites relatives aux agressions sexuelles est encore présent[101]. Conformément à la jurisprudence, il n'est pas permis d'utiliser le passé sexuel de la plaignante pour suggérer la probabilité qu'elle ait consenti aux activités sexuelles puisque son utilisation empêche la bonne administration de la justice et « menace les droits à l'égalité, à la vie privée et à la sécurité de la plaignante »[102].

Toutefois, le passé sexuel de la plaignante peut être admissible en preuve si c'est pertinent et substantiel[103] et que la preuve répond aux conditions énumérées à l'article 276(2) du *Code criminel*. Il reste néanmoins que l'utilisation d'une telle preuve repose majoritairement sur des généralisations et des préjugés[104] en plus d'humilier la plaignante et d'attaquer sa moralité[105].

En l'espèce, certaines femmes autochtones sont des travailleuses du sexe. Leur travail ne devrait pas permettre à une pensée erronée comme quoi elles auraient forcément consenti aux activités sexuelles puisque celles-ci étaient « typiques ». Comme soulevé par le juge Moldaver : « l'omission d'appliquer le régime prévu par l'art. 276 risquait grandement d'amener les jurés à adopter, consciemment ou non, des formes inadmissibles de raisonnement sur ces questions cruciales, entachant ainsi irrémédiablement la recherche de la vérité »[106].

Par ailleurs, dans les affaires criminelles, il arrive parfois que ce soient les membres du jury qui décident si l'accusé est coupable ou non. Il serait insensé de croire que les membres du jury effacent entièrement leurs préjugés raciaux. Le juge a le devoir de prendre des mesures raisonnables de « s'attaquer de front aux partis pris, aux préjugés et aux stéréotypes

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[99] *Barton*, *supra* note 58 au para 7.
[100] *Code criminel*, *supra* note 7, art 276(1).
[101] *R c Goldfinch*, 2019 CSC 38, au para 1 [*Goldfinch*].
[102] *Ibid* au para 2.
[103] *Ibid* au para 28.
[104] *Goldfinch*, *supra* note 101 au para 31.
[105] *Ibid* au para 33.
[106] *Barton*, *supra* note 58 au para 162.

systémiques dont sont victimes les Autochtones »[107]. Le but n'étant pas de se fermer les yeux sur ces problématiques, mais d'expliquer la situation particulière des personnes autochtones, notamment celles des femmes autochtones, qui débute par la colonisation et qui perdure avec le racisme systémique[108]. Telles qu'énumérées dans l'arrêt *Barton*, les femmes autochtones qui sont travailleuses du sexe sont victimes de nombreux préjugés :

- Elles n'ont pas droit aux mêmes protections que celles qu'offre le système de justice pénale aux autres Canadiens;
- Elles ne méritent pas d'être traitées avec respect, humanité et dignité;
- Elles sont des objets sexuels destinés à procurer du plaisir aux hommes;
- Elles n'ont pas besoin de donner leur consentement à l'activité sexuelle et que [traduction] « l'on a qu'à les prendre »;
- Elles acceptent, parce qu'elles effectuent un travail dangereux, le risque qu'il puisse leur arriver quelque chose de mal; et
- Elles sont moins crédibles que d'autres personnes[109].

Les personnes autochtones sont victimes de racisme qui peut mener à une discrimination systémique dans le système de justice pénale[110] tel qu'il fut démontré dans le rapport sur les autochtones et la justice pénale au Canada[111]. De plus, les préjugés raciaux peuvent compromettre l'impartialité des membres du jury[112].

C'est pourquoi le contexte des peuples autochtones doit toujours être pris en considération[113], en effet leur situation et contexte historique peuvent influencer plusieurs parties de leur vie et la façon dont ils sont perçus dans le système de justice. Les femmes autochtones victimes de violence sexuelle sont mal desservies ou même protégées par le système de justice canadienne :

> Les tribunaux canadiens ne répondent pas véritablement aux préoccupations et aux besoins des Autochtones adultes ayant survécu à une agression sexuelle. Les décisions judiciaires semblent au contraire réaffirmer les discours racistes,

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107 *Ibid* au para 200.

108 *Ibid* au para 201.

109 *Ibid* au para 201.

110 *R c Williams*, [1998] 1 RCS 1128, 1998 CanLII 782 (SCC) au para 58 [*Williams*].

111 Commission royale sur les peuples autochtones, *Par-delà les divisions culturelles: Un rapport sur les autochtones et la justice pénale au Canada*, (1996) à la p 37.

112 *Williams*, *supra* note 84 au para 58.

113 *R c LP*, 2020 QCCA 1239 au para 62.

> sexistes et coloniaux qui créent des problèmes permanents d'accès à la justice pour les peuples autochtones au sein du système judiciaire[114].

Bref, ces comportements et violations constants de la part des acteurs du système de justice sont intolérables et doivent être changés entièrement le plus rapidement possible. Si une femme caucasienne était traitée de la sorte, ou mieux encore, un homme caucasien, les médias s'emporteraient, les lois se modifieraient, les acteurs du système changeraient leurs méthodes plus rapidement qu'il n'en faut pour le dire. Pourquoi n'est-ce pas pareil en ce qui concerne les femmes autochtones ? Dans une société libre et démographique, une telle question ne devrait techniquement même pas être posée.

B. Racisme systémique, discrimination et préjugés

Il faut mentionner que les femmes autochtones sont doublement discriminées, du fait de leur appartenance autochtone et étant donné de leur genre. Certains chercheurs utilisent même l'expression de « discrimination dans la discrimination »[115]. Cette présente section analysera ainsi comment cette double discrimination s'inscrit dans la violence sexuelle faite aux femmes autochtones et à leur difficulté d'avoir accès au système de justice. Ainsi, les stéréotypes racistes et sexistes perdurent, allant même à blâmer les femmes autochtones d'être responsables de « la violence qu'elles subissent et les difficultés auxquelles elles sont confrontées, allant même jusqu'à trouver ces dernières coupables d'actes de violence ou d'autres crimes »[116]. Rattachant ainsi les femmes aux étiquettes des personnes hypersexualisées et des travailleuses du sexe[117].

Même que la *Loi sur les Indiens* apporte une discrimination spécifique envers les femmes autochtones, plus spécifiquement sur leur droit à l'identité. Et malgré plusieurs modifications à la loi, la discrimination perdure, notamment en raison du fait que le gouvernement persiste « maintenir plusieurs politiques administratives qui discriminent les femmes autochtones et qui violent le droit à l'identité de celles-ci »[118].

Du fait de l'existence nocive de ces stéréotypes et de l'application consciente ou non de discrimination, les femmes autochtones sont

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[114] Patricia Barkaskas et Sarah Hunt, *supra* note 10 à la p 4.

[115] Cheryl Suzack, "Indigenous Feminisms in Canada" (2015) 23:4 NORA – Nordic Journal of Feminist and Gender Research 261 à la p 261.

[116] Enquête nationale sur les femmes et les filles autochtones disparues et assassinées, *supra* note 88 à la p 692.

[117] *Ibid* à la p 695.

[118] Laurence Guénette, Andréa Rousseau & Isabelle Sauriol-Nadeau, *supra* note 19 à la p 7.

désavantagées dans plusieurs sphères, dont au niveau plan de la justice et au niveau du plan socio-économique.

C. Peur et méfiance

Il a été précédemment mentionné que les femmes autochtones préféraient rendre justice elles-mêmes ou se protéger par leurs propres moyens. Ceci peut s'expliquer d'un côté par le fait que le système de justice canadien ne reflète pas leurs réalités culturelles et qu'il n'est ainsi pas adapté à elles[119].

D'un autre côté, la peur et la méfiance se sont créées par les histoires d'agressions répétées des policiers sur les femmes autochtones. Il est parfois plus sécuritaire pour les personnes autochtones de ne pas signaler les cas de violence aux policiers. De plus, certains décident de ne pas avertir les policiers puisqu'ils ne feront rien. Plusieurs histoires relatées dans l'enquête nationale démontrent que les femmes autochtones ont raison de croire que la police ne fera rien pour les aider[120].

La méfiance des peuples autochtones envers les policiers et le système de justice est bien connue au Canada[121]. Toutefois, peu d'étude s'intéresse sur cette notion en tant qu'objet en soi – la méfiance est surtout considérée comme partie de l'histoire des relations entre le Canada et les peuples autochtones[122].

« La confiance n'est pas non plus une affaire de foi aveugle : elle se forge plutôt dans une expérience antérieure »[123]. C'est pourquoi, compte tenu de l'histoire des relations entre le Canada et les peuples autochtones, ces derniers peuvent être réticents à se tourner vers les forces de l'ordre pour régler leurs problèmes. En effet, l'historique d'oppression et de contrôle depuis l'ère de la colonisation[124] peut miner la confiance des peuples autochtones, notamment les femmes autochtones qui sont davantage discriminées dans bien des domaines. Les peuples autochtones n'ont ainsi aucune raison de se sentir en sécurité ou d'avoir confiance envers le système judiciaire[125].

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119 Enquête nationale sur les femmes et les filles autochtones disparues et assassinées, *supra* note 88 à la p 692.

120 *Ibid* à la p 694.

121 Mylène Jaccoud, « Entre méfiance et défiance : les Autochtones et la justice pénale au Canada » (2020) 61:1 Les Cahiers de droit 63 à la p 65.

122 *Ibid* à la p 65.

123 *Ibid* à la p 67.

124 *Ibid* à la p 71.

125 *Ibid* à la p 72.

On peut être mené à croire que les préjugés et la discrimination systématique envers les peuples autochtones auront une incidence lorsque les femmes autochtones dénonceront les actes de violence sexuelle dont elles ont été victimes. En effet, les femmes autochtones sont plus marginalisées et sont plus à risque d'être victime de répressions et de revictimisation lorsqu'elles vont porter plainte au service de police.

Il y a également un cas où une femme autochtone s'est fait agressée sexuellement à quelques reprises par un policier. La victime consommait beaucoup d'alcool pour amoindrir ses souffrances face aux événements qu'elles avaient subies par le policier. Elle a gardé le silence par méfiance puisque l'accusé était un policier; elle n'avait pas confiance que sa dénonciation serait crue[126].

Bref, « [p]our les Autochtones, le système de justice canadien restera illégitime tant et aussi longtemps que le droit continuera d'être un « outil de dépossession et de démantèlement des sociétés autochtones » et non un « instrument de soutien pour l'émancipation des peuples autochtones »[127].

IV. PARTIE III – STRATÉGIES

Dans les parties précédentes, il fut question des obstacles et difficultés dont font face les femmes autochtones victimes de violence sexuelle dans leur accès au système de justice. À présent, il faut se concentrer sur les solutions à apporter ou à améliorer.

A. Au Niveau des communautés

Afin de faire une différence réelle dans les vies des femmes autochtones, il faut d'abord s'attaquer au problème à sa souche. Tout commence, dans les communautés, tant autochtones qu'allochtones. Il faut leur donner les outils nécessaires pour changer le cours de leur vie dès le début. C'est pourquoi il faut donner priorité à l'indépendance économique et l'éducation des femmes autochtones[128].

Afin de régler le problème du taux de crimes plus élevé des femmes et des filles autochtones, il faut permettre et encourager celles-ci à participer aux différents processus décisionnels du gouvernement. Il faut que ces femmes aient une table où elles peuvent discuter de leur réalité, des causes qui sous-tendent leurs problèmes et des différents remèdes pouvant les aider. De plus, pour leur permettre d'avoir une telle voix, il faut s'assurer

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126 *R c Neashish*, 2016 QCCQ 10775 au para 68 [*Neashish*].

127 Mylène Jaccoud, *supra* note 121 à la p 73.

128 Femmes autochtones du Québec, *supra* note 78 à la p 3.

que toutes les filles et les femmes autochtones reçoivent une éducation sur leurs droits et pouvoirs.

Les services communautaires œuvrant dans les différentes communautés autochtones ne sont parfois pas suffisamment préparés et renseignés sur le contexte et la réalité des femmes autochtones. Il n'y a qu'à prendre l'exemple des camps industriels masculins. Les travailleurs de ces camps sont souvent auteurs de violence sexuelle à l'encontre des femmes autochtones[129]. Le manque de soutien et de services gouvernementaux aggrave également la difficulté des services communautaires à la prestation de services adéquats.

De plus, malgré la présence de services communautaires dans les différentes régions, les femmes peuvent être réticentes à utiliser ces services, et ce, pour différentes raisons. Tout d'abord, dans les petites communautés isolées, il peut y avoir beaucoup de stigmatisation entourant la violence et le fait que tout le monde peut rapidement savoir lorsqu'il y a une femme qui dénonce peut inciter celle-ci à se taire. De plus, les moyens pour faire cesser la violence, notamment conjugale, sont pour la plupart insuffisants. Par exemple :

> L'absence de sanctions pour les conjoints ayant des comportements violents, les rapports inégalitaires entre les hommes et les femmes, un manque de leadership communautaire ainsi qu'un niveau d'information et de sensibilisation faible eu égard aux manifestations et aux répercussions de la violence sont autant de facteurs qui contribuent à perpétuer le problème[130].

Par exemple, FAQ tente de promouvoir des formations afin d'aider les femmes autochtones à améliorer leurs conditions de vie en plus de celles de leur famille[131]. De plus, cette initiative favorise la participation des femmes autochtones dans leur communauté et les aider à connaitre leurs droits et savoir comment les défendre[132].

Pour s'assurer d'aider les femmes autochtones et de les encourager à dénoncer la discrimination et les violences qu'elles subissent, il faut placer des conseillers ou spécialistes autochtones ou allochtones connaissant la réalité autochtone dans les centres de ressources et de plaintes[133]. Les femmes autochtones seraient ainsi potentiellement plus enclines à se confier à des personnes qui comprennent leur situation particulière.

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129 Association des femmes autochtones, *Les femmes autochtones et l'évaluation d'impact – Rapport final*, *supra* note 61 à la p 34.

130 INSPQ, *supra* note 73.

131 *Ibid* à la p 5.

132 *Ibid* à la p 6.

133 Femmes autochtones du Québec, *supra* note 78 à la p 9.

B. Au Niveau Fédéral et Provincial

« La loi est un processus, non une chose »[134]

Depuis quelques années déjà des pistes de solutions sont discutées. Par exemple, depuis 2007, la Commission canadienne des droits de la personne rencontre et discute avec les femmes autochtones afin d'avoir leur point de vue sur les enjeux les concernant[135]. Il y a notamment l'Association des femmes autochtones du Canada qui sont aux premières lignes des efforts pour résoudre la violence envers les femmes autochtones[136].

Malgré l'article 35(1) de l'acte de constitution de 1982, il n'y a aucun changement innovateur pour une meilleure justice pour les autochtones. L'un des seuls efforts au niveau de la justice pour soutenir les personnes autochtones fut de demander aux juges de prendre en considération le contexte et les circonstances spéciaux et historiques des personnes autochtones, ce qui est en soi insuffisant[137].

L'arrêt *Gladue* a apporté des changements dans la décision des peines des accusés autochtones. À présent, les accusés autochtones ont un « rapport *Gladue* » identifiant les différents facteurs atténuants, ceux-ci peuvent comprendre l'identité autochtone, la famille, les antécédents judiciaires, la cessation de consommation d'alcool ou de drogues, la fréquentation d'un pensionnat[138].

Autant qu'il soit important de reconnaitre ces points pour les accusés autochtones afin d'avoir une meilleure justice et une meilleure vision de leur contexte historique, il ne faut pas oublier, à mon avis, ces mêmes points au niveau de la victime. Comme soulevé par le juge Jacques Lacoursière dans l'affaire *Neashish* :

> [...]il ne faut pas omettre de prendre en considération la situation particulière des victimes qui sont toutes également autochtones. Elles ont aussi subi les facteurs historiques et les années de bouleversements et de développement économique de cette communauté. En plus d'être victimes des gestes posés par l'accusé, elles sont les victimes d'une discrimination directe ou systémique. Elles sont également susceptibles de souffrir des séquelles de la relocalisation et selon le rapport

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[134] Val Napoleon, « Thinking About Indigenous Legal Orders » dans *Dialogues on Human Rights and Legal Pluralism*, Dordrecht: Springer Netherlands 2013, 137 à la p 139.

[135] Commission canadienne des droits de la personne, *Hommage à la résilience de nos sœurs : améliorer l'accès à la protection des droits de la personne pour les femmes et les filles autochtones*, *supra* note 74 à la p 9.

[136] Emily Snyder, Val Napoleon & John Borrows, "Gender and violence: Drawing on Indigenous legal resources" (2015) 48:2 UBC L Rev 593 à la p 626.

[137] *Ibid* à la p 625.

[138] Voir par exemple : *Neashish*, *supra* note 107 au para 82.

> *Gladue*, certaines d'entre elles, contrairement à l'accusé, sont dans une situation économique et sociale défavorable[139].

Par la suite, l'association des Femmes des autochtones du Québec [FAQ] conseille de supprimer de la loi toutes discriminations au niveau du genre[140]. Il y a déjà eu des changements apportés à certaines dispositions de la *Loi sur les Indiens* avec qu'elles deviennent conformes aux droits protégés par la *Charte canadienne*, mais il reste encore des changements à apporter afin d'effacer toute discrimination. Une autre recommandation de FAQ est de finaliser l'inscription au registre des femmes et enfants autochtones[141].

Finalement, pour continuer dans la voie d'une meilleure accessibilité à la justice des femmes et des hommes autochtones, il faut continuer à donner une meilleure visibilité aux peuples autochtones et leur donner des opportunités de devenir des acteurs principaux dans le système de justice. La nomination de la première juge autochtone, l'honorable Michelle O'Bonsawin, à la Cour suprême du Canada est un pas énorme dans cette direction. Pour continuer dans cette veine et garantir à une personne autochtone d'être juge à la plus haute cour du pays, il faudrait leur réserver un siège. Le Québec a trois sièges de réserver sur le banc dû au droit civil, il ne sera qu'équitable que de réserver un siège pour les autochtones puisqu'ils ont un droit et des coutumes différentes et uniques. En garantissant un siège, la confiance des personnes autochtones envers le système de justice pourrait s'améliorer. De plus, la Cour aurait une meilleure application du droit autochtone en plus de renforcer sa légitimité d'institution multijuridique[142].

V. CONCLUSION

Pour mettre fin à la violence faisant rage envers les femmes autochtones, il faut non seulement s'appuyer sur les points de vue des communautés autochtones, plus particulièrement sur ceux des femmes, mais également changer les relations entre le Canada et les diverses communautés autochtones[143].

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139 *Neashish*, *supra* note 107 aux paras 134 et 135.

140 Femmes autochtones du Québec, *supra* note 78 à la p 6.

141 *Ibid* à la p 7.

142 Kayla Cheeke, *supra* note 55 à la p 100.

143 Canada, *Rapport provisoire - L'enquête nationale sur les femmes et les filles autochtones disparues et assassinées – Nos femmes et nos filles sont sacrées*, *supra* note 1 à la p 13.

Les répercussions du colonialisme et des pensionnats sont encore bien présentes et sont intergénérationnelles. Ils influencent non seulement les personnes autochtones et leur mode de vie, mais également la façon dont le reste des Canadiens voient et interagissent avec les peuples autochtones. Il faut pouvoir offrir les mêmes chances et opportunités aux femmes autochtones et cesser la propagation du racisme et de préjugés à leur égard. Si les méthodes de pensées ne changent pas, il n'y a aucun espoir que le reste change.