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Manuscripts and communications should be directed to:

Criminal Law Special Edition (Robson Crim)

Richard Jochelson
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2

Phone: 204.474.6158
Fax: 204.480.1084
E-mail: info@Robsoncrim.com

Regular MLJ

Editors-in-Chief
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2

Phone: 204.474.6136
Fax: 204.480.1084
E-mail: lawjournal@umanitoba.ca

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CALL FOR PAPERS: Closes February 1, 2022
Manitoba Law Journal – Robson Crim, Special Issue

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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
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- Analyses of recent Supreme and Appellate court criminal law cases in Canada
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- 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:

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- Understandings of harms or evidence in corporate criminality
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- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system

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

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We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2022. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

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THE JOURNAL

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Wrongful Extradition: Reforming the Committal Phase of Canada's Extradition Law

ROBERT J. CURRIE*

ABSTRACT

There has recently been an upswing in interest around extradition in Canada, particularly in light of the high-profile and troubling case of Hassan Diab who was extradited to France on the basis of what turned out to be an ill-founded case. Diab's case highlights some of the problems with Canada's *Extradition Act* and proceedings thereunder. This paper argues that the "committal stage" of extradition proceedings, involving a judicial hearing into the basis of the requesting state's case, is unfair and may not be compliant with the *Charter* and that the manner in which the Crown conducts these proceedings contributes to this unfairness. It also argues that regardless of the Act's constitutionality, in light of *Diab* and other disturbing cases, the time is ripe for law reform to ensure that extradition proceedings are carried out in a way that is consistent with

* Professor of Law and University Research Professor, Schulich School of Law, Dalhousie University. I am grateful to the participants in the "Halifax Colloquium on Extradition Law Reform," which was held at the MacEachen Institute for Public Policy & Governance, Dalhousie University, in September 2018, hosted by Professor Kevin Quigley and Rachel Cadman. The Colloquium was funded by the Canadian Partnership on International Justice (CPIJ), under a grant provided by the Social Sciences and Humanities Research Council of Canada (SSRHC), and I thank Professor Fannie Lafontaine and M. Érick Sullivan for their support. I am also grateful to: Laura Ellyson, doctoral student at the Schulich School of Law, who provided research support and acted as *rapporteur* to the Colloquium; Olivia Genge, Lee Ann Conrod, and Nicholas Hooper for research assistance; and Andrew Martin, Neil Boister, Joseph Rikhof, Joanna Harrington, and Maeve McMahon for their comments. Unless otherwise indicated, all views expressed here are my own.

Canadian public policy. Some suggestions for reform are made, as well as a proposal for a serious Parliamentary effort.

Keywords: Extradition; International Law; *Charter of Rights and Freedoms*; Transnational Crime; International Assistance Group; Crown Law

I. INTRODUCTION

Extradition – the formal surrender of individuals between states in order to facilitate criminal proceedings – is often thought of as an obscure legal process, despite its reputedly ancient origins.[1] This is no less true in Canada where the relatively small number of extradition cases are handled predominantly by lawyers in Justice Canada's International Assistance Group (IAG)[2] and a smattering of defence lawyers across the country, most of the latter of whom do not practice enough in the field to develop any particular expertise. The Canadian legal literature on extradition is not voluminous.

However, the veil of obscurity has been yanked open in the last several years. Internationally, extradition has been front and centre, from a proposed extradition law that sparked months of rioting and civil unrest in Hong Kong[3] to Julian Assange's narrow escape from extradition to face American wrath over the Wikileaks disclosures.[4] For Canada's part, the arrest of Huawei CFO Meng Wanzhou in December 2018 on an American extradition warrant has embroiled it in what is easily the most complex and

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1 Ivan Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971) at 5.

2 See Section II.C, below.

3 "Hong Kong: Timeline of extradition protests", *BBC News* (4 September 2019), online: <www.bbc.com/news/world-asia-china-49340717> [perma.cc/MD68-J5FZ]. See also "Canada suspends extradition treaty with Hong Kong over new security law", *CBC News* (3 July 2020), online: <www.cbc.ca/news/politics/canada-suspending-extradition-treaty-hong-kong-over-security-law-1.5636479> [perma.cc/B7LG-R866] (Canada recently "suspended" its extradition treaty with Hong Kong as a means of protesting the new security law imposed upon it by China).

4 "Julian Assange: UK judge blocks extradition of Wikileaks founder to US", *BBC News* (4 January 2021), online: <www.bbc.com/news/uk-55528241> [perma.cc/V4LL-85ZW].

daunting foreign policy dispute it has faced in decades[5] and put our extradition relations firmly on the public radar.

Even aside from the Meng case, however, Canada's extradition laws have increasingly come under scrutiny in the last several years by way of a slowly-building groundswell of unease around the mechanics and application of the 1999 *Extradition Act*.[6] An early and prescient critique by Professor Anne La Forest suggested that while the then-"new" Act was certainly capable of achieving the Crown's stated goals of making Canada's extradition process more efficient and easier to access by partner states, it had also greatly reduced the role of the courts and focused too much power and discretion in the hands of the executive (specifically, the Minister of Justice).[7] Over the course of two decades, and even in the face of (mostly unsuccessful) constitutional challenges, this forecast has proven to be true, and there have been growing calls for reform of the *Extradition Act* – a piece of legislation that frequent extradition commentator Gary Botting has called (perhaps hyperbolically) "the least fair law in Canada."[8]

This unease came to a head during 2018–2019, during which time there was intense public interest in the case of Dr. Hassan Diab. Diab, a Canadian citizen of Lebanese descent, was extradited to France in 2014 to face terrorism charges, only to be released more than three years later when (as had been apparent during the Canadian extradition proceedings) the French case against him was exposed as being without foundation. This controversial case sparked calls for reform, which will be explored below.

More recently, a highly-criticized extradition case ended in the death of the individual sought. The leading recent extradition decision by the Supreme Court of Canada, *MM v United States of America*,[9] dealt with an extradition request by the U.S. for Michele Messina, a dual Canadian-U.S. citizen who fled the state of Georgia with her children in 2010 for fear of

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5 See Charles-Louis Labrecque, "Canada-China Relations Since Meng Wanzhou's Arrest" (3 December 2019), online: *Asia Pacific Foundation of Canada* <www.asiapacific.ca/publication/canada-china-relations-wanzhous-arrest> [perma.cc/7BHW-NX38].

6 *Extradition Act*, SC 1999, c 18 [*Act*].

7 Anne Warner La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28:1 Queen's LJ 95 (QL).

8 Elyse Skura, "Nunavut priest sex abuse case stirs up criticism of 'least fair law in Canada'", *CBC News* (22 February 2019), online: <www.cbc.ca/news/canada/ottawa/extradition-france-canada-diab-rivoire-1.5028783> [perma.cc/LC2K-7AHZ].

9 *MM v United States of America*, 2015 SCC 62 [*MM*].

her abusive husband.[10] After she was arrested at a women's shelter in Quebec, she fought extradition for nine years. In its 2015 decision, a majority of the Supreme Court of Canada upheld her surrender despite clear evidence that had the conduct occurred in Canada, she would have a defence of necessity available, but that the defence was not available in the U.S. This, the Court ruled, was a matter for the foreign trial court. Then-Justice Minister Jody Wilson-Raybould agreed to re-consider the case but eventually confirmed the surrender order, and the Supreme Court denied leave to appeal on the confirmed order on October 17, 2019.[11] Messina died by suicide in prison three weeks later,[12] bringing her case to a dramatic and troubling close.

Extradition from Canada,[13] as will be explained below, is a three-phase process. This article will focus on the second "judicial" or "committal" phase and argue that Canada's law and procedures are in need of significant reform. Changes are required, not because extradition itself is somehow illegitimate, but because our extradition machinery has a number of problematic features that produce unfairness, both systemically and in individual cases.

The rest of this paper will proceed in five parts. Part II will give an overview of the *Diab* case and explain how it, in particular, has provided impetus for reform efforts. Part III provides a brief overview of extradition law and procedure in Canada to set the backdrop for the reform proposals. Part IV will critique the law and procedure that underpin the committal phase and offer suggestions for change, while Part V will give similar treatment to the manner in which the Crown's role in extradition is conceived and executed. Reference to specific cases, particularly *Diab* and

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10 Some background about the case can be found in Matthew Behrens, "Canada's extradition law a dangerous back-door bludgeon for abusive ex-spouses" (14 December 2018), online: *rabble.ca* <rabble.ca/columnists/2018/12/canadas-extradition-law-dangerous-back-door-bludgeon-abusive-ex-spouses> [perma.cc/XA5Z-62GA].

11 *Michele Marie Mulkey aka Michele Marie Messina v Minister of Justice of Canada on behalf of the United States of America,* 2019 CarswellQue8803, 2019 CarswellQue8804 (SCC).

12 Verity Stevenson, "Quebec mother who was to be extradited to U.S. on custody charge dies in Laval jail", *CBC News* (7 November 2019), online: <www.cbc.ca/news/canada/montreal/quebec-mother-to-be-extradited-us-dies-in-jail-1.5351567> [perma.cc/DT9P-WNAD]; Matthew Behrens, "An act of institutional femicide: Remembering the life of Michele M" (21 November 2019), online: *rabble.ca* <rabble.ca/columnists/2019/11/act-institutional-femicide-remembering-life-michele-m> [perma.cc/22JX-C3WA].

13 Part 3 of the *Extradition Act*, which deals with extradition to Canada, will not be examined here.

MM, will be made where useful, though comprehensive treatment must be sacrificed for brevity's sake. Part VI will offer conclusions and suggestions for further work.

II. *FRANCE V DIAB*: THE CASE THAT MAKES THE CASE FOR REFORM

Prior to the Meng case, Hassan Diab's was probably the only extradition case that could truly be said to have captured substantial attention among Canadians. Detailed accounts can be found in a thorough academic article,[14] numerous media stories,[15] and most importantly a 124-page external review by former Ontario Deputy Attorney General Murray Segal, which was commissioned by the Justice Minister.[16] In brief, the Ottawa sociology professor was arrested on an extradition warrant in November 2008, sought by France as the alleged perpetrator of the bombing of a Paris synagogue in 1980. Initially detained, he was released on extremely restrictive bail conditions, including the imposition of an electronic bracelet costing $2,000.00 per month for which he had to pay. "Justice for Hassan Diab," a volunteer organization, was formed to fundraise for his bail and defence, and to lobby for staying the case and reform of Canada's extradition laws.[17]

From the outset, Diab maintained that he was the victim of mistaken identity and had been in Lebanon at the time of the bombing. He was eventually represented by distinguished Ottawa defence lawyer Don Bayne, and the case was fought fiercely by both Bayne and the IAG lawyers, to the extent that the judge at the committal hearing was moved to comment on

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14 Maeve W. McMahon, "The Problematically Low Threshold of Evidence in Canadian Extradition Law: An Inquiry into its Origins; and Repercussions in the Case of Hassan Diab" (2019) 42:3 Man LJ 303.

15 See e.g. Amanda Connolly, "Who is Hassan Diab and why was his extradition so controversial?", *Global News* (26 July 2019), online: <globalnews.ca/news/5682551/hassan-diab-extradition-report/> [perma.cc/74D3-GF65].

16 Canada, Department of Justice, *Independent Review of the Extradition of Dr. Hassan Diab* (Report), by Murray D. Segal (Ottawa: DOJ, May 2019), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/ext/01/review_extradition_hassan_diab.pdf> [perma.cc/9X9W-BQJY] [Segal Report].

17 Its website can be found here: "Justice for Hassan Diab: Preserve the Rights of Canadians Under Extradition Law" (last modified 9 February 2020), online: <www.justiceforhassandiab.org/> [perma.cc/S2K6-2U5S].

its intensity.[18] Diab's defence centred on the weakness of the case presented by France, which essentially rested on a highly-contested handwriting analysis. Judicial decisions in the course of the proceeding featured several now-infamous *dicta*. The judge who presided over the committal hearing described the French case as being so weak that if Diab received a fair trial in France, he would likely be acquitted—but that nonetheless, Canada's extradition law required that he be surrendered.[19] Affirming both the committal decision and the decision by the Minister of Justice to surrender Diab, the Ontario Court of Appeal dismissed concerns that the French case was not even ready for trial, remarking that Diab clearly would "not simply 'languish in prison.'"[20]

After being extradited, Diab did indeed "simply languish" for more than three years, mostly in solitary confinement, in a maximum-security prison while the French investigation continued. He was released – without ever being committed for trial – when it became clear that the case had foundered completely, and what evidence there was indicated that Diab was not the bomber.[21] Diab's return to Canada in January 2018 sparked renewed criticism from the Justice for Hassan Diab organization, now joined by others including Amnesty International, the British Columbia Civil Liberties Association (both of which had intervened in the original appeal), and the International Civil Liberties Monitoring Group. Controversy increased when media reporting revealed that Canadian officials had withheld exculpatory evidence and actively assisted French officials in shoring up the foundering French case.[22] A group of academics, defence lawyers, and representatives from human rights organizations convened a colloquium to formulate a set of reform proposals, which is expected to be published in the future.[23]

Calls for examination of how extradition had gone so wrong drew concern from the Minister of Foreign Affairs, Chrystia Freeland, who disclosed that both she and the Prime Minister had pressed France to return

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18 *France (Republic) v Diab*, 2011 ONSC 337 at para 193 [*Diab* Sup Ct].

19 *Ibid* at para 191.

20 *France (Republic) v Diab*, 2014 ONCA 374 at para 176 [*Diab* CA].

21 Segal Report, *supra* note 16 at 70–71.

22 This was confirmed in Segal Report, *supra* note 16. See section IV, below.

23 See *Changing Canada's Extradition Laws: The Halifax Colloquium's Proposals for Law Reform* (2021), online: <iclmg.ca/wp-content/uploads/2021/10/The-Halifax-Proposals-2021.pdf> [perma.cc/LT8S-JJLS] . Disclosure: I was the convenor and chair of the Colloquium.

Diab.[24] Prime Minister Justin Trudeau stated that "what happened to [Diab] should never have happened," and promised that the federal government would "make sure this never happens again."[25] However, this promise was eventually dissipated by the Segal Report which concluded that while Diab's case had seen some unfortunate events, all relevant laws and policies had been followed and all Crown personnel had acted appropriately.[26]

A criminal prosecution that results in an innocent person being convicted is referred to as a "wrongful conviction." In Hassan Diab's case, an extradition proceeding led to a demonstrably innocent person being extradited to face a faulty foreign criminal process, in a case where the Prime Minister of Canada stated that extradition "should never have happened." The only sensible descriptive phrase for this is "wrongful extradition," and that is the term that will be used in this paper. The critique here is based on the simple premise that an extradition system that allowed the wrongful extradition of Hassan Diab to occur must be in need of reform. This need is made all the more pressing by the fact that, as discussed in Part V below, the government authorities in charge of extradition are explicitly and publicly of the view that no reform is needed and that Diab's extradition to France was marred only by the fact that it took so long.

III. The Current Canadian Scheme for Extradition

A. The International Law Backdrop: Sovereignty, Treaties, and Arrangements

Extradition is the oldest and still one of the primary tools to accomplish the goal of inter-state cooperation in the suppression of crime generally, and transnational crime in particular. It has been defined as:

> [T]he formal rendition of a criminal fugitive from a state that has custody (the requested state) to a state that wishes either to prosecute or, if the fugitive has

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24 Jim Bronskill, "Justice Minister Wilson-Raybould orders independent review of Hassan Diab extradition case", *National Post* (30 May 2018), online: <nationalpost.com/news/politics/justice-minister-orders-external-review-of-hassan-diab-extradition-case> [perma.cc/85XD-JAFJ].

25 David Cochrane & Lisa Laventure, "Hassan Diab to boycott external review of 2014 extradition to France", *CBC News* (24 July 2018), online: <www.cbc.ca/news/politics/hassan-diab-boycott-external-review-france-extradition-1.4758418> [perma.cc/382M-F4FN].

26 Segal Report, *supra* note 16 at 13–14.

> already been convicted of an offence, to enforce a penal sentence (the requesting state).[27]

Extradition is made necessary by a fundamental rule of customary international law that prohibits states from enforcing their laws on the territories of other states.[28] In the criminal sphere, this means that police cannot investigate or effect arrests outside their own country. Accordingly, in order for states to be able to prosecute individuals who leave or escape from their territories,[29] they enter into agreements with foreign states under which each agrees to arrest and transmit the "fugitives" (now typically referred to as "persons sought") upon request and subject to certain conditions. The most standard practice is for states to enter into bilateral extradition treaties, which allows each government to carefully select the states with which it wishes to have such cooperation, in accordance with domestic priorities, human rights obligations, etc. Also, there are a number of multilateral crime suppression treaties, geared towards facilitating inter-state cooperation around suppressing particular transnational crimes, which have extradition provisions.[30]

Canada is party to 51 bilateral extradition treaties[31] and a large number of the crime suppression conventions that contain extradition provisions. A Schedule to the *Extradition Act* also designates certain states[32] and

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27 Robert J. Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 531. It is important to distinguish extradition from other legal means of removing individuals from a state, like immigration law-based mechanisms such as deportation or the expulsion of spies or foreign diplomats. Extradition relies explicitly on state-to-state agreements and is designed to facilitate criminal (and, increasingly, quasi-criminal/regulatory) prosecutions. It is a formal legal process with unique international and domestic law machinery.

28 *R v Hape*, 2007 SCC 26.

29 Or, at least, lawfully to do so. History is replete with examples of states simply abducting criminal fugitives from foreign states, which is a breach of international law. See Currie & Rikhof, *supra* note 27 at 560–67.

30 Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2018), c 20; Joanna Harrington, "Extradition of Transnational Criminals" in Neil Boister & Robert J. Currie, eds, *Routledge Handbook of Transnational Criminal Law* (London: Routledge, Taylor & Francis Group, 2015) 153.

31 Reasonably current compiled lists can be found at Halsbury's Laws of Canada (online), *Extradition & Mutual Legal Assistance*, "Introduction: Extradition Partners" (I.2) at HEX-2 "Creation of Extradition Obligation" (2019 Reissue); Seth Weinstein & Nancy L. Dennison, *Prosecuting and Defending Extradition Cases: A Practitioner's Handbook* (Toronto: Emond Publishing, 2017) at 15–16.

32 Most of which are Commonwealth states, including the United Kingdom.

entities[33] as "extradition partners," which unlocks Canada's extradition machinery for those states/entities in the same manner as a treaty does. Most commonly, Canada makes and receives extradition requests via its bilateral treaties, particularly with the U.S.[34] which unsurprisingly sees the most traffic of any of the treaties.

While the treaties do not play a large role in this article, it is worth noting that, constitutionally, they are strictly the preserve of the federal executive, and "that neither Parliament nor the provincial legislatures need, as a matter of law, to be consulted before the Crown binds Canada to an international agreement."[35] So far as can be seen from the rather paltry public sources on point,[36] decisions on whether to negotiate extradition treaties are formally made via consultations between the Minister of Justice and the Minister of Foreign Affairs, and negotiations are conducted by officials within those two departments. Since the introduction of the federal treaty tabling policy in 2008, it appears that treaties are at least tabled in the House of Commons but do not attract debate;[37] nor are the explanatory memoranda which are meant to accompany them ever published.[38]

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33 Specifically, the International Criminal Court and the UN International Criminal Tribunals for the Former Yugoslavia and Rwanda.

34 *Treaty on Extradition between the Government of Canada and the Government of the United States of America*, United States and Canada, 3 December 1971, Can TS 1976 No 3 (in force 22 March 1976), as amended by *Protocol 1*, 11 January 1988, CTS 1991 No 37 (in force 26 November 1991) and *Protocol 2*, 12 January 2001, Can TS 2003 No 11 (in force 30 April 2003) [*Canada-US Treaty*].

35 Phillip M. Saunders et al, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Edmond Publishing, 2019) at 155.

36 A modest amount of information can be found at Canada, Department of Justice, *About the International Assistance Group* (Ottawa: DOJ, last modified 20 October 2016), online: <www.justice.gc.ca/eng/cj-jp/emla-eej/about-apropos.html> [perma.cc/L222-XHYN].

37 "Bill C-4, An Act respecting non-for-profit corporations and certain other corporations", 2nd reading, *House of Commons Debates*, 40-2, No 010 (6 February 2009) at 1200 (Hon Lawrence Cannon), online: <www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-10/hansard> [perma.cc/5LTK-M2RD] (Foreign Affairs Minister Lawrence Cannon tabled a new Canada-Italy extradition treaty, without any comment being made).

38 Gib Van Ert has commented that "Canada's practices in the conclusion and domestic performance of treaties remain scandalously opaque". See Gib Van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (8 June 2020), online (blog): *Gib Van Ert* <gibvanert.com/2020/06/08/pogg-and-treaties-the-role-of-international-agreements-in-national-concern-analysis/> [perma.cc/99MU-6J7K].

It is worth highlighting, then, that extradition proceedings will necessarily deprive individuals (including Canadian citizens) of their liberty, at the hands of both the Canadian government and a foreign state; yet no meaningful public consultation has ever been conducted by the government as to whether we should have extradition treaties with particular states, nor what conditions should be placed on extraditions completed under those treaties. Even Prime Minister Trudeau's sudden announcement in September 2016 that Canada would begin negotiating an extradition treaty with China seemed to emerge from some government back room and only saw any debate because it was so publicly controversial.[39]

B. The *Extradition Act 1999*

Extradition treaties (like all treaties) are not automatically part of Canadian law but must be implemented by way of statute. In the case of extradition, the *Extradition Act* implements all of Canada's extradition arrangements and provides a "complete code" of procedure for extradition to and from Canada. Prior to 1999, extradition was completed under two different statutes: the old *Extradition Act*, which was modelled on the British statute, and the now-repealed *Fugitive Offenders Act*, which contained a streamlined extradition process for Commonwealth partners. The current Act was brought in as an effort to address what the federal government identified as inefficiencies and difficulties in Canada's ability to extradite to foreign states. A particular problem was said to be issues faced by foreign states with civil justice systems, which had difficulty meeting the evidentiary requirements of the Canadian legislation – to the point where some partner states were discouraged from making requests at all.[40] Generally speaking, the goal was to replace Canada's "antiquated" extradition system in order to respond to the new realities of transnational crime and, rhetorically at least, ensure Canada did not become a haven for criminals.

The new legislation was explicitly designed to create a more streamlined and simplified "three-phase process" for extraditions from Canada: (1) the

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39 Steven Chase & Robert Fife, "Justin Trudeau defends extradition treaty talks with China", *The Globe and Mail* (21 September 2016), online: <www.theglobeandmail.com/justin-trudeau-defends-extradition-treaty-talks-with-china> [perma.cc/ZR7S-JQFB].

40 Elaine F. Krivel et al, *A Practical Guide to Canadian Extradition* (Toronto: Carswell, 2002) at 11. An excellent account of how the new Act was ushered in can be found in McMahon, *supra* note 14. McMahon notes, in particular, that while there was little doubt that the procedural machinery needed updating, the evidence of problems experienced by requesting states was overstated.

"Authority to Proceed" (ATP); (2) judicial committal or discharge; and (3) ministerial surrender or refusal to surrender for extradition.[41] The front end of the process is the ATP phase in which lawyers at the IAG receive and evaluate the extradition request to ensure it complies with the relevant treaty and, in particular, that the offence for which the individual is sought is an extraditable offence. The latter point requires that there be "double criminality" (i.e., that the offence involved is one that is punishable up to a certain threshold by both Canada and the requesting state).[42] The Canadian offence that corresponds to the foreign offence must be explicitly identified. The ATP itself is issued by the Minister and empowers staff counsel to, *inter alia*, have the individual arrested and seek an order "committing" them for extradition.

The committal phase, which is the focus of this article, requires a hearing before a superior court judge who will essentially decide two things: (1) whether the person before the court is actually the person sought and (2) whether the evidence that has been presented by the requesting state would be sufficient to have a person committed for trial in Canada (for the Canadian offence identified in the ATP) if the conduct had occurred in Canada.[43] While, historically, the requesting state would have had to actually adduce evidence that made out a *prima facie* case, the 1999 Act brought in an innovation: requesting states are permitted to submit a "Record of the Case" (ROC) which is essentially a summary of the evidence underpinning the request. It must be accompanied by the certification of a judicial or prosecuting authority of the requesting state, to the effect that the evidence summarized is indeed available for trial, and either is sufficient under that state's law to justify prosecution or was gathered in accordance with that state's law.[44] This provision was seemingly designed to accommodate states (primarily from civil law traditions[45]) whose evidentiary

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41 See *MM*, *supra* note 9 at paras 16–26.

42 Either a minimum of two years imprisonment under s. 3 of the *Act* or whatever the governing treaty says—for example, Article 2 of the *Canada-US Treaty*, *supra* note 36, provides for extradition where the offence is punishable by one year or more of imprisonment.

43 *Act*, *supra* note 6, s 29(1)(a).

44 *Act*, *supra* note 6, s 33.

45 There is a similar regime specifically provided for in the Canada-France extradition treaty, which pre-dates the *Act*. See *Extradition Treaty between the Government of Canada and the Government of the Republic of France*, Canada and France, 17 November 1988, Can TS 1989 No 38 (in force 1 December 1989), art 10(2)(c).

regimes were dissimilar to Canada's and who would otherwise not be able easily to produce a *prima facie* case based on evidence. However, it was quickly adopted as the desirable approach by the U.S., Canada's most frequent requesting state, and now is used in the majority of cases.[46] The ROC regime also spares the requesting state the need to present evidence in court, particularly *viva voce* evidence which is expensive and time-consuming. The result is that the ROCs contain what Canadian lawyers would call hearsay, unsworn statements and otherwise unsubstantiated evidence.

The role of the committal judge is similar to, but more expansive than, that of a preliminary inquiry judge.[47] The sufficiency of evidence test under s. 29(1)(a) still assesses whether the evidence shows a *prima facie* case, albeit with relaxed evidentiary rules, and the judge must engage in a "limited weighing" of the evidence (or, more accurately, the summary of the evidence, assuming the ROC to be true) to determine whether a reasonable jury, properly instructed, could convict on the evidence. Importantly, under the Act, the evidence in the ROC is presumed to be reliable,[48] and while the individual sought is permitted to challenge the evidence (either individual items or in its entirety) on the basis of reliability, they bear the overall onus of rebutting this presumption (s. 32(1)(a)). In turn, that rebuttal will only be successful where the person sought demonstrates that the evidence is "manifestly unreliable."[49] More will be said about this below.

If the person is committed for extradition, the process enters the "surrender phase" where the Minister of Justice makes the final decision on whether the individual will be extradited.[50] This task has consistently been described by the Supreme Court as "essentially political in nature,"[51] in that the Minister is primarily concerned with discharging Canada's treaty obligations as "a responsible member of the international community."[52]

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46 In a minority of cases, the requesting state can lead evidence under the terms of the relevant extradition treaty per s. 32(1)(b) of the *Act*, *supra* note 6. However, it must still establish that the evidence exists and is available for trial (*United States v Ferras*, 2006 SCC 36 at paras 57–58 [*Ferras*]; *United Mexican States v Ortega*, 2006 SCC 34).

47 Weinstein & Dennison, *supra* note 33 at 215. See also *Act*, *supra* note 6, s 24(2).

48 *Ferras*, *supra* note 48 at paras 52–56.

49 *United States v Prudenza (sub nom Anderson)*, 2007 ONCA 84 at para 31 [*Anderson*], cited in *MM*, *supra* note 9 at para 72.

50 *Act*, *supra* note 6, s 40.

51 *MM*, *supra* note 9 at para 25.

52 *Ibid.*

While the decision must be *Charter*-compliant, it is one that is on "the extreme end of the… scale" and attracts an extremely deferential standard of review.[53] This is because the Minister is exercising their capacity under the Crown prerogative over foreign affairs, and the courts choose to be circumspect. Ss. 44 and 46 to 47 of the *Act* set out a number of grounds on which the Minister can refuse surrender, some of which are mandatory and more of which are discretionary.

Finally, it is well-established in the Supreme Court's jurisprudence that the *Charter* applies to the entire extradition process. The Court's preferred analytical lens has been s. 7, which bars the state from depriving an individual of liberty "except in accordance with the principles of fundamental justice", and it has developed a set of such principles that are tailored to both the committal[54] and ministerial[55] phases (the former of which will be dealt with here).

Committal decisions are subject to appeal,[56] and surrender decisions to judicial review,[57] before the relevant provincial court of appeal, and both can end up at the Supreme Court for final disposal if granted leave. In many cases, both committal and surrender are challenged, and the standard practice is to combine both appeal and judicial review into a single hearing at both levels of court.[58]

C. The Role of the International Assistance Group

The IAG is a specialized division of Justice Canada which "was established to carry out most of the responsibilities assigned to the Minister of Justice under the *Extradition Act* and the *Mutual Legal Assistance in Criminal Matters Act*."[59] IAG acts as Canada's "central authority"[60] for all of Canada's international criminal cooperation activities and administers the government's communication and cooperation with foreign states in this

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53 *Lake v Canada (Minister of Justice)*, 2008 SCC 23 [*Lake*].

54 *Ferras*, *supra* note 48; *MM*, *supra* note 9.

55 *United States v Burns*, 2001 SCC 7 [*Burns*]; *Lake*, *supra* note 55.

56 *Act*, *supra* note 6, s 49.

57 *Ibid*, s 57.

58 Weinstein & Dennison, *supra* note 33.

59 *About the International Assistance Group*, *supra* note 38.

60 Under modern extradition practice, states create or designate a particular branch of the government, called a "central authority," to deal with all incoming and outgoing requests in order to create efficiency and avoid the need to use diplomatic communication.

regard. So far as extradition goes, the IAG plays a number of roles: it develops extradition treaty relationships; it fields incoming requests from foreign states, as well as consulting and assisting them, and also presides over outgoing communication and requests; it obtains evidence "for use at home or abroad, including for use in extradition";[61] it advises regional Canadian counsel on international cooperation methods; and it approves and issues the ATP in appropriate cases.

Most important for present purposes, IAG personnel conduct the litigation in the adversarial extradition proceedings. They do this either indirectly, by advising and instructing litigation counsel employed by Justice Canada[62] or, in some cases, acting as counsel in those proceedings[63]– which is to say, they act as counsel for the requesting states. They also advise the Minister on all aspects of extradition proceedings, up to and including the drafting of Ministerial surrender decisions.[64] In fundamental terms then, IAG adversarially "prosecutes" the extradition case on behalf of the Crown and, ultimately, the requesting state; makes the final decision regarding surrender; and fights any appeals or judicial reviews in court. This remarkable dominance of the entire process by a government agency will examined in Part V below.

IV. THE JUDICIAL TASK AND ISSUES AT THAT COMMITTAL STAGE

A. The Primary Problem: Legislative Interpretation

In *MM*, the current leading case on the committal process, Justice Cromwell for the majority of the Court began the judgment by stating that "the extradition process serves two important objectives: the prompt compliance with Canada's international obligations to our extradition partners, and the protection of the rights of the person sought."[65] On the current state of the law, however, there is an imbalance between these two

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61 Segal Report, *supra* note 16 at 34.

62 In British Columbia and Ontario, where the extradition traffic is highest, there are specialist Justice Canada practice groups set up for extradition and MLAT proceedings.

63 This occurred in *Diab* Sup Ct, *supra* note 20. The Segal Report presented this as "unusual" (*supra* note 16 at 19).

64 Formally speaking, this is a power that is reserved for the Minister, and the Minister personally makes the decision upon the advice of IAG and signs it. However, the decisions are in substance made by IAG lawyers. See Segal Report, *supra* note 16 at 65.

65 *MM*, *supra* note 9 at para 1.

"objectives." The *Extradition Act* is the driver of the "extradition process," and the courts have consistently found that its sole objective is to facilitate extradition. Protection of the rights of the person sought has been a secondary objective at best, de-emphasized by the Crown and applied only half-heartedly by the courts. From this standpoint, I will argue that the committal process is unfair.

In the course of two decades of caselaw regarding the committal process, the Crown has urged upon the courts – mostly successfully – two related themes: (1) that the primary interpretive principle the courts should apply to the *Extradition Act* is the safeguarding and promotion of international comity between Canada and its extradition partner states, and (2) that Parliament intended extradition to be an expeditious and summary process, informed as little as possible by Canadian criminal law fundamentals. I will briefly explain each of these in turn.

On the first theme, extradition, of course, is a tool of inter-state cooperation that has the single goal of suppressing transnational crime, and the achievement of this goal depends on states making effective use of extradition treaties and arrangements. The 1999 *Act* was explicitly drafted with this in mind,[66] and thus it is not surprising that nearly every reported extradition decision makes reference to some variant of Canada maintaining "international comity" by being a good extradition partner.[67] In fact, comity is basically the only interpretive principle that the courts, urged on by the Crown, have seen fit to use.

On the second theme, the Supreme Court and lower courts have constantly emphasized that extradition cannot be efficacious unless it is expeditious, and that expedition, in turn, requires the procedural machinery to be kept to a minimum. The most consistent expression of this emphasis is that, as the majority noted in *MM*, "the extradition process is not a trial and, as the Court said nearly three decades ago, it should never be permitted to become one."[68] The committal process, in particular, is a "modest screening device,"[69] and fairness in this process does not require a

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66 Krivel et al, *supra* note 42 at 10–13.

67 *United States v Dynar*, [1997] 2 SCR 462 at para 122, 147 DLR (4th) 399.

68 MM, *supra* note 9 at para 2.

69 *Ibid* at para 2; *United States v Yang* (2001), 56 OR (3d) 52 at paras 47, 64, 86, DLR (4th) 337 (ONCA), cited in MM, *supra* note 9 at paras 38, 53, 61.

(criminal) trial. Instead, it simply requires "that there is sufficient evidence to justify putting the person on trial."[70]

The procedural machinery will be explored below. As a preface point, however, this matrix of emphasis is perhaps to be expected since, despite the fact that the goal of the Act is to render people to face criminal trials, the process created is fundamentally a non-criminal, judicial-administrative law hybrid that incorporates certain criminal procedure machinery only by necessity.[71] In roughly the same manner that a preliminary inquiry judge would do, the committal judge determines, essentially in the abstract, whether the evidence proffered by the requesting state would justify committal for trial in Canada. The presumption of innocence does not apply, and any questions regarding defences are left for the actual criminal trial to be held in the requesting state. The push and pull throughout the case law, however, reflects consistent effort by the defence bar to have the courts take into account that the entire ambit of the process is the deprivation of liberty of the person sought and to inject an appropriate amount of gravity and procedural protection into it – an effort that has been largely unsuccessful.

During the following examination of issues that are raised by the committal process, it is worth bearing in mind that the Crown's insistence on these two themes is fundamentally accurate. The structure of the *Act* and the way the process has played out supports the view that Parliament did indeed intend to provide for an expeditious process that was primarily geared toward making sure extradition requests were fulfilled. Of course, though Parliament held the pen, it was guided by the hand of Justice Canada which formulated the legislation and the policy goals that underpin it, steered the Act through the legislative process, and continues to negotiate and administer the treaties and determinedly pursue extradition, all with minimal public input. The Act is fundamentally a piece of law enforcement legislation because it was made by law enforcers. The question for Canadians is whether this is as it should be or whether change needs to be made.

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70 *MM*, *supra* note 9 at para 61.

71 See Joanna Harrington, "Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in India v. Badesha" (2019) 88 SCLR (2d) 273.

B. Admissibility and Sufficiency of Evidence: Re-Invigorating *Ferras*

1. Changes to Committal Under the 1999 Act: From Shephard to MM

To understand properly the central fairness issues with the committal process, it is important to review the changes made by the 1999 Act. In a detailed overview, Professor Anne Warner La Forest wrote that extradition law had always rested on maintaining a balance between safeguarding the liberty of the person sought and state interest in international cooperation.[72] In Canada, historically the committal process had achieved this, more or less, by maintaining a procedural alignment between extradition proceedings and the preliminary inquiry; the committal hearing was in fact prescribed by the former legislation to be conducted "as nearly as may be"[73] to a preliminary inquiry. In keeping with the approach of most common law jurisdictions, the requesting state was required to present a *prima facie* case[74] which, importantly, had to be based on evidence that was admissible under Canadian law.[75] The trickiest point was around hearsay, to which common law jurisdictions like Canada took a restrictive approach but was used liberally in other states. Since the calling of live witnesses was too expensive and time-consuming to be justified or practical for extradition purposes, first-person sworn/affirmed statements or affidavits were admissible. However, second- and third-hand hearsay was not admissible, "ensur[ing] that the evidence is reliable and that the person giving it has received a warning that he or she must speak truthfully."[76]

The test for committal, originally laid out *US v Shephard*,[77] was the same as that which governed preliminary inquiries: if there was evidence that offered some form of proof on each element of the offence (i.e. sufficiency), and assuming that evidence to be true (i.e. reliability), the judge asked whether a reasonable trier of fact, properly instructed, could find the accused guilty. The judge did not weigh the evidence, nor was the defence

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72 La Forest, *supra* note 7.

73 *Extradition Act*, RS 1985, c E-23, s 13 (repealed by the Act, *supra* note 6, s 129).

74 See Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (New York: Springer Publishing, 1998) at 119–27.

75 This included certain modest relaxations of Canadian evidence law in the old Act to accommodate the extradition setting.

76 La Forest, *supra* note 7 at para 57.

77 *United States v Shephard*, [1977] 2 SCR 1067, 70 DLR (3d) 136.

allowed to challenge its reliability. However, as Professor La Forest pointed out, this was unnecessary since the evidence was admissible under Canadian law and thus to assume its reliability was reasonable and fair.[78] This structure allowed Canada to strike the balance between comity and the safeguarding of liberty – the trial system of the foreign state, which might be very different from Canada's, was not questioned or undermined, but Canada would only extradite a person where they could be put on trial in similar circumstances in Canada. This was, in fact, the substance of the double criminality principle.

The 1999 Act changed this machinery fundamentally, particularly with the introduction of the ROC. The policy justification often proffered was that providing evidence in a form admissible under Canadian law resulted in extradition being difficult or even impossible for requesting states which had civil law systems, not least because hearsay evidence was used extensively and the concept of sworn statements was not known to those systems.[79] The solution was adopting the ROC which, as noted earlier, is a summary of evidence supporting the charge that is certified either to be available for trial in the requesting state or at least gathered in accordance with that state's law. The evidence described in the ROC is presumed reliable. The analogy to a preliminary inquiry was kept, subject to "any modifications that the circumstances require."[80]

Importantly, the test for committal did not change and the *Shephard* test was essentially codified in s. 29(1)(a) of the *Act*. As Professor La Forest noted, this approach amounted to "retaining the *prima facie* standard but relaxing the admissibility standard."[81] She argued that this upset the balance between liberty and comity in a way that de-legitimized the process:

> The logic of *Shephard* in terms of reliability does not apply once admissibility is relaxed to the point of allowing second and third hand hearsay in one process and not in the other. It is true that under the new Act, the record of the case must be certified by a judicial or prosecuting authority in the requesting state, but that would not be sufficient to warrant admissibility of the evidence in Canadian proceedings. There is thus no longer an alignment between preliminary proceedings and extradition proceedings in Canada. It was this balance that

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78 La Forest, *supra* note 7 at para 72.

79 Both Professor La Forest and Professor McMahon are highly critical of the solidity of this rationale and the quality and amount of evidence which was put forward in support of it. See especially McMahon, *supra* note 14 where she carefully reviews the process of the Bill through Parliament.

80 *Act*, *supra* note 6, s 24(2).

81 La Forest, *supra* note 7 at para 103.

> formed the basis for the statements in *Charter* decisions that the extradition hearing was generally in accordance with fundamental justice. If it is accepted that it is a basic tenet of our legal system that a person cannot be bound over for trial in this jurisdiction based upon the kind of evidence provided for in the new Act, then it can be postulated that, in general, it is contrary to fundamental justice to extradite a person, who may well be a Canadian national, to a requesting state based upon that evidence to face trial in that country.[82]

Essentially, Canada had gone from a system where committal should be ordered based on evidence that was admissible under Canadian law, to one where committal should be ordered based on the fact that evidence could be shown to exist even though that evidence would not necessarily have been admissible under Canadian law[83] and could not realistically be tested. "Indeed," Professor La Forest memorably remarked, "other than as a matter of form, it is difficult to understand why the judicial role has been retained in the new Act, as the extradition judge has little, if anything, to do."[84]

For some years after the Act's coming into force, the Crown advanced the argument that the sufficiency test had not changed from *Shephard* and that, despite the changes regarding admissibility of evidence, the committal judge had no discretion to review, weigh, or evaluate the evidence put forward in the ROC. In a set of constitutional challenges led by the case of *R v Ferras*,[85] however, the Supreme Court took up the substance of Professor La Forest's suggestion that the new Act had swung the balance over into unconstitutional territory. Noting that "[t]he Act is silent on whether the judge has a residual discretion to exclude evidence that is unreliable or dangerous,"[86] Chief Justice McLachlin for the Court held that using the preliminary inquiry structure as an analogue for the committal hearing could not, as a matter of "fundamental justice" under s. 7 of the *Charter*, be pushed as far as the *Shephard* test permitted. It might be acceptable to deprive trial judges of the ability to weigh or evaluate evidence in the context of committal for trial in Canada because evidence was admitted in a

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82 *Ibid* at para 73.

83 As Botting notes, "[s]ince the summary of evidence set out in the record of the case is hearsay – if not double or triple hearsay – it clearly would not be 'admissible under Canadian law' except by virtue of section 32". See Gary Botting, "The Supreme Court 'Decodes' the *Extradition Act*: Reading Down the Law in *Ferras* and *Ortega*" (2007) 32:2 Queen's LJ 446 at 468 (QL).

84 La Forest, *supra* note 7 at para 130.

85 *Ferras*, *supra* note 48.

86 *Ibid* at para 37.

preliminary inquiry "according to the domestic rules of evidence, with all of the inherent guarantees of threshold reliability that those rules entail."[87] In the extradition context, however, this protection was not present, which would "deprive the subject of his or her constitutional right to a meaningful judicial determination before the subject is sent out of the country and loses his or her liberty."[88] This, the Court ruled, was constitutionally infirm:

> [T]he combined effect of the relevant provisions (ss. 29, 32 and 33 of the Act) may be to deprive the person sought of the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition. If the extradition judge possesses neither the ability to declare unreliable evidence inadmissible nor to weigh and consider the sufficiency of the evidence, committal for extradition could occur in circumstances where committal for trial in Canada would not be justified. I take as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence is so manifestly unreliable that it would be unsafe to rest a verdict upon it. It follows that if a judge on an extradition hearing concludes that the evidence is manifestly unreliable, the judge should not order extradition under s. 29(1). Yet, under the current state of the law in *Shephard*, it appears that the judge is denied this possibility.[89]

It is worth pausing at this point to observe that in support of these points, Chief Justice McLachlin pointedly cited Professor La Forest's criticism that the committal judges "have nothing left to do."[90] "The judge," she wrote, "becomes a rubber stamp."[91] One might conclude that this unconstitutional and unfair hollowing out of judicial process was, in fact, a deliberate product of the 1999 *Extradition Act*'s design or, at the very least, a product of the Crown's litigation strategy in proceedings under the Act.[92]

To remedy the situation, the Court read down s. 29(1) such that it granted the committal judge discretion "to refuse to extradite on insufficient evidence such as where the reliability of the evidence certified is successfully impeached or where there is no evidence, by certification or otherwise, that the evidence is available for trial."[93] In terms of impeaching

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87 *Ibid* para 48.

88 *Ibid* at para 47.

89 *Ibid* at para 40.

90 La Forest *supra* note 7 at 172, cited in *Ferras supra* note 48 at para 41. The Court also cited similar remarks made by Gary Botting in *Extradition Between Canada and the United States* (Leiden: Martinus Nijhoff, 2005) at 8.

91 *Ferras*, *supra* note 48 at para 41.

92 This is borne out by a review of the Respondent Factum in *Ferras*, in which the Crown resolutely denied any *Charter* or fairness issues with these provisions. See *United States of America v Ferras*, Supreme Court of Canada File No. 30211, *Factum of the Respondent*.

93 *Ferras*, *supra* note 48 at para 50.

the reliability of the evidence, the person sought could lead their own evidence or make arguments about the evidence in the ROC. Informed in this way, the judge could "engage in a limited weighing of evidence to determine whether there was a plausible case."[94] However, the evidence was presumed reliable and the challenge could only be successful if the evidence was "so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict"[95] or (in the phrase that ultimately shaped the jurisprudence) the evidence could be shown to be "manifestly unreliable."[96] Notably, the Court did not go as far as Professor La Forest might have preferred, as the presumption of reliability essentially meant automatic admissibility in the absence of challenge from the person sought; the American ROC in *Ferras* itself featured hearsay that came from unsavoury witnesses.

While early commentary hailed the *Ferras* framework as bringing much-needed rigour to the committal decision,[97] the Crown immediately went about narrowing the window of fundamental justice that *Ferras* had tried to open. It found success and a sympathetic ear with Justice Doherty in the case of *United States of America v Anderson*.[98] While conceding that *Ferras* had "turned a new jurisprudential page in the law of extradition,"[99] Justice Doherty characterized the scrutiny of the requesting state's evidence as a "limited qualitative evaluation" that:

> [D]oes not envision weighing competing inferences that may arise from the evidence. It does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable. Nor does it call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition in cases that appear to the extradition judge to be weak or unlikely to succeed at trial.[100]

Evidence, he wrote, could be rendered defective or unreliable "due to problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of

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94 *Ibid* at para 54. The "limited weighing" predominantly refers to testing the inferences sought to be established by circumstantial evidence pursuant to *R v Arcuri*, 2001 SCC 54.

95 *Ibid* at para 40.

96 *Ibid*.

97 See Botting, "The Supreme Court 'Decodes' the *Extradition Act*", *supra* note 85.

98 *Anderson*, *supra* note 51. See also *United States v Thomlinson*, 2007 ONCA 42.

99 *Anderson*, *supra* note 51 at para 26.

100 *Ibid* at para 28 [emphasis added].

those two factors," but it was only where the concerns with the evidence became "sufficiently powerful to justify the complete rejection of the evidence" that they were even "germane" to the sufficiency of evidence inquiry.[101] The presumption of reliability could only be overcome where the person sought could demonstrate "fundamental inadequacies or frailties" in the requesting state's evidence."[102]

Justice Doherty's *dicta* in *Anderson* were influential in subsequent case law. The other most influential appellate court in extradition matters, the British Columbia Court of Appeal, initially resisted the tone struck by *Anderson*[103] but softened its approach over time.[104] The coup de grace came from Justice Cromwell whose judgment in *MM* put an authoritative seal on the *Anderson* line of case law. Stating that he "largely agree[d]" with Justice Doherty's interpretation of *Ferras*, Justice Cromwell echoed the narrowing language from *Anderson*[105] and further shrank any hope of meaningful evaluation of the requesting state's evidence:

> *Ferras* does not call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial.[106]

Justice Cromwell then went on to impose an additional procedural hurdle to a challenge of the requesting state's evidence. He noted that the task of the extradition judge was only one of limited weighing of the requesting state's evidence, and that any evidence sought to be used to challenge reliability had to be discretely relevant to this task. Accordingly, before even being allowed to lead the evidence, the person sought would have to make "an initial showing that the proposed evidence is realistically capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability of the requesting state's evidence."[107] Analogously to a *Vukelich* motion,[108] this "initial showing"

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101 *Ibid* at para 30.

102 *Ibid* at para 31.

103 *United States v Graham*, 2007 BCCA 345, in which Justice Donald referred to the Ontario Court of Appeal's approach as "reductionist."

104 See e.g. *United States of America v SU*, 2013 BCCA 483.

105 *MM*, *supra* note 9 at paras 71–72.

106 *Ibid* at para 71.

107 *Ibid* at para 77.

108 A hearing in which the court will decide whether it will even allow the accused to make a *Charter* motion. See *R v Cody*, 2017 SCC 31 at para 38.

could include "summaries or will-say statements or similar offers of proof."[109]

Justice Cromwell concluded by offering what he called "examples of evidence that may or may not meet the high threshold justifying a refusal of committal on the basis of unreliability of the evidence." His list of examples which "may not" meet the high threshold (because it was "irrelevant or not sufficiently cogent"[110]) included[111] evidence that: goes to witness credibility; attempts to establish a competing inference of innocence; attempts to establish a defence; or presents a "different or exculpatory account of events."[112] Justice Cromwell offered no specific examples of evidence that "may" meet the high threshold, offering instead that even the types of evidence he had just referred to might establish unreliability in "certain, and likely fairly unusual cases" if it was "of virtually unimpeachable authenticity and reliability." However, such cases would be "very rare."[113]

2. Ferras and Fairness

In my view, *Ferras*'s promise of restoring a meaningful screening role for the committal judge has evaporated. This is because the Court's view in *Ferras* of the role played by the presumption that the ROC is reliable was too sanguine or even incautious. Practically speaking, rebutting the presumption of reliability is not only a difficult hill to scale but an impossible one. Individuals sought routinely challenge reliability on the basis of information known to them or that can be squeezed out of the ROC documents themselves – bearing in mind that these are tailored by the requesting states and the IAG and that disclosure is practically a non-starter – only to meet a ruling that questions regarding the reliability of the evidence should be handled by the trial court in the requesting state. Between them, the Ontario Court of Appeal and the Supreme Court have essentially interpreted *Ferras* out of practical existence.

It is helpful to contextualize this argument with reference to what might inelegantly be referred to as the Crown's "win/loss record" in extradition

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109 MM, *supra* note 9 at para 77. This too appears to have originated in *Anderson*, *supra* note 51 at paras 43–46, adopted from the earlier case of *R v Mach*, [2006] OJ No 3204, 70 WCB (2d) 318 (Ont Sup Ct).

110 MM, *supra* note 9 at para 81.

111 *Ibid* at paras 82–84.

112 *Ibid* at para 84.

113 *Ibid* at para 85.

cases generally, and at the committal stage specifically. Anecdotally speaking, it is well-known among defence lawyers that arrest of a client on an extradition warrant means they are usually facing a process that is practically a *fait accompli*, and that the best advice the lawyer can give is to immediately retain local counsel in the requesting state in hope of negotiating a plea deal in exchange for waiving the extradition process.[114] A well-known "joke" about extradition is that there is only one question that needs answering: aisle or window seat?[115] In light of Hassan Diab's wrongful extradition to France this "joke" seems in poor taste, yet it accurately captures the extent to which, at least in the perception of non-Crown people interested in extradition, the deck is stacked.

This anecdotal understanding is borne out, moreover, by data. In terms of the broader question of whether extradition efforts by the Crown result in extradition, any brief look at the extradition case law would indicate that the overwhelming majority of challenges to extradition are lost by the person sought and result in "success" for the Crown.[116] This figure would not take into account those cases where extradition is not contested by the person sought, which would make the Crown's "success" rate higher still. In the wake of Hassan Diab's return from France, IAG disclosed statistics which indicated that individuals sought are in fact surrendered in 90% of cases.[117]

More to the point of this article, however, is that a look specifically at reported committal decisions shows that Justice Cromwell aptly described successful challenges to the requesting state's case as "very rare." As one reliable text notes,[118] successful challenges at the committal hearing are rare, and successful appeals of committal orders are rarer still. Moreover, in 2017 I directed a study of 198 post-*Ferras* committal decisions reported between

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114 See Weinstein & Dennison, *supra* note 33, c 4.

115 Roger Clark, "Clark: Results of inquiry into Hassan Diab's extradition must be made public now", *Ottawa Citizen* (17 July 2019), online: <ottawacitizen.com/opinion/columnists/clark-results-of-inquiry-into-hassan-diabs-extradition-must-be-made-public-now> [perma.cc/TGX2-VFTT].

116 Whether it is even appropriate to refer to a completed extradition as a "win" or "success" for the Crown is an interesting question, which is taken up in Section IV below.

117 Lisa Laventure & David Cochrane, "Canada's high extradition rate spurs calls for reform", *CBC News* (30 May 2018), online: <www.cbc.ca/news/politics/extradition-arrest-canada-diab-1.4683289> [perma.cc/Z9CQ-45HX].

118 Weinstein & Dennison, *supra* note 33.

2006 and 2017, which revealed only 16 successful challenges among all of the cases.[119]

It is important to acknowledge that these numbers represent a crude measure of a more nuanced situation. While this is an unpopular view among defence lawyers, it seems sensible to conclude that a strong plurality, if not a majority, of extradition requests are well-founded and rest on a reasonable evidential record. Moreover, if an extradition case is put forward by the IAG for a committal hearing, then this means that the ROC has been evaluated – in light of both the relevant treaty and the *Act* – and the Crown has a certain amount of confidence in the overall quality of the case. The IAG notes publicly that it is responsible for Canada's communications and dealings with its extradition partners,[120] and it is reasonable to infer (and has been anecdotally indicated to me) that weaker or ill-founded requests are either screened out or sent back to the requesting state for repair. On this logic then, a simple request-to-committal ratio does not account for the legal strength of those cases that actually proceed through the process.

However, on the specific issue of the committal test, a look at the 16 successful cases from the above-noted survey is revealing. In a strong majority of them, committal was not refused because the requesting state's evidence (almost always in an ROC) was – in the language of *Ferras* – "defective or unreliable," but because evidence was simply not present on one or more elements of the charged offence. For example, in *Kamaldin* the allegation was that the six persons sought had engaged in telemarketing fraud, but for one of the six, Iacino, the only evidence was that he had visited the site of the operation once and was there when arrests were executed; there were no fingerprints or any other evidence of his participation in the offences. In three other fraud cases (*Valde*, *Pataki*, and

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119 *United States of America v Kamaldin*, 2016 QCCS 6228; *United States of America v Toren*, 2012 BCSC 1655; *United States v Yu*, 2011 ONSC 2777; *Hungary (Republic) v Valde*, 2011 ONSC 328; *Hungary (Republic) v Pataki*, 2010 ONSC 2663; *United States v Gillingham*, [2007] OJ No 4402, 75 WCB (2d) 438 (Ont Sup Ct); *United States v Laird*, 2010 ONSC 1553; *Anderson v United States*, 2006 QCCS 4211; *United States v Cheema*, 2007 BCCA 342; *Pelchat c Canada*, 2008 QCCA 74; *DiRienzo c Canada*, 2005CarswellQue 13334; *United States of America v Viscomi*, 2015 ONCA 484; *United States of America v Aneja*, 2012 ONSC 4062; *United States of America v Robertson*, 2012 BCSC 1800; *United States v Walker*, 2011 BCCA 110; *Seifert v Italy (Republic)*, 2007 BCCA 420 [*Seifert* CA]. In some cases, the challenges were only partly successful, and the individual was committed on other charges.

120 "About the International Assistance Group", *supra* note 38.

Gillingham), evidence of *mens rea* was missing from the requesting state's case as to some of the persons sought. In *Pelchat*, evidence of the *actus reus* of manufacturing a controlled substance was missing, as was evidence of aiding and abetting the production. In *Di Rienzo*, two of the five people sought were discharged because the evidence did not show proof of their knowledge of the conspiracies for which they were sought; a similar discharge resulted in *Cheema*. In *Aneja*, the person sought was committed on several charges relating to a fraud investigation but discharged on obstruction of justice because his impugned statements did not relate to the investigation itself, and there was therefore a gap in evidence on the *actus reus* of the offence. In *Walker*, there was so little information relating to an alleged eyewitness identification that the committal judge could not even determine sufficiency.[121] In *Seifert*, the person sought was committed on a number of charges but discharged on one for which there was no evidence of causation and another for which there was no evidence of causation or identity.[122]

Some of the cases show a mixture of a lack of evidence and "defective and unreliable" evidence. In *Yu*, one of the persons sought, Chuck, was discharged because the evidence in the ROC purporting to implicate him in the charges was a mixture of mistaken identification, inconsistent inferences, bad translation, and baseless assertions by investigators. In *Laird*, the person sought was accused of having drugged and sexually assaulted the victim, but there was no evidence of how the victim had ingested the drug and the Crown's inferences were, at best, speculation. In *Anderson*, the judge struck summaries of Canadian-gathered wiretap evidence from the ROC because it had not been led in the hearing, as required under the Act, and, as a result, the case suffered from a total absence of proof regarding some of the persons sought.[123]

In all of these cases, the challenged evidence was fairly hopeless; even bearing in mind the challenges of dealing with authorities in requesting

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121 It appears Walker was eventually extradited when a revised ROC was submitted. See *United States v Walker*, 2011 BCCA 110.

122 *Seifert v Italy (Republic)*, 2003 BCSC 1317. Strictly speaking, this was a pre-*Ferras* ruling, insofar as the committal judge's decision came before *Ferras* was released. However, if anything, the committal judge applied an even more Crown-friendly test than *Ferras* (see paras 20–22). The Court of Appeal in *Seifert* CA, *supra* note 121 did a *de novo* committal assessment using *Ferras* but upheld these two discharges without comment.

123 See *United States of America v Fraser*, 2017 BCCA 136; *United States of America v Tahvili*, 2008 BCCA 359.

states and the development of evidentiary records, one wonders why the Crown went forward. In any event, *Ferras* promised that the person sought would have the opportunity to challenge weak evidence, but what the case law shows is this: all the law truly seems to provide is the much narrower opportunity, in cases where there really is no evidence, to point it out. Other reliability issues with the requesting state's evidence, no matter how grave, are simply left for the requesting state's trial courts to sort out. It also raises the possibility that after the constriction of *Ferras* between *Anderson* and *MM*, the window of fairness for the person sought is so narrow that we must be fearful that wrongful extraditions are happening.

This is not to say that our extradition process is itself wholly toxic; by analogy, we do not mistrust the entire criminal justice system because we know there are problems with wrongful convictions. However, in the latter space, the Supreme Court of Canada, appellate courts, and successive government inquiries have shaped the common law and pushed Parliamentary reform to deal with the problem. In the extradition space, the Crown-designed process is accepted, mostly uncritically, by the courts, and reform proposals do not attract interest.

If the examples cited above are not completely convincing on this point, there is no better support for this argument than the *Diab* case. The evidence in the French ROC was mostly geared toward identifying an individual known as "Panadriyu" as the bomber, and the case came down to a handwriting analysis report by a French expert which purported to link Diab's handwriting to samples of handwriting suspected to be that of Panadriyu. The reliability of the report was attacked by three defence experts, and among the committal judge's findings were that the report "ha[d] been shown to be based on some questionable methods and on an analysis that seems very problematic"[124] and was "susceptible to a great deal of criticism and attack;"[125] it was "convoluted, very confusing, [and] with conclusions that are suspect."[126] However, relying on *Anderson*, the judge found that he had no choice but to order committal; despite these "major weaknesses," choosing between competing expert views was ultimately the task of the foreign trial court and, somehow, the presumption of reliability

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124 *Diab* Sup Ct, *supra* note 20 at para 118.
125 *Ibid* at para 120.
126 *Ibid* at para 121.

was not overcome.[127] The Court of Appeal upheld the decision, noting that the expert evidence could only have been "manifestly unreliable" if it was "devoid of reliability and of utility to the fact finder."[128]

With respect, it is difficult to imagine a case where evidence proffered by the requesting state was more "devoid of reliability and utility," and yet it was on the basis of this report that Hassan Diab was extradited to France to face a prosecutorial case that, as noted above, ultimately fell apart. This case therefore demonstrates two interlocking problems. First, if the "questionable," "problematic," "convoluted," "confusing," and "suspect" evidence in *Diab* was not manifestly unreliable, then arguably the test cannot actually be met. If there is any evidence, regardless of how poor or suspect, then the trial court in the requesting state is the appropriate place deal with its problems. Canada's courts are truly applying the old *Shephard* test and just calling it by another name.

Second, if one accepts that the test has been correctly stated and is being correctly applied in law (in cases like *Diab* and *MM*), then it is acceptable for Canadians to be extradited on the basis of evidence that is "questionable," "problematic," "convoluted," "confusing," and "suspect" – and by way of a process in which it is essentially impossible meaningfully to challenge that evidence and bring out its weakness. Surely, such an unfair process is not in line with "fundamental justice" such that it is acceptable to Canadians. In *Ferras* the Supreme Court promised a "meaningful judicial determination,"[129] but individuals like Hassan Diab did not receive and are not receiving it. Compliance with the principles of fundamental justice under s. 7 of the *Charter* demands better. Since, as Justice Cromwell wrote in *MM*, "[t]here is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial,"[130] then Diab's case shows that such a power needs to be created.

3. Efficiency and Expeditiousness

This problem is compounded by the insistence in the extradition jurisprudence that extradition is intended to be "expeditious and efficient", even summary in nature – which infects not only what scrutiny is to be given to the requesting state's case but, generally, how fair the committal hearing

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127 *Ibid* at paras 122–23.
128 *Diab* CA, *supra* note 22 at para 126.
129 *Ferras*, *supra* note 48 at para 26.
130 *MM*, *supra* note 9 at para 71.

must be in order to be *Charter*-compliant. The most currently authoritative version of this can be found in MM. Charged with abducting her children, Messina had argued that the defence of necessity would be available to her if the conduct had occurred in Canada, as she had been helping her children to flee their abusive father, and thus double criminality could not be made out. For the majority, Justice Cromwell took the opportunity to reinforce what he referred to as "long-settled principles about the extradition process,"[131] which centred around the theme that "expeditiousness and efficiency" mean that "an extradition hearing is not a trial and it should never be permitted to become one."[132] This weighed against the argument that defences could even be considered at the committal stage since committal had fundamentally the same limited function as a preliminary inquiry, which is to determine whether there is any evidence that justified committal for trial. Defences, Justice Cromwell wrote, "have never formed part of the test for committal to trial in the preliminary inquiry context," and to allow consideration of them "would fundamentally change the nature of the extradition hearing, making it more akin to a trial."[133] *Ferras*, he conceded, had expanded the scope of the committal judge's powers somewhat due to its requirement that the judge be permitted to engage in a limited weighing of the requesting state's evidence. However, this did not expand the issues to which the judge was confined to considering:

> *Ferras*'s insistence on a meaningful judicial determination by the extradition judge speaks only to the rigour that an extradition judge must bring to the assessment of the evidence. *Ferras* did not — indeed could not — change by judicial decree the statutory requirement that the requesting state has only to show that the record would justify committal for trial in Canada. The committal for trial process has never been concerned with possible defences on which the accused bears an evidential or persuasive burden and *Ferras* provides no support for any fundamental change to this statutory test for committal.[134]

A three-judge dissent led by Justice Abella argued that any meaningful application of the concept of "double criminality" meant that the committal judge must take into account clear evidence showing that the person sought has a defence available. While Justice Cromwell responded – correctly in

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131 *Ibid* at para 41.
132 *Ibid* at para 64.
133 *Ibid* at para 86.
134 *Ibid* at para 66.

my view – that this did damage to the statutory language that clearly confined the committal process and any defence-side evidence to the firmness of the requesting state's evidence,[135] Justice Abella's reasons were grounded in *Ferras*'s fundamental holding that the committal process is only *Charter*-compliant if there is "meaningful judicial assessment" of the evidence. She wrote:

> A meaningful judicial determination of whether the double criminality requirement is met should not be sacrificed on the altar of potential concerns of expediency, comity and cost. These concerns are adequately addressed in the existing extradition process and not undermined by consideration of the viability of a [necessity] defence. In any event, they must be counterbalanced against the need for a meaningful judicial assessment of the case based on the evidence and the law so that the liberty interests of the person sought for extradition are fully respected and protected.[136]

The dissenting argument has much to commend. It is reasonable to say that extradition should not become a trial, but if it is to comport with basic fairness, neither does it need to be the furthest thing from a trial. Allowing consideration of defences might depart from the preliminary inquiry structure upon which committal is based, but as the Court itself pointed out in *Ferras*, the Act does not demand slavish adherence to that structure.[137] If compliance with the principles of fundamental justice could justify expanding the scope of evidentiary consideration as a "meaningful judicial process," it could safely justify including consideration of defences as well. It is worth remembering that preliminary inquiries (a fully criminal procedure) and extradition (a process Crown personnel insist on referring to as "civil") may have technically similar goals but produce different results. A person who is committed for trial after a preliminary inquiry is going to face a trial within the Canadian criminal justice system, in which we are confident. A person extradited faces consequences which are "more onerous."[138] Like Hassan Diab, this person will be sent to a foreign state where they may never have been[139] and where they may not speak the local

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135 *Ibid*.

136 *Ibid* at para 230.

137 *Ferras*, *supra* note 48 at para 48. See also MM, *supra* note 9 at para 212.

138 La Forest, *supra* note 7 at para 132.

139 It is increasingly common for some states, particularly the U.S., to assert "extended territorial jurisdiction" and request extradition of individuals whose alleged criminal conduct touched U.S. territory in some way but who never left Canada. See e.g. *Sheck v Canada (Minister of Justice)*, 2019 BCCA 364. There is nothing disturbing about this in principle, as Canada asserts the same form of jurisdiction. However, in practice, the

language; they may face a foreign justice system that has significant problems, such as prosecutors who wish to rely on secret intelligence as evidence or have drawn conclusions on the basis of incompetently-gathered evidence.[140] Like Michele Messina, a defence that would be available to them under Canadian law may not even be available in the requesting state, in a case engaging the kind of gendered violence that Canada has committed both domestically and internationally to combat.[141] "Fundamental justice" by way of a "meaningful judicial process" may require a broader scope of inquiry.

The six to three margin in *MM* shows, however, that challenging the current Crown-driven view of the extradition process – which is supported by decades of extradition jurisprudence – is an uphill battle. The debate in *MM* around whether defences can be considered in the committal hearing is emblematic of the fact that the current process, underpinned by overwhelming judicial acceptance of the Crown's policy agenda, has essentially fetishized the mantras of "extradition cannot be a trial" and "extradition must be efficient." Even if one accepts that the current system is defensible in terms of complying with the scheme Parliament has laid out in the 1999 *Extradition Act*, it is worth asking the hard but basic democratic question: now that we have seen it in action for over 20 years, is this kind of process actually what Canadians want? It may be, as Justice Cromwell wrote in *MM*, that "[b]asic fairness to the person sought does not require that the extradition process have all of the safeguards of a trial"[142] but safeguards it should have. In my view, there are aspects of basic fairness missing from the extradition machinery which could potentially be remedied by changes that maintain efficiency and keep extradition from devolving into some kind of preliminary trial while, at the same time, do a more robust, effective, and *Charter*-compliant job of protecting the rights of the individual sought. If changes would mean going beyond "settled principles" of extradition law, then it is time to unsettle those principles.

U.S. has requested jurisdiction on the basis of very broad assertions of extended territoriality. See e.g. *United States v Meng*, 2020 BCSC 785.

140 In *Diab*, part of the French investigation consisted of two French handwriting "experts" who found that an early sample of Diab's handwriting was a match for handwriting suspected to be that of the bomber. It was later revealed that the sample was actually the handwriting of Diab's then-wife. See Segal Report, *supra* note 16 at 37.

141 *MM*, supra note 9 at paras 217–24 per Justice Abella.

142 *Ibid* at para 53.

4. Reforming the Committal Phase: How to Right the Ship?

This article will not provide a re-write of the *Extradition Act*'s provisions dealing with committal, though this should be done and only after scrutiny by a Parliamentary committee with substantial (and heretofore sorely-lacking) public input. A judicial inquiry into the Hassan Diab case, as was proposed by Diab and his many supporters, would also serve to highlight problems and generate solutions. However, a few proposals can be offered.

The primary focus of reform efforts should be on un-neutering the "meaningful judicial process" that *Ferras* framed as a principle of fundamental justice by making the system fairer to the person sought. Extradition can and probably should, in some sense, be expeditious, and it makes sense that committal should not be a preliminary attempt to litigate the anticipated criminal trial in the requesting state. However, "expeditious" does not mean "summary," and the current formulation of the committal process is just that. It requires some expansion to be fair.

The Halifax Colloquium[143] has proposed a number of interlocking reforms that would be worth exploring. An explicit but modified invocation of the presumption of innocence on the process would provide balance: "explicit" in that it should be inserted into the Act, but "modified" in that it would not bring with it an obligation on the Crown to offer proof beyond a reasonable doubt. The idea would be to send the signal to the committal judge that an adjudication of guilt or innocence is sought by the Crown at the end of the process, and that the requesting state's case should be appropriately scrutinized and some equality of arms between the Crown and defence actively sought.

One way to achieve the latter goal would be to remove the presumption of reliability from the ROC approach and require the Crown to prove reliability on a balance of probabilities. Even if the threshold to be met could be shaped by taking into account the peculiarities of the extradition context – and perhaps be slightly more modest for the Crown – this change would sweep away the current dysfunction around the "manifestly unreliable" standard. Making this exercise meaningful, in turn, could be accomplished by moving somewhat back in the direction of the old *prima facie* case requirement – to wit, key witness evidence could be offered in the form of affidavits and the affiants made available for cross-examination. "The purpose of the cross-examination would be to explore whether the witness is fundamentally reliable and not for exploring credibility *simpliciter*.

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143 *Proposals for Law Reform*, *supra* note 25.

This is especially important if the witness has taken a plea deal"[144] or is otherwise what Canadian law would label a *Vetrovec* witness.

To the extent that this proposal would appear regressive, unwieldy, or undesirable, there are 21st century solutions that would buff off the rough edges. Recalling that an explicit rationale for abandoning the *prima facie* case approach in the new Act was that some foreign legal systems do not have the capacity to generate what we recognize as sworn evidence, Canada could agree with the requesting state that a government official in the foreign state could take the witness's affidavit in a special but brief procedure in which Canadian law would apply. If this seems overly complex, it is not; Canada already has such arrangements in place in some of its mutual legal assistance treaties (MLATs),[145] and provisions could be inserted into existing MLATs or even into the extradition treaties themselves. So far as cross-examination goes, in post-COVID 19 times, video-conferencing is an eminently practical solution, and one which is, in fact, already used to allow testimony from foreign witnesses in domestic criminal trials.[146]

Despite Murray Segal's recommendation that ROCs be more "streamlined and economical" – i.e., contain even less than they currently do – his scrutiny of the *Diab* case led him to recommend that in any case where the requesting state intends to rely on expert reports, the reports must be led in evidence and not simply summarized in the ROC.[147] He invoked in justification the findings of the Goudge Inquiry, among others, that untrustworthy expert opinion has played a role in wrongful convictions and is worthy of special scrutiny and caution.[148] In light of *Diab*, where unreliable expert evidence caused a wrongful extradition, this makes good sense. While Segal stopped short of recommending that the reports be held admissible in accordance with the *White Burgess* test in Canadian evidence

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144 *Ibid.*

145 Notably, the *Canada-US treaty*, *supra* note 34. See *R v Dorsay*, 2006 BCCA 117, 42 CR (6th) 155, leave to appeal to SCC refused, [2006] SCCA No 374.

146 See e.g. *R v S* (2018), 2018 ONCA 962. The Crown's evidence in one war crimes case was led entirely via video. See Currie & Rikhof, *supra* note 27 at 314. Cross-examination on affidavits via video is already happening in civil cases. See e.g. *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359. Wagner CJC recently suggested its use for domestic trials. See Olivia Stefanovich, "Supreme Court chief justice suggests Criminal Code changes to cut into court backlogs", *CBC News* (13 June 2020), online: <www.cbc.ca> [perma.cc/9TZQ-FL8Z].

147 Segal Report, *supra* note 16 at 88.

148 *Ibid* at 90.

law (an argument that the committal court and the Court of Appeal rejected in *Diab*), this too would seem logical. Moreover, the IAG should make it clear to treaty partners that this kind of evidence, in particular, must mandatorily be disclosed for extradition purposes if it is going to be led at trial; this could be backed by a treaty obligation, if necessary.

The Halifax Colloquium also proposed that the committal judge should admit and consider defence-side evidence on any excuse, defence, or justification that would be available to a person sought under either Canadian law or the law of the requested state. A robustly-proven defence might produce a discharge. In light of MM firmly slamming the door shut on this point, it is likely that it would need to be accomplished through amending the Act. However, there is a model to start with, as federal immigration proceedings considering criminal inadmissibility explicitly consider available defences and immunities.[149]

Even in my mind, this is something that would have to be carefully calibrated given the potential for time-wasting and disruption it might cause. It should probably be limited to affirmative defences rather than simple attacks on the elements of the offence (e.g., "I did not intend to do it" as an attack on *mens rea*). It might be that the evidence would need to have an "air of reality" even to be considered, much as is required in criminal cases.[150] Otherwise, it is too easy to imagine defences based on bare assertions (e.g., "she attacked me, it was self-defence"). A modified air of reality test might be applied, such that the judge would have to find that a reasonable jury could find the defence to be made out on a balance of probabilities (rather than just raising a reasonable doubt), even for those defences that do not require this standard of proof under Canadian law.

At its most conservative, perhaps this change could apply only in cases like MM itself where the main problem was that the evidence disclosed a defence that would have been available to Messina in Canada but was not available to her in the requesting state. As the dissent in MM argued powerfully, denying a challenge in this situation flies in the face of any meaningful version of double criminality, if not the technical manner in which it currently operates. The majority justified precluding this issue from consideration by the committal judge by noting that it is within the purview

149 *Bellevue v Canada (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 560 at paras 33–34.

150 *R v Cinous*, 2002 SCC 29.

of the Minister to consider it when making the surrender decision.[151] Whether the Act appropriately balances the tasks in the extradition process between the judicial and Ministerial phases will be the subject of a future article. Suffice it to say that the issue of availability of defences is, in my view, a predominantly legal question that belongs in the hands of a judge who is directed by discrete statutory language formulated by Parliament – and not in those of a Minister of the Crown who is making an explicitly "political" decision that enjoys the most deferential standard of review known to Canadian administrative law.[152]

This point of view also reflects the reality that, so far as any meaningful public information could show, there are very few cases in which the Minister has actually refused surrender.[153] Stays of surrender, even in meritorious cases, mostly only occur where the courts can be convinced to order them, and this too is rare.[154] The tragic result of the *MM* case gives some measure of the reality around this and of the troubling enthusiasm for extradition on the Crown side, to which this paper now turns.

V. The Role of the Crown

A. Crown "Culture"

As noted in Section III.C above, Justice Canada is responsible for conducting extradition proceedings on behalf of the Crown, both through the IAG and litigation counsel. In this section, I will argue that part of the problem with how extradition proceedings generally, and the committal phrase in particular, are conducted is in the way that the Crown and the law conceive the Crown's role and in how that role is executed.

The Crown side of extradition is notoriously murky, a fact remarked upon even by the Segal Report[155] which was otherwise sympathetic to the Crown's role in the *Diab* case. However, the same Report does shed some light on how the Crown actually operates through the committal and

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151 *MM*, *supra* note 9 at paras 116–18.

152 *Lake*, *supra* note 55.

153 One experienced extradition practitioner described them to me as "scarce as hen's teeth." In my own decades of studying and working on extradition cases, I have only seen one and heard of a few others.

154 In *India v Badesha*, 2018 BCCA 470 [*Badesha*] the Court of Appeal refused to order a stay even after finding an abuse of process by the Canadian Crown.

155 Segal Report, *supra* note 16 at 106–08.

surrender process.[156] In *Diab*, an IAG lawyer interacted closely with the investigating judge in France,[157] conducting and co-ordinating communications between French and Canadian authorities. In particular, this lawyer worked closely with the Canadian legal team that was actually litigating the committal proceedings, assisting with evidentiary and other requests. The litigation team itself was staffed by IAG lawyers and staff.[158] After committal, IAG counsel prepared the usual report for the Minister, facilitated defence submissions on surrender, provided legal advice to the Minister, and drafted his surrender decision. IAG counsel also litigated the appeal of the committal decision and the judicial review of the surrender decision.

The Crown side, then, is essentially a unit, populated by lawyers and support staff among whom there is some differentiation of roles, but all of whom are working toward the same goal. Accurately articulating what that goal is, however, is key to understanding the true nature of the process. To frame it provocatively, is the goal "producing a fair result in an extradition proceeding," or is it "producing extradition, at whatever cost?"

Describing the Crown's role accurately, in terms of how it currently exists, will be helpful to ground suggestions about what it should be and how it should be structured. A key point is that the Crown differentiates its role in extradition proceedings from the role of Crown prosecutors and specifically does not feel bound by prosecutors' enhanced obligation to achieve fairness in proceedings and results. The Segal Report, which was based in part on Segal's interviews with IAG personnel, explains this cogently. A Crown prosecutor, in line with traditional authority,[159] is not acting as counsel for any particular party but is instead "a quasi-Minister of Justice"[160] simply concerned with producing a just result and eschewing any

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156 The IAG, as noted earlier, receives and evaluates incoming extradition requests, causes the ATP to be issued, facilitates arrest of the person sought, and so on. See Weinstein & Dennison, *supra* note 33, c 2.

157 Unusually in this case, the IAG lawyer, Jacques Lemire, was actually posted to France to play this role for Canada-France extraditions due to the historic connections between these states. However, IAG staff play this role from the Ottawa office as well.

158 Again, this was slightly unusual but had to do with the fact that the proceedings were being conducted in Ottawa where the IAG office is located and that the case involved many materials in French and were more easily accessible by the fluently bilingual IAG staff.

159 See *Boucher v The Queen*, [1955] SCR 16, 1954 CarswellQue 14 (SCC); *R v Ahluwalia* (2000), 149 CCC (3d) 193, 48 WCB (2d) 200 (ONCA).

160 Segal Report, *supra* note 16 at 81.

notion of "winning" or "losing." In extradition proceedings, by contrast, the Crown is acting as counsel for a party (specifically, the requesting state) and is indeed seeking a "win" for its client through "a more purely adversarial role":

> Before a trial in Canada, Crowns must consider whether there is a reasonable prospect of conviction. They also have an obligation to evaluate the strength of their case at all stages of the proceedings. These types of considerations are not relevant to counsel for the Attorney General in extradition proceedings. These government lawyers are not charged with looking into the future and asking whether, down the line, there will be problems with the case or whether there is a reasonable prospect that the evidence available is capable of convincing a jury beyond a reasonable doubt. Instead, the objective of counsel for the Attorney General at the judicial phase is modest: can they establish a prima facie case against the person sought? There is good reason for this more circumscribed role. Counsel for the Attorney General in extradition proceedings are not building a case for trial. They are not responsible for and may not be knowledgeable about the trial procedures available in the requesting state; and, more to the point, they do not know what evidence will ultimately be available for trial in that country.[161]

On this view, then, the Crown's job in extradition proceedings is to facilitate extradition. The Crown is fighting the person sought, on behalf of its client. The committal phase – indeed, the entire process – is adversarial and, beyond complying with ethics and procedure, no holds should be barred. Protections for the person sought can be sought by that person; the system is designed to be fair and *Charter*-compliant, and of course the individual will be represented by able counsel. The nature of the process, as explained in the excerpt above, drives the scope of the Crown's function.

Or so goes the narrative. Putting aside the argument in section III above (that the system is neither fairly designed nor *Charter*-compliant), and putting aside the pressing issue of access to justice in this country and whether individuals sought will even have meaningful access to counsel,[162] I would argue that this is a cultural standpoint and not a legal one. This is not to say that it has no grounding in law – quite the contrary, in fact. This view of the Crown's role is certainly facilitated by the structure of the Act and the Crown-side policy arguments that have found favour in the

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161 *Ibid* at 82.

162 Notably, Hassan Diab was represented by one of the most prestigious criminal defence lawyers in Canada, Don Bayne, who was acting *pro bono*. Not all individuals sought are so fortunate; some extradition defences are conducted by over-stretched legal aid counsel or local defence lawyers who might see only one extradition case in their career.

jurisprudence.[163] However, this construction of the role has been chosen by the Crown for itself. It is by no means an inevitable version of what the role of the Crown might be in a reasonable, fair, and *Charter*-compliant extradition process.

To say that the Crown's role is the simple one of demonstrating a sufficient case for committal, and that it is divorced from any knowledge of or responsibility for the trial in the requesting state, is simply a policy choice. To repeat the mantra of "extradition is not a trial, the trial takes place in the requesting state" is also a choice, and this particular choice artificially dissociates Canada from the result of the extradition process: the ultimate fate of the person sought. To say "extradition is not a criminal law process" ignores the fact that the goal of the process is to have the person sought wrung through the criminal justice system of a foreign state[164] and either into its prisons or some other hardship. Hassan Diab and Michele Messina learned this lesson, as they say, the hard way, and no sensible person would say that Canada was not instrumental to what happened to each of them.

Putting the interests of comity at the front does, of course, drive an argument that this dissociation is necessary or inevitable; we must respect the processes of our foreign partners and so on. However, the best counterargument can be found in the part of the extradition process where comity matters most, which is the surrender phase. At that point, the Minister is constrained by the *Charter* not to surrender the individual to the foreign state in circumstances where their fate, as a result of being surrendered, would not be consistent with the principles of fundamental justice.[165] Comity is balanced against that vital, constitutional interest. That is to say, what will happen to the individual as a result of actually being surrendered is a driver of the law in the surrender phase. There is no principled reason that, properly tailored, this legal interest cannot be taken

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163 In his writing, Gary Botting has made the point that the Supreme Court's post-*Charter* extradition jurisprudence reflects the many leading decisions written by Justice Gerard La Forest, which carried a very pro-extradition and pro-comity flavour. Indeed, the first edition of the La Forest textbook, which was written by Justice La Forest, was written as an extradition manual for Department of Justice lawyers (See Botting, *Extradition Between Canada and the United States*, *supra* note 92 at 22–27).

164 Of course, it should be acknowledged that in some cases the "foreign state" will be the state of the person's nationality, though nothing depends on that point nor does it undermine the argument I am making here.

165 *Canada v Schmidt*, [1987] 1 SCR 500 at 522, 39 DLR (4th) 18; Burns, *supra* note 57; *MM*, *supra* note 9.

into account at the committal stage. There is no reason that committal needs to be almost[166] completely unconcerned with the criminal process and trial that awaits the person sought. There is, moreover, no reason that Crown personnel cannot act as "ministers of justice" in committal proceedings.

To reach this conclusion, however, would take not only legislative amendment but a shift in the culture among Crown personnel who conduct extradition cases. Again, it is sometimes necessary to resort to anecdotal evidence to make certain points, both because there is so little inquiry and commentary on extradition in Canada and because Justice Canada and the IAG in particular are so opaque and secretive.[167] Anecdotally speaking, then, it is well-known in Canadian circles that the Crown is ferocious and extremely adversarial in advancing the interests of its "clients" in extradition matters. Given the view of its role as expressed in the Segal Report, this would be unsurprising, and, of course, litigation is hardly a "tea party" as the old saying goes; one could expect, and even hope, for some tough lawyering given the important goals that extradition fulfills.

That said, this adversarial stance sometimes appears excessive. In the case of Abdullah Khadr, for example, disclosure during the committal hearing revealed that the requesting state, the U.S., had engaged in what the committal judge termed "gross misconduct," not least by putting a bounty on the head of the person sought, facilitating his mistreatment by Pakistani security forces, and breaching Canada's right of access to its citizen under international law.[168] It seemed clear that in requesting Khadr after all of this, the US was clearly abusing the process of Canada's courts, yet the Crown pressed for extradition. When the committal judge stayed the proceeding because it was an abuse of process, the Crown appealed to the Ontario Court of Appeal where Justice Sharpe denounced both the extradition request and some of the Crown's legal arguments in no uncertain terms, noting that to allow extradition in such circumstances

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166 I say "almost" because the committal judge does have a narrow *Charter*-based jurisdiction to maintain the fairness of the hearing itself. This jurisdiction, in very rare circumstances, can produce a stay of proceedings based on the conduct of the requesting state. See Weinstein & Dennison, *supra* note 33, c 9.

167 Even the Segal Report makes this point. See Segal Report, *supra* note 16 at 107.

168 *United States v Khadr*, 2010 ONSC 4338.

would undermine the rule of law.[169] The Crown's response? A leave application to the Supreme Court of Canada which was denied.[170]

The pressing question, in my view, is why the Crown "went to the wall" (to again use a colloquial phrase) on this case. The basis of the appeal seemed to be the issue of whether the two levels of court were somehow misapplying the test for abuse of process, though the arguments were not convincing. The leave application itself was a surprise; surely when one is handed such a resounding defeat by two levels of court, the best course would be to give up – not to press on with an extradition case so desperately tainted by the unlawful and shocking actions of the very state requesting extradition. Surely the people of Canada would want its government to stop such a case in its tracks after these court findings, at the very least so as not to throw good taxpayer dollars (lawyer time, resources) after bad.

Yet there are cases that make it appear that the Crown is sometimes willing to pursue extradition at all costs. It is worth recalling that the landmark Supreme Court of Canada case on abuse of process at the committal phase, *Cobb*,[171] came about because the Crown insisted on pressing forward with the extradition of a man who had been threatened by both the prosecutor and a presiding judge in the requesting state. In a recent and prominent British Columbia case, the IAG was so eager to keep two individuals from exercising any more procedural rights that it engaged in what the Court of Appeal called "subterfuge" in an attempt to rush them out of the country – which the Court held was an abuse of process that had "a very serious adverse impact on the integrity of the justice system."[172]

B. *Diab*: "Lessons Learned"?

The *Diab* case, one where more detail is known than most, is highly illustrative of the point I am making here. The Segal Report is replete with disturbing details, among them:

- At the bail stage, the Crown did not provide an English translation of the French ROC materials and had to be ordered to do so, even though Diab was not fluent in French. It also

169 *United States v Khadr*, 2011 ONCA 358.
170 *Ibid*, leave to appeal to SCC refused, 34357 (29 July 2011).
171 *United States v Cobb*, 2001 SCC 19.
172 *Badesha*, *supra* note 156 at para 77.

opposed even the very restrictive bail that was granted and unsuccessfully challenged this at the Court of Appeal;[173]

- For some reason the IAG initially took the position that translation of the ROC materials was not its responsibility (though later this stance was "properly abandoned");[174]
- Prior to the committal hearing proper, Diab's counsel indicated that he would lead expert evidence that would destroy the foundation of the French handwriting reports that formed part of the ROC. It eventually emerged that the reports had been partly based on handwriting that was not Diab's, but the experts nonetheless concluded that it matched the bomber's prints. To deal with this development, the advisory counsel and litigation counsel worked together to warn the French investigating judge that this would undermine the case and request that he obtain new handwriting analyses which could be used. In the meantime, litigation counsel continued to argue that the flawed handwriting analyses were sufficiently reliable to ground committal but later changed tack and submitted the new handwriting analyses when they arrived;[175]
- At one point, France realized that they had a sample of what were thought to be the bomber's prints and requested that IAG send Diab's fingerprints so that they could be compared. The Crown considered obtaining Diab's prints surreptitiously but concluded that his counsel would probably challenge this in court. Instead, the Crown arranged for France to send copies of the prints to Canada for comparison with those found in Diab's arrest record. Of the six prints found in France, four of them were conclusively not Diab's, and two were held to be inconclusive. Despite the obviously exculpatory nature of this

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173 Segal Report, *supra* note 16 at 40–41.

174 *Ibid* at 43.

175 *Ibid* at 55–56. This particular stratagem raised concerns the ethical soundness of Mr. Lefrancois's conduct, which I will not take up here but which Segal deals with at 95–103.

evidence, IAG counsel decided it was "neither inculpatory nor exculpatory," and while they sent the results to France, they did not disclose this to Diab on the basis that (1) the prints did not form part of the French case and (2) they did not want to take a chance of undermining the very restrictive approach taken to disclosure in the extradition case law;[176]

- It was clear that the ROC contained unsourced intelligence, the unreliability and dangers of which have long been known (particularly to those who work in inter-state criminal cooperation).[177] The Crown unsuccessfully opposed Diab being permitted to lead evidence on this point, and it was only after Professor Kent Roach had testified about it and final arguments were about to begin that they withdrew reliance on the unsourced intelligence.[178]

Hassan Diab, it needs to be recalled, was wrongfully extradited. There is simply no other sensible conclusion. As regards the role of the Crown, the Segal Report is interesting because it raises two contradictory conclusions. The first is the conclusion reached by the report itself: in conducting the case, the Crown complied with all relevant legal and ethical norms and principles. This was certainly the view of the Crown officials to whom Segal spoke in preparing the Report; an internal "Lessons Learned" exercise ordered by the Minister revealed that IAG personnel found that "the current Canadian extradition system is fair and working well," and, if anything, it needed to be made more efficient.[179] Specific to Diab, the only problem with his case was that it was unduly protracted, and it was still entirely proper that he was extradited to France.[180]

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176 *Ibid* at 10, 54. It is worth noting that the later French decision to discharge Diab held this very fingerprint evidence was "an essential element" of why the case against him was hopeless.

177 Kent Roach, "The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations" in Nicola McGarrity, Andrew Lynch & George Williams, eds, *Counter-Terrorism and Beyond* (New York: Routledge, 2010) 48.

178 Segal Report, *supra* note 16 at 60.

179 *Ibid* at 74.

180 *Ibid* at 77.

Though perhaps undermined slightly by the fact that Segal consulted predominantly Crown sources in putting the report together,[181] this conclusion is nonetheless technically defensible – based on the way the committal phase is structured and the Crown's view of their own function, everything is working as it is supposed to. Importantly, Segal's terms of reference excluded any consideration of the *Extradition Act* itself or any consideration of how things should be. His result, however, underpins the second conclusion: if the Hassan Diab case can be held up as a model of how extradition is supposed to work, then Canadians require a serious inquiry into "how things should be." This case featured Crown officials actively collaborating with a foreign state to shore up a case that was weak from the start, litigating with needless aggression against a Canadian citizen, withholding exculpatory evidence, and reaching the conclusion that a wrongful extradition was the correct result. All of this, of course, is in the context of a government department that dominates all of the decision-making, subject to the modest judicial role. Specifically, it assists the requesting state, litigates on its behalf, makes the decision on whether to extradite, and fights off appeals and judicial reviews. It seems to me beyond question that if this is the state of the law then Canadians need to consider whether this is desirable or whether the system needs to be reformed.

C. Potential Changes

As noted above, this paper can only suggest directions and a few potential fixes for the problems besetting the Crown's role in extradition since what is required is a full-scale judicial inquiry, sustained Parliamentary attention, or preferably both. That said, a few points offer themselves as obvious contenders for consideration.

The first is the issue of exculpatory evidence in the hands of the authorities. As noted earlier, outside the narrow scope of a *Charter* motion or the highly-circumscribed process around the sufficiency of the requesting state's case, the Crown has minimal duties of disclosure and the requesting state is practically immune.[182] While it would be useful to explore disclosure in detail, I would offer, at a minimum, that exculpatory evidence in the hands of the Crown should be disclosed to the person sought, full stop.

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[181] And, to a limited extent, French sources of information. Segal notes that Dr. Diab and his counsel were invited to participate and declined.

[182] Weinstein & Dennison, *supra* note 33, c 8.

Recognizing that there is no such obligation in the current law, even the Segal Report recommends that such disclosure could be made, where the evidence is high-quality, "as a courtesy or discretionary call made in the circumstances of the particular case."[183] The Halifax Colloquium expressed the view this disclosure should be mandatory rather than discretionary, and regardless of whether the evidence was independently gathered by Canadian officials or disclosed to them. Also, whether the evidence is "exculpatory" or not should be assessed in compliance with the *Stinchcombe* criteria that bind the Crown in criminal cases. This would avoid the kind of mischief that occurred in *Diab*, where the Crown decided that fingerprints predominantly excluding the person sought were somehow "neither inculpatory nor exculpatory."

The Segal Report also spoke to the inter-mingling of roles among the Crown personnel, noting that most typically the litigation is done by a federal Crown in the relevant province, instructed by IAG counsel who also acts as a go-between with the requesting state. IAG personnel would also "advise" the Minister, draft the Minister's decision, and then either conduct or instruct on appeals of committal and judicial reviews of surrender. Segal acknowledged that this might raise the appearance of conflicts of interest, particularly the direct contact between litigation counsel and the requesting state, which he viewed as generally inadvisable.[184] Expressing his conviction that all involved "already act in a manner that ensures the requisite independence at each stage of the extradition proceedings," he nonetheless felt that a "formal" separation of roles "would increase transparency and help to ensure the appearance of independence."[185]

The Halifax Colloquium essentially takes Segal's latter recommendation as a starting point. There must certainly be litigation counsel who conduct adversarial litigation in extradition, and one would really not expect anything different. However, there is something wrong with a structure where the entire governmental litigation, advisory, and decision-making machinery are all arrayed against the person sought and uniformly driven by the imperative to extradite –especially in a legal process that, as the Supreme Court reminds us in MM, is supposed to facilitate comity and protect the rights of the person sought equally.[186] A foreign state

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183 Segal Report, *supra* note 16 at 102.
184 *Ibid* at 84.
185 *Ibid* at 85.
186 MM, *supra* note 9 at para 1.

is simply not an ordinary client. One way to think about it is to consider the Attorney General of Canada as representing the requesting state, so litigation counsel would act in this capacity;[187] the Minister of Justice (despite being the Attorney General's alter ego in the constitutional sense) would play the separate and less adversarial role. Accordingly, separation could be imposed between Attorney General lawyers who litigate on the requesting states' behalf and the Minister's advisory counsel who facilitate communication with those states. The advisory counsel, in particular, should be oriented to act in the traditional Crown prosecutor mould of trying to achieve a just and fair result, rather than simply a "win."

All of this activity, moreover, should be separate from IAG's other function of advising the Minister on whether surrender should be ordered. These lawyers should not be, as the old saying goes, "in each other's pockets." To underscore that fair treatment is just as important as comity, the Halifax Colloquium recommended that like other federal agencies such as the Immigration and Refugee Board, the IAG should adopt an explicit mandate to the effect that it administers its duties "efficiently, fairly and in accordance with the law."[188]

Finally, the Segal Report recommends that Justice Canada publish more information about extradition processes generally, including "statistics about extradition cases" and "the policies and procedures that guide decision-making by counsel within the IAG."[189] Transparency, Mr. Segal felt, would help to combat public ignorance and suspicion.[190] I would echo this call but add an additional rationale: more information would assist Canadians in understanding the actual policies and practices which are in place and allow us to ask the tougher questions about whether they serve adequately to protect persons sought, especially in cases like *Diab*

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187 This is what happens, formally speaking. See Weinstein & Dennison, *supra* note 33 at 217–18.

188 See the Board's website: *Immigration and Refugee Board of Canada* (Ottawa: IRBC, last modified 26 January 2021), online: <irb-cisr.gc.ca/en/Pages/index.aspx> [perma.cc/V77J-3VVM].

189 Segal Report, *supra* note 16 at 107. Not long before the Segal Report was released, the IAG did publish statistics on extradition between Canada and the US. See Canada, Department of Justice, *Extradition Fact Sheet: Statistics on requests from the United States* (Ottawa: DOJ, last modified 1 March 2019), online: <www.justice.gc.ca/eng/cj-jp/emla-eej/stat.html> [perma.cc/W42J-PMN2].

190 Segal Report, *supra* note 16 at 107.

where, as the record shows, a wrongful extradition was actively sought and is not regretted by those who sought it.

VI. CONCLUSION

While attending a criminal law conference some years ago, I struck up a conversation with a federal litigator whom I knew to have worked on some extradition cases. When I brought up an interesting issue that had arisen in a couple of recent cases, the lawyer's response was to smile and say (condescendingly, if truth be told), "Ah, academics hate extradition."

Suffice it to say, this seems like a misplaced opinion. "Academics" and indeed many others will know that extradition is one of the most important tools to suppress transnational crime. Given the increasing presence and intrusiveness of cross-border and even globalized criminal activity, it is important for Canada to be an effective and enthusiastic participant in inter-state cooperation efforts. We need an effective extradition system, and I should not be heard to suggest otherwise.

However, it is equally important that our extradition system be procedurally fair and sufficiently protective of the rights of individuals caught up in it, including, but not limited to, Canadian citizens who are sought by foreign states for prosecution. As this paper has demonstrated, there are serious problems on both fronts. Hassan Diab's case, in particular, powerfully makes the case that significant changes are needed in order to prevent wrongful extradition. I have argued here that: the committal process, while it seems consistent with Parliament's design, is not *Charter*-compliant and dissatisfactory on a number of fronts; and the role of the IAG should be re-thought and restructured.

Currently, we are living with the Prime Minister's apparently broken promise to usher in change that will prevent a re-occurrence, IAG's insistence that there are no problems with the current system, and courts which are deferential to the status quo. It appears that public attention and Parliamentary scrutiny are the next logical steps to enact meaningful change, and it is past time that we had more of both.

Blurred Lines: A Critical Examination of the Use of Police Officers and Police Employees as Expert Witnesses in Criminal Trials

BRANDON TRASK AND EVAN PODAIMA *

ABSTRACT

There is a two-step inquiry in determining whether expert opinion evidence is admissible. The party calling the evidence must first satisfy the threshold requirements of admissibility, demonstrating that the expert evidence is relevant, necessary, not precluded by any exclusionary rule, and that it is provided by a properly qualified expert. If this threshold stage is satisfied, the court progresses to the second stage, the discretionary gatekeeping step, wherein the trial judge assesses whether the expert evidence is sufficiently beneficial to justify admission, meaning that the benefits flowing from admission outweigh any potential harm. The Supreme Court of Canada has clarified that experts must be impartial, independent, and unbiased. These factors must be considered at both steps of determining the admissibility of expert evidence and are also relevant to the determination by the trier of fact as to how much weight should be placed upon admissible expert testimony. That there are three potential

* Brandon Trask, JD (Manitoba), LLM, SJD Candidate (Toronto), is an assistant professor of law at the University of Manitoba and an adjunct fellow at St. John's College. He previously worked as a Crown prosecutor with the Nova Scotia Public Prosecution Service and the Newfoundland and Labrador Public Prosecutions Division. Evan Podaima, BBA (Winnipeg), JD (Manitoba), is a 2021 graduate of the University of Manitoba Faculty of Law. The authors would like to thank Shawn Singh, the Robson Crim editorial team, the Manitoba Law Journal editorial team, and the anonymous peer reviewers for their insights and assistance. The authors would also like to acknowledge financial support provided by the Legal Research Institute of the University of Manitoba and the Manitoba Law Foundation.

points in the trial process at which expert objectivity is considered underscores the importance of ensuring that expert evidence is impartial, independent, and free of bias. This paper analyzes recent Canadian case law in relation to the use of expert witnesses and determines that structure-related concerns ultimately pertaining to bias have played a significant role in court determinations as to the admissibility of expert evidence. Guided by this finding, the authors propose a new two-stream expert structure in order to present a model for proactively reducing concerns relating to impartiality, independence, and bias about experts called by the Crown.

Keywords: Evidence; Expert Evidence; Opinion Evidence; Expert Witness; Duty of Expert; Impartial Evidence; Independent Evidence; Unbiased Evidence; Threshold Inquiry; Gatekeeper Inquiry; *Mohan* Criteria; *White Burgess*; Police Witness; Police Expert; Expert Bias

> *"Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them."*
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> – Sir George Jessel[1]

I. INTRODUCTION

There is a two-step inquiry in relation to determining whether expert opinion evidence is admissible in trials.[2] Firstly, the party calling the evidence must satisfy the threshold requirements of admissibility, demonstrating that the expert evidence is relevant, necessary, not precluded by the existence of any exclusionary rule, and that it is provided by a properly qualified expert.[3] If this threshold stage is satisfied, the court progresses to the second stage, the discretionary gatekeeping step, wherein the trial judge must assess whether the expert evidence is sufficiently beneficial to justify admission, meaning that the benefits flowing from admission outweigh any potential harm.[4] The Supreme Court of Canada has clarified that experts must be impartial, independent, and

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1 Then Master of the Rolls, from *Lord Abinger v Ashton* (1873), 17 LR Eq 358 at 374.

2 *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 19–24 [*White Burgess*].

3 *Ibid.*

4 *Ibid.*

unbiased—and that these factors must be considered at both steps of determining the admissibility of expert evidence.[5] In fact, concerns about these factors are also relevant to the determination by the trier of fact as to how much weight — if any — should be placed upon admissible expert testimony.[6] The fact that there are three potential points in the trial process at which expert objectivity is considered underscores the importance of ensuring that expert evidence is impartial, independent, and free of bias.[7] This paper analyzes recent Canadian case law in relation to the use of expert witnesses and determines that structure-related concerns ultimately pertaining to bias have played a significant role in court determinations as to the admissibility of expert evidence. Guided by this finding, this paper proposes a new two-stream expert structure in order to present a model for proactively reducing concerns relating to impartiality, independence, and bias about experts called by the Crown.

A. Background: Potential Issues with Having Police Officers and Employees Testifying as Expert Witnesses in Criminal Trials

Before proceeding to analyze case law relevant to issues of impartiality, independence, and bias, it is necessary to briefly review the bias-focused risks potentially associated with the use of expert evidence in the Canadian court system.[8] As Dr. Jason Chin, Michael Lutsky, and Dr. Itiel Dror outline, these risks include: a relationship bias;[9] potential rewards;[10] pre-existing

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5 *Ibid* at para 32.

6 David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 262–63.

7 *Ibid.*

8 See generally Bruce A MacFarlane, "Convicting The Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403 [MacFarlane, "Convicting The Innocent"]; Carla L MacLean, Lynn Smith & Itiel E Dror, "Experts on Trial: Unearthing Bias in Scientific Evidence" (2020) 53:1 UBC L Rev 101; Sahana Pal, "Establishing Bias in an Expert Witness: The What, Why and How" (2016) 14 Intl Comment on Evidence 43; Mingxiao Du, "Legal Control of Expert Witness Bias" (2017) 21:1–2 Intl J Evidence & Proof 69.

9 Jason M Chin, Michael Lutsky & Itiel E Dror, "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42:4 Man LJ 21 at 26.

10 *Ibid.*

views and selection bias;[11] contextual bias;[12] bias cascades;[13] and bias snowballing.[14] The potential consequences[15] flowing from these forms of bias are extremely significant in the criminal law context and are particularly concerning with respect to police officers or civilian employees of police agencies who are called to provide expert testimony in court.

Relationship bias or association bias refers to evidence that "[s]imply being assigned a side (even at random) can unconsciously bias an expert toward that side."[16] If an expert witness is employed by a police agency, this can be "a source of organizational relationship bias."[17] As Elisabeth Giffin argues, "[a]s a result of a system which allows experts to enter into an employment relationship with one party to a legal proceeding, the expert witness becomes vulnerable to that party's influence."[18] This is because "[t]he employment relationship gives rise to a dynamic wherein the expert will be reluctant to do anything which might threaten the working relationship and is likely to develop an unconscious allegiance bias toward [that] party."[19] Due to the pressures stemming from expert retention and employment arrangements, Giffin argues that "the 'objectivity' of party experts is a legal fiction."[20]

Additionally, there is some evidence that having "[a] financial stake in the outcome of a case… may unconsciously bias the expert in favour of one side." Interestingly, this factor alone does not necessarily indicate difficulties with having full-time, secure, salaried police officers or employees act as expert witnesses in cases (though there are still concerns police officers or employees may be incentivized toward giving particular evidence, with a view to career advancement considerations); rather, typically, this factor is considered quite relevant for experts who are retained on a per-case basis.

Concerns relating to pre-existing views and selection bias arise where "[a]n expert may be selected because he or she has a particular view on an

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11 *Ibid* at 26–27.
12 *Ibid* at 27.
13 *Ibid.*
14 *Ibid* at 28.
15 See e.g. MacFarlane "Convicting The Innocent", *supra* note 8 at 421–31.
16 Chin, Lutsky & Dror, *supra* note 9.
17 *Ibid.*
18 Elisabeth Giffin, "Experts for Hire: A Dangerous Practice Which Increases the Risk of Bias and Disadvantages the Accused" (2018) 26 Dal J Leg Stud 1 at 3.
19 *Ibid* at 3–4.
20 *Ibid* at 15.

issue."[21] These "[p]re-existing views (including whether an accused is guilty or innocent) may result in confirmation bias, as the expert tends to distort information to fit that view"[22] — even if this is done entirely unconsciously.

Contextual bias refers to situations wherein an expert receives (often irrelevant) "[c]ontextual information, such as emotional case facts or whether the accused confessed, [which] has a demonstrable and well-supported impact on decision making."[23]

The notion of cascading bias refers to the tendency for biases to "not only impact an individual expert at one stage of the investigation, but they can cascade to other aspects of the investigation and also impact other experts and legal professionals."[24]

Finally, bias snowballing occurs where "forensic examiners are exposed to irrelevant details about the case and then share these details as well as their biased conclusion or case theory with another examiner. Bias then snowballs… because the bias now has a double impact."[25]

Unfortunately, though bias concerns with regard to expert evidence are "ubiquitous,"[26] research indicates that "[e]xperts may… labour under what psychologists term a 'bias blind spot' resulting in the 'illusion of objectivity.'"[27] For instance, a survey of forensic examiners in 2017 revealed that "approximately 71% agreed that cognitive bias is a cause for concern in forensics, but only 26% agreed that it impacted their own judgments."[28] Forms of expertise that are based primarily upon intuition, subjectivity, or experience are particularly susceptible to the impact of unrecognized bias.[29]

Independence, which is largely a structurally focused concern,[30] can have a significant impact on whether a witness is partial or impartial, resulting in either a biased or unbiased opinion. Therefore, in order to

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21 Chin, Lutsky & Dror, *supra* note 9.

22 *Ibid* at 26–27.

23 *Ibid* at 27.

24 *Ibid*.

25 *Ibid* at 28.

26 Giffin, *supra* note 18 at 15.

27 Chin, Lutsky & Dror, *supra* note 9 at 25.

28 *Ibid*.

29 *Ibid*; David M Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34:2 Queen's LJ 565 at 578.

30 *White Burgess*, *supra* note 2 at para 32.

prevent — or, at the very least, limit — bias[31] from tainting decision-making within the criminal justice system, it is important to institute safeguards that ensure the principles of the law of evidence are upheld. In particular, it is vital to ensure that unduly prejudicial evidence is not admitted for consideration by the trier of fact.

II. OVERVIEW OF THE CURRENT TEST FOR ADMITTING EXPERT OPINION EVIDENCE: *WHITE BURGESS* REVIEWED

Recognizing that bias-related issues exist and are acknowledged by science,[32] it is important to now examine how these concerns are addressed by Canadian courts.

A. General Overview

In *White Burgess Langille Inman v Abbott and Haliburton Co*,[33] the Supreme Court of Canada summarized and clarified the test for admissibility of expert evidence in Canada:

> *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert.... *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis....
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> *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

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31 It is worth noting that bias—at least to some degree—may be inherent any time humans are involved in decision-making processes. For a discussion about this issue, please see generally: Jerry Kang et al, "Implicit Bias in the Courtroom" (2012) 59:5 UCLA L Rev 1124; Commission of Inquiry into Pediatric Forensic Pathology in Ontario, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System*, by Bruce A MacFarlane (Toronto: Ontario Ministry of the Attorney General, 2008) at 20–26, online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf> [perma.cc/YQ9K-K93J].

32 Chin, Lutsky & Dror, *supra* note 9.

33 *White Burgess*, *supra* note 2, generally.

> At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose.... Evidence that does not meet these threshold requirements should be excluded....
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> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.... Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence."[34]

While *White Burgess* was a civil case, it has had a significant impact upon the criminal law realm, as many criminal matters — particularly those involving serious offences — involve expert evidence. The factual matrix in *White Burgess* involves professional negligence claims.[35] The lawsuit alleged that a financial audit was performed improperly by the first accounting firm and that this was revealed after a second accounting firm, the Kentville, Nova Scotia, office of Grant Thornton LLP, became involved.[36] When the original auditors brought a motion to have the lawsuit summarily dismissed, the plaintiffs retained Susan MacMillan, a forensic accounting partner at the Halifax, Nova Scotia, office of Grant Thornton LLP, to prepare an expert report for court purposes.[37] Ms MacMillan's affidavit included her opinion "that the auditors had not complied with their professional obligations."[38] The original auditors then sought to have Ms MacMillan's expert evidence excluded on the basis that she was not an impartial expert witness.[39] The original auditors' argument was that "the action comes down to a battle of opinion between two accounting firms"[40] and that "Ms MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms MacMillan could be personally liable."[41] As a result of Ms MacMillan's "personal financial interest in the

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34 *Ibid* at paras 19–24.
35 *Ibid* at para 4.
36 *Ibid.*
37 *Ibid* at para 5.
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*
41 *Ibid.*

outcome"[42] of the case, the original auditors argued that Ms MacMillan ought to be disqualified from acting as an expert witness.[43]

Justice Pickup of the Nova Scotia Supreme Court struck out the forensic accountant's affidavit on the ground of impartiality, saying that an expert's evidence "must be, and be seen to be, independent and impartial."[44] On appeal, the majority of the Nova Scotia Court of Appeal held that this impartiality test imposed by Justice Pickup was wrong at law.[45] The jurisprudence cited by the majority opinion did not contain authority that permitted exclusion of evidence due to perceived bias.[46]

The Supreme Court of Canada's decision in this matter supported the Nova Scotia Court of Appeal ruling that Justice Pickup erred in law in determining that the forensic accountant was in a conflict of interest that precluded her from providing impartial and objective evidence.[47] In discussing the expert's duty to the court, Justice Cromwell, writing for a unanimous Supreme Court of Canada, stated that this is comprised of three closely related concepts:

> [I]mpartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her.... These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.[48]

With the terms defined, Justice Cromwell then held that these obligations are expected from the expert, after a review of supporting legislation and jurisprudence from across Canada and internationally.[49]

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42 *Ibid.*

43 *Ibid.*

44 *Abbott and Haliburton Company v WBLI Chartered Accountants*, 2012 NSSC 210 at para 99.

45 *Abbott and Haliburton Company v WBLI Chartered Accountants*, 2013 NSCA 66 at para 60.

46 *Ibid* at paras 104–25.

47 *White Burgess*, *supra* note 2 at para 62.

48 *Ibid* at para 32.

49 *Ibid* at paras 26–31.

This set the foundation for the more important question: Do impartiality, independence, and bias concerns go to weight or admissibility?

1. First Step

Ultimately, Justice Cromwell chose to include the possibility of excluding evidence at the admission stage due to concerns relating to bias.[50] The *White Burgess* decision outlined that "[a] proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert."[51] This means that concerns relating to independence, impartiality, and bias are initially considered under the "properly qualified expert" criterion from the *Mohan* factors at the first step of the admissibility analysis.[52]

To pass this first step "is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it."[53] In order to be considered a properly qualified expert, at least insofar as the factors of impartiality, independence, and lack of bias are concerned, "the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met."[54] (Once this occurs, the burden shifts to the opposing party to prove on a balance of probabilities the expert is biased.[55]) The focus at this first step is not on what a reasonable observer would think about possible bias but on "whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance."[56] At this threshold stage, "[a]nything less than clear unwillingness or inability to [fulfill the expert's duty to the court] should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence."[57]

The threshold stage assessment of the "properly qualified expert" criterion is only the first of three potential points for consideration of

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50 *Ibid* at para 46.
51 *Ibid* at para 53.
52 *Ibid*.
53 *Ibid* at para 49.
54 *Ibid* at para 47.
55 *Ibid* at para 48.
56 *Ibid* at para 50.
57 *Ibid* at para 49.

independence, impartiality, and bias issues.[58] As Justice David M. Paciocco, Dr. Palma Paciocco, and Professor Lee Stuesser outline:

> Effectively, there are three different points in the analysis when impartiality and independence are to be considered: (1) as an admissibility consideration relevant to the proper qualification of the expert witness (...[s]tage 1 of the two-part admissibility test); (2) as part of the cost-benefit assessment undertaken at the discretionary gatekeeping stage ([s]tage 2 of the two-part admissibility analysis); and (3) when weighing expert evidence that has been admitted.[59]

2. Second Step

The second point of consideration of bias issues — the discretionary gatekeeping stage of the admissibility analysis — involves the weighing of costs and benefits.[60] As the Supreme Court of Canada explained in *R v Bingley*:

> At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process.... Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded.[61]

In *White Burgess*, Justice Cromwell clarified that at this second stage (the discretionary gatekeeping stage) "the judge must still take concerns about the expert's independence and impartiality into account."[62] He stated,

> At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is

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58 Paciocco, Paciocco & Stuesser, *supra* note 6.

59 *Ibid*.

60 *Ibid* at 272.

61 *R v Bingley*, 2017 SCC 12 at para 16. Also, note that, as per Paciocco, Paciocco & Stuesser, *supra* note 6 at 272, "[i]n the case of defence evidence at a criminal trial, the standard differs: having satisfied the threshold analysis, the evidence must be admitted unless its prejudicial effects *substantially* outweigh its probative value" [emphasis in original].

62 *White Burgess*, *supra* note 2 at para 54.

> not outweighed by the risk of the dangers materializing that are associated with expert evidence.[63]

As explained by Paciocco, Paciocco, and Stuesser, it is important to consider the objectivity of the expert at the discretionary gatekeeping stage of the admissibility analysis, as "[p]artiality, or a lack of independence, can contribute to a finding that the unreliability of the evidence makes it too costly to admit."[64]

B. Third Opportunity for Consideration of Bias-Related Concerns

Finally, even if an expert's opinion is admitted into evidence (meaning that concerns about bias were not significant enough to prompt exclusion at either stage of the *White Burgess* admissibility analysis), these concerns can still be considered after admission when an assessment is made by the trier of fact as to how much weight should be placed on the expert's testimony.[65] Support for this proposition is found in *Mouvement laïque québécois v Saguenay (City)*,[66] a decision that was released by the Supreme Court of Canada 15 days prior to the *White Burgess* decision. In *Saguenay*, on behalf of the majority, Justice Gascon wrote:

> I agree that the independence and impartiality of an expert are very important factors. It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker.... However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert.... For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case.[67]

It is open to the trier of fact to give no — or very little — weight to an expert's testimony based upon concerns relating to bias. After all, though the trial judge is responsible for the admissibility decision stemming from the two-step analysis outlined in *White Burgess*, the trier of fact makes

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63 *Ibid*.

64 Paciocco, Paciocco & Stuesser, *supra* note 6 at 274.

65 *Ibid* at 262–63.

66 2015 SCC 16 [*Saguenay*].

67 *Ibid* at para 106.

determinations with regard to placing weight on evidence.[68] Nevertheless, it is important that the trier of fact is permitted to consider only properly admissible evidence so as to guard against the "risk that the jury 'will be unable to make an effective and critical assessment of the evidence.'"[69]

III. NOTEWORTHY CASES SINCE *WHITE BURGESS*

The *White Burgess* case elucidates that expert opinion evidence holds significant potential to prejudice an accused and that this risk is recognized by the courts, by virtue of the fact that the jurisprudential test developed by the Supreme Court of Canada requires weighing bias-related concerns at three separate points — including two prior to any evidence being admitted for consideration by the trier of fact. With that in mind, we now turn to consider subsequent judicial decisions regarding the admission or rejection of expert opinion evidence in order to highlight important considerations that have arisen in recent years in this area.

This section canvasses seven recent cases dealing with a variety of bias- and reliability-related issues, examining how courts have interpreted and applied the *White Burgess* decision. Overall, we determine that structural concerns (including an expert's past work or involvement with particular agencies) — while not always determinative with respect to a court's findings with regard to whether a proposed expert witness is independent, impartial, and lacking bias — can have a significant impact on the trajectory of a court's analysis. This review of cases is helpful with respect to attempting to prevent from the outset structure-related concerns that may otherwise impact upon a *White Burgess* analysis as a party's potential expert witnesses are considered by the courts.

A. *R v Livingston*

In the years following *White Burgess*, several cases serve as noteworthy examples of the application of these principles in relation to criminal cases. The high watermark is seen in *R v Livingston*;[70] this is an example of a case in which structural considerations — namely, the proposed expert's involvement with the police investigation leading to charges against the

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68 Paciocco, Paciocco & Stuesser, *supra* note 6 at 274.

69 *White Burgess*, *supra* note 2 at para 18.

70 2017 ONCJ 747 at paras 1–12.

accused individuals in this case — were determinative with respect to the proposed expert being deemed unable to fulfill his duty to the court.

Stemming from the prosecution of two high-ranking public officials in Ontario, the case concerned whether the accused were involved in the willful destruction of computer data.[71] An expert witness for the Crown, well versed in data storage and manipulation, was required to determine the extent of the accused individuals' involvement in deleting the data. Robert Gagnon, a retired Ontario Provincial Police (OPP) officer, was retained as the Crown's expert witness.[72] Despite his retirement, he had been asked by the OPP to return as a technical analyst and participate in a special project; he agreed, and this project resulted in the charges in the *Livingston* case.[73] Mr. Gagnon was given full access to the OPP headquarters,[74] and he was regularly involved in the investigation, from reviewing the search warrant application to receiving regular updates from investigators.[75] On his own volition, Mr. Gagnon assisted the investigative team in determining which charges to lay.[76] Due to Mr. Gagnon's extensive involvement in the investigation, defence counsel objected to his qualification as an expert witness, relying upon the *White Burgess* decision.[77] Crown counsel relied on the comment in *White Burgess* that passing the threshold stage "is not particularly onerous."[78]

In reviewing Mr. Gagnon's potential for acting as an expert, Justice Lipson mentioned that it was not a problem that Mr. Gagnon was specifically selected by the OPP to work on the special project,[79] nor was it an issue that he gave unpaid time to the project[80] (in fact, Justice Lipson viewed this as a positive indication of Mr. Gagnon's "work ethic and… professionalism").[81] Mr. Gagnon's in-court conduct was not problematic; he gave Justice Lipson the impression that he intended to provide non-partisan evidence.[82]

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71 *Ibid.*
72 *R v Livingston*, 2017 ONCJ 645.
73 *Ibid* at paras 4–5.
74 *Ibid* at para 6.
75 *Ibid* at paras 7–8.
76 *Ibid* at para 15.
77 *Ibid* at para 28.
78 *Ibid* at para 29.
79 *Ibid* at para 39.
80 *Ibid.*
81 *Ibid.*
82 *Ibid* at para 41.

However, Mr. Gagnon's repeated and extensive involvement with the investigation[83] ultimately led Justice Lipson to rule that "there is a realistic concern that [Mr. Gagnon] is unable to provide independent, impartial and unbiased evidence"[84] and that "the Crown did not rebut this concern on a balance of probabilities, failing to satisfy the fourth *Mohan* criterion for threshold admissibility,"[85] meaning that Mr. Gagnon was not considered to be "properly qualified to give expert opinion evidence."[86] As a technical expert, he was hired to provide analysis and interpretation of the data the officers gave him; this should have been a limited, defined role.[87] Yet Mr. Gagnon "played an important role in the uncovering and processing of evidence. He even participated in the execution of a search warrant."[88] As stated by Justice Lipson, "Mr. Gagnon took on an extensive, active and at times a proactive role in the investigation. He provided investigators with strategic and legal advice in their efforts to mount a case against the defendants."[89] The investigating officers and Mr. Gagnon "worked together and toward the same goal — the successful prosecution of [the accused individuals]."[90]

It is impossible to be impartial and unbiased as an expert when one is actively, methodically building a case for one party. Even where a proposed expert says all of the right things, that individual may still not be considered suitable to provide objective, expert opinion evidence due to concerns about bias. In *Livingston*, Justice Lipson succinctly summarized the Crown's duty with respect to attempting to call expert witnesses like Mr. Gagnon:

> The Crown has the burden of showing on a balance of probabilities that the proposed expert witness is capable of testifying independently and impartially. The trial judge is required to determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence whether the expert is able and willing to carry out his primary duty to the court.[91]

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83 *Ibid* at para 43.
84 *Ibid* at para 68.
85 *Ibid*.
86 *Ibid*.
87 *Ibid* at para 45.
88 *Ibid* at para 52.
89 *Ibid* at para 47, 54.
90 *Ibid* at para 48.
91 *Ibid* at para 33.

In *Livingston*, though Mr. Gagnon was willing to carry out his duty to the court, Justice Lipson found, after extensive review, that he was unable to do so.[92]

B. *R v McManus*

The case of *R v McManus*[93] further asserts that the significant involvement of a proposed expert with regard to police investigations can preclude an individual from providing the court with expert opinion evidence at trial. This case focused on drug trafficking allegations; several hundred grams of marijuana and cocaine were found by police, along with a "debt book" and *The Cocaine Handbook: An Essential Reference*.[94] Drug possession and trafficking charges were laid.[95] In addition to the drugs, the Crown relied upon text messages from cell phones.[96] The Crown's case required clarification on slang used in the text messages.[97] An officer working on the investigation, Detective Constable ("D.C.") Bullick, was called as an expert witness on behalf of the Crown.[98] The defence argued that the proposed expert was not impartial and independent.[99]

Writing for a unanimous Ontario Court of Appeal panel, Justice van Rensburg explicitly noted that "D.C. Bullick's position as a police officer did not disqualify him from giving expert evidence."[100] However, D.C. Bullick had known the accused for an extended period, was involved with investigating him previously, and believed that he was a drug trafficker.[101] In this case, there was little doubt that D.C. Bullick was biased and that he "had a strong interest in seeing that McManus was convicted."[102] In fact, D.C. Bullick "prepared his report in response to the preliminary inquiry judge's comment that the Crown's case was not strong."[103]

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92 *Ibid* at para 68.
93 2017 ONCA 188.
94 *Ibid* at para 4.
95 *Ibid*.
96 *Ibid* at para 6.
97 *Ibid*.
98 *Ibid*.
99 *Ibid* at para 57.
100 *Ibid* at para 71.
101 *Ibid*.
102 *Ibid*.
103 *Ibid*.

Justice van Rensburg clearly summarized the difficulties flowing from allowing biased expert evidence to be considered by jurors (with the jury making determinations as to the weight to be attributed to this evidence) in this case:

> Instead of ruling the expert opinion evidence inadmissible, the trial judge left the issue of bias to be addressed in D.C. Bullick's cross-examination before the jury. In doing so, the trial judge failed to appreciate the practical impossibility that would present. To effectively explore the grounds of D.C. Bullick's bias and partiality, the defence would necessarily have elicited prejudicial bad character evidence about McManus before the jury.[104]

The Ontario Court of Appeal ultimately held that D.C. Bullick's evidence should have been excluded.[105]

C. *R v Patterson*

The case of *R v Patterson*[106] represents a thorough analysis of *White Burgess* in the criminal sphere and outlines that it is beneficial for parties wishing to call expert witnesses to proactively take all reasonable steps to quell possible concerns relating to independence, impartiality, and potential bias from the outset. Mr. Patterson, a lawyer who ultimately represented himself in these legal proceedings, was found staggering to his vehicle, was later pulled over, and an approved screening device test for alcohol intoxication was administered.[107] After failing the roadside screening test, Mr. Patterson was arrested and issued a breath demand.[108] Due to delays stemming from contacting Mr. Patterson's counsel of choice following his arrest, the breath samples were taken outside the presumptive two-hour period in the *Criminal Code*.[109] Under the impaired driving regime that existed at the time of the offence, the Crown was required to call expert evidence with regard to blood-alcohol content extrapolation during the course of the trial.[110]

The Crown attempted to call Ms Christine Frenette, an alcohol specialist with the Ottawa-based National Forensic Laboratory Services, as

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104 *Ibid* at para 74.
105 *Ibid* at para 75.
106 2020 NSSC 151.
107 *Ibid* at paras 8–9.
108 *Ibid*.
109 *Ibid* at paras 8–12.
110 *Ibid* at para 12.

an expert witness in relation to the extrapolation evidence.[111] Ms Frenette's background in this area was extensive, and she had repeatedly previously provided expert evidence in court.[112] During cross-examination, it was clear that "her demeanour and manner of giving evidence appeared to be a model of what would be expected from an expert advanced in these circumstances."[113] However, during submissions with regard to the expert evidence admissibility hearing, the accused highlighted that Ms Frenette had not confirmed her non-partisanship, impartiality and independence to the court.[114] This became the main point of argument in the case. Ultimately, the trial judge opted not to infer that Ms Frenette was impartial, either based on her previous qualification as an expert or her membership to a professional body.[115]

The Crown appealed the trial judge's decision. The summary conviction appeal court determined that "a party seeking to qualify an expert must appreciate that addressing the issue of bias is as important as asking questions about the witness's past education or work history."[116] Although "[t]here is no 'magic incantation' of words that must be used by the witness,"[117] it "is critical… to put into the record information sufficient to demonstrate that the proposed expert recognises and accepts their duty to the Court."[118] When a party "fail[s] to do so, [it] will be left with only the possible inferences which can be drawn from the record as it does exist."[119]

Due to the risks involved with relying upon available inferences, it is best practice for counsel to ask questions of the proposed expert in order to address impartiality, independence, and bias-related issues directly.[120] In *Patterson*, on summary conviction appeal, Justice Hunt considered Ms Frenette's candour during the *voir dire*, her voluntary cooperation with defence counsel, and her previous qualifications in other cases.[121] However, the record allowed for the trial judge to rationally come to this conclusion

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111 *Ibid* at paras 12–13.
112 *Ibid* at paras 12–19.
113 *Ibid* at para 22.
114 *Ibid* at para 25.
115 *Ibid* at para 31.
116 *Ibid* at para 83.
117 *Ibid* at para 84.
118 *Ibid*.
119 *Ibid* at para 83.
120 *Ibid* at paras 86–87.
121 *Ibid* at paras 94–96.

(wherein he declined to infer that Ms Frenette was impartial), and a high level of deference was owed on this point.[122]

Ultimately, the *Patterson* case advises counsel that there are not supposed to be magic words that are required to establish an expert's qualifications and that inferences can potentially lead to the same result. However, it is clear from this decision that there are words that can make the qualification process much easier and that it is helpful to parties to take positive steps to address any potential questions relating to bias the court may have.

D. *R v Heimbecker*

The case of *R v Heimbecker*[123] makes it clear that structural concerns — ultimately impacting upon bias considerations — can apply to proposed experts called by the defence as well as by the Crown. In *Heimbecker*, during a drug trafficking sentencing hearing for an Indigenous offender, the defence attempted to introduce expert evidence in relation to *Gladue* factors from a high-profile witness.[124] Canadian Senator Kim Pate was proposed as an expert witness by the defence.[125] Senator Pate had a long and storied past in advocating for women in prison, particularly the negative impacts of imprisonment on Indigenous women and girls.[126] Moreover, as the court recognized, "Senator Pate was the Executive Director of the Canadian Association of Elizabeth Fry Societies from 1992 until she was appointed to the Senate in 2016."[127] Importantly, in her biography for the Senate of Canada, Senator Pate highlighted her quest to help marginalized women.[128] The most controversial area in which the defence sought to have Senator Pate qualified to give opinion evidence was in relation to "how the prison system does not meet the sentencing principle of denunciation or deterrence"[129] and how "research and study, including research by the Department of Justice Canada, has demonstrated that incarceration does not serve as a deterrent, including for young Indigenous women."[130]

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122 *Ibid* at paras 98–99.
123 2019 SKQB 204.
124 *Ibid* at para 1.
125 *Ibid* at para 5.
126 *Ibid* at paras 7–10.
127 *Ibid* at para 8.
128 *Ibid* at para 13.
129 *Ibid* at para 15.
130 *Ibid*.

As Justice MacMillan-Brown outlined, Senator Pate testified that "she understood that her duty as an expert witness is a duty owed to the court and that her obligation is to provide fair, objective and non-partisan evidence for the benefit of the court."[131] In fact, Justice MacMillan-Brown very clearly stated that there is no "[suggestion] that [Senator Pate] would intentionally give evidence in such a way as to sway the court in a particular direction *vis-à-vis* Ms Heimbecker."[132]

However, in the context of assessing witness objectivity, Justice MacMillan-Brown took issue with Senator Pate's role as "an activist who continues to work within Canada's Senate Chamber and beyond to bring widespread attention to the increasing over-representation of Indigenous women in Canada's prisons,"[133] which was, in fact, something defence counsel attempted to argue in written submissions that assisted with establishing Senator Pate's expertise.[134] Justice MacMillan-Brown "[had] grave concerns about [Senator Pate's] ability to fulfill her duty to the court as an independent and impartial witness in light of her three and a half decade old advocacy role."[135]

Ultimately, Justice MacMillan-Brown was "not persuaded that Senator Pate can so easily shed the cloak of advocate or the mantle of activist"[136] and ruled that "this court cannot be a platform for Senator Pate's social advocacy."[137]

E. *R v Abbey #2*

Even where courts stop short of finding outright bias, structural considerations can impact the reliability analysis of a proposed expert's testimony and can result in that testimony being excluded or rejected. The case of *R v Abbey #2* reaffirms and incrementally builds upon the test of expert evidence.[138] This was a lengthy murder case that bounced around the court system for over a decade.[139] *Abbey #2* involved a fresh evidence application by defence counsel concerning issues related to the trial judge's

131 *Ibid* at para 36.
132 *Ibid* at para 45.
133 *Ibid* at para 40 [emphasis in original].
134 *Ibid*.
135 *Ibid* at para 45.
136 *Ibid* at para 46.
137 *Ibid*.
138 *R v Abbey*, 2017 ONCA 640 [*Abbey #2*].
139 *Ibid* at paras 13–36.

decision to admit expert evidence pertaining to the meaning of a teardrop tattoo.[140] This piece of evidence was crucial to the Crown's case, as it was relied upon to identify the purported killer.[141]

The current iteration involved the Crown calling one expert, Dr. Mark Totten, whom the Crown discredited as an expert in another case,[142] in relation to his gang-focused research. Notwithstanding its approach to Dr. Totten in the previous unrelated case, the Crown in *Abbey #2* called him as an expert at trial.[143] Ultimately, the Ontario Court of Appeal determined that the fresh evidence — the information used by the Crown to challenge Dr. Totten's expertise in the previous unrelated case — demonstrated "the unreliability of Totten's opinion evidence on teardrop tattoos."[144] Justice Laskin goes into great detail in outlining how Dr. Totten's research was fundamentally flawed.[145] In spite of the irregularities in his research, Dr. Totten was held not to be biased,[146] though his "trust-me" approach to research clashed with the idea of an "evidence-based approach to the evaluation of the reliability of expert evidence."[147] This unreliability meant that Dr. Totten's evidence should have been excluded.[148] *Abbey #2* underscores the importance of avoiding unreliable expert evidence, even if outright bias is not present.[149]

F. *R v Millard*

R v Millard[150] confirms that if it can be shown that the proposed expert wilfully ignored real possibilities or explanations, especially if there are structural concerns involved that ultimately pertain to bias, this evidence can be properly excluded. *Millard* was a murder case wherein the Crown sought to introduce expert evidence from D.C. Sutherland in relation to

140 *Ibid* at paras 9–10.
141 *Ibid* at para 32.
142 *Ibid* at paras 37–40
143 *Ibid* at paras 19–40.
144 *Ibid* at para 54.
145 *Ibid* at paras 56–125.
146 *Ibid* at para 109.
147 *Ibid* at paras 119–21.
148 *Ibid* at paras 152–55.
149 *Ibid* at paras 109, 141.
150 2018 ONSC 4410.

shooting scene reconstruction work.[151] D.C. Sutherland understood what his qualification as an expert entailed:

> D.C. Sutherland testified that he understood the concept of bias and that he understood the duty of an expert witness which he described as an obligation to deliver impartial, honest, full, frank and fair evidence. He testified that he understood that his evidence was to be as unbiased as possible. He testified that to the best of his ability he removed any bias from his experimentation, report and testimony.[152]

However, D.C. Sutherland ultimately neglected to include some vital information and analysis in his testimony.[153] D.C. Sutherland stated there were several inconsistencies in the crime scene with suicide, the initially suspected cause of death.[154] Namely, there was a critical piece of evidence that was left out of his explanation and accident recreation, a potential intermediary surface that could have contained gunshot residue.[155]

Under cross-examination, D.C. Sutherland stated he assumed he was viewing an undisturbed, unaltered crime scene when he reviewed the photos.[156] He relied upon photographs of the crime scene.[157] Officers who attended the scene might have disturbed the surrounding area, including the intermediary surfaces.[158] In his analysis and under cross-examination, D.C. Sutherland stated the potential intermediary surface was "discounted."[159]

D.C. Sutherland was held to have "rejected any evidence"[160] that an intermediary surface could have come into play and that his experiment was guided by one central presumption.[161] Pursuant to defence counsel's challenge against D.C. Sutherland's proposed qualification due to bias concerns, Justice Forestell concluded that D.C. Sutherland "was unwilling or unable to interpret this evidence in a way that was inconsistent with his theory."[162] Justice Forestell continued by stating that "[t]he failure of a

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151 *Ibid* at para 3.
152 *Ibid* at para 11.
153 *Ibid* at paras 20–35.
154 *Ibid* at para 12.
155 *Ibid* at para 13.
156 *Ibid* at paras 26–30.
157 *Ibid* at para 27.
158 *Ibid* at paras 31–33.
159 *Ibid* at para 34.
160 *Ibid* at para 53.
161 *Ibid.*
162 *Ibid* at para 65.

proposed expert to disclose information that would undermine his opinion goes beyond confirmation bias."[163] In fact, such a failure demonstrates a misapprehension on the part of the prospective expert as to their duty to the court.[164] D.C. Sutherland "was not entitled to discount the theory that an intermediary surface was implicated without disclosing evidence that might bear upon that theory."[165] As a result, the evidence connected to this aspect of D.C. Sutherland's testimony was removed at the admissibility stage.[166]

G. *R v Morrill*

The case of *R v Morrill*[167] illustrates that where an expert takes steps — especially those relating to structural considerations — to ensure that they remain relatively detached from a party's interests, this can increase the likelihood of that expert's testimony being received by the court.[168]

In *Morrill*, the accused faced a number of charges stemming from an incident involving his uncle, whom he threatened to kill.[169] The charges focused on allegations of discharging a firearm towards his uncle, fleeing from police, and shooting at police.[170] The accused pleaded not criminally responsible due to mental disorder.[171]

The defence proposed to call Dr. Curtis Woods, a forensic psychologist, to testify as an expert witness.[172] Dr. Woods had treated the accused previously, and again when he completed an assessment for Mr. Morrill for the purposes of the case.[173] The Crown took issue with Dr. Woods' involvement, claiming that he was biased in giving expert testimony, after having treated him and having previously prescribed medication (which Mr. Morrill could not afford).[174] Dr. Woods recognized this and attempted to elicit the help of a colleague to provide a second opinion while maintaining

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163 *Ibid* at para 67.
164 *Ibid*.
165 *Ibid* at para 68.
166 *Ibid* at para 70.
167 2016 ABQB 638.
168 *Ibid* at para 111.
169 *Ibid* at para 15.
170 *Ibid*.
171 *Ibid* at para 5.
172 *Ibid* at para 95.
173 *Ibid* at para 97.
174 *Ibid* at para 109.

his professional distance.[175] The testimony of the colleague corroborated the opinion that Mr. Morrill was not criminally responsible at the time of events.[176] Justice Erb found that Dr. Woods' attempt to distance himself from the accused helped to ensure the objectivity of his testimony and that there was no evidence of bias.[177]

IV. Toward a New Two-Stream Model for Experts

As we have seen from the above cases, structural considerations relating to bias-based concerns play a vital role in a court's determination as to whether an expert's testimony will be received. Courts have made it clear that taking proactive steps to reduce concerns relating to bias is desirable. We propose a new two-stream model for experts, providing a clear structural separation between experts called by the Crown for court purposes and those expertly trained individuals who are vital to police investigations.

It must be recognized that the "unconscious bias which threatens the reliability of expert testimony is not a failing of the experts, nor even of the parties retaining them."[178] Rather, this is a systemic failing within the justice system.[179] As Giffin explains, experts are placed in an unenviable position "in which they are told that they must be independent and impartial, but are simultaneously being paid and instructed by a party with a specific viewpoint which they want supported."[180] Despite "the experts' best intentions and efforts to remain impartial, they may be influenced in ways of which they themselves are unaware and therefore over which they have little control."[181]

A substantial risk of the current setup is that experts may be "'unable' to remain fully non-partisan and uninfluenced by the party retaining them due to the nature of the employment relationship in which they are engaged."[182] Some of the cases discussed above since the Supreme Court of Canada's decision in *White Burgess* have indicated that courts are giving significant consideration to systemic bias risks and are at times excluding

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175 *Ibid* at 110.
176 *Ibid* at paras 103–04, 115–22.
177 *Ibid* at para 111.
178 Giffin, *supra* note 18 at 4.
179 *Ibid.*
180 *Ibid.*
181 *Ibid.*
182 *Ibid* at 5.

expert evidence on this basis. Although the Supreme Court of Canada held in *White Burgess* that, at the threshold stage, "[a]nything less than clear unwillingness or inability to [fulfill the expert's duty to the court] should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence,"[183] this should not necessarily be interpreted as an ongoing endorsement of the use of party employees as experts. It is important to bear in mind that there are now three potential opportunities for consideration of independence, impartiality, and bias issues; two of these potential opportunities can lead to outright exclusion of evidence due to bias concerns, while the final one can potentially lead to no weight being attributed to an expert's testimony even after the evidence is received by the court.[184] Problems relating to potential bias — even unconscious bias resulting from structural pressures and issues — are unlikely to be assumed away or ignored by courts on a prospective basis. Police agencies, public prosecution services, and governments therefore should take proactive steps to safeguard against bias-related pressures and concerns; in addition to being ethical and virtuous, doing so may increase the likelihood that expert evidence is received and utilized by the courts.[185]

Bruce MacFarlane, a legal scholar and former deputy attorney general of Manitoba, has argued that police need to guard against bias on multiple levels.[186] With regard to experts, specifically, he has stated that forensic experts and labs "should be independent from the police."[187] MacFarlane has suggested that "[i]deally, [this] means an independent, stand-alone organization with its own management structure and budget."[188] However, if these experts are located within a police agency, they "should minimally be segregated into a specific branch or division, with a separate management structure and budget, physically located away from investigative units."[189]

Though MacFarlane was initially writing about forensic scientists, the same logic can and should be applied to computer forensic experts,[190] given how common it is — and will continue to be — for digital evidence to be

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183 *White Burgess*, *supra* note 2 at para 49.

184 Paciocco, Paciocco & Stuesser, *supra* note 6.

185 See discussion of *R v Morrill*, above.

186 MacFarlane, "Convicting The Innocent", *supra* note 8 at 444.

187 *Ibid* at 464.

188 *Ibid.*

189 *Ibid.*

190 At present, digital evidence experts include sworn police officers and civilian members of police agencies. See e.g. *R v Cumberland*, 2019 NSSC 307.

used in prosecutions ranging from fraud to murder. Whether the forensic experts are scientists or technological specialists, there is a need to guard against these experts being "too closely linked with law enforcement and the investigative function,"[191] given the risk of "[feeling] aligned with the police."[192]

We pause to acknowledge that investigators typically do not intend anything nefarious by consulting with experts during the investigative stage. It is sensible for an investigator to seek input from a technical expert where there is uncertainty or where there is an opportunity for gaining valuable insights. However, as explained in *Livingston*, it is problematic for individuals to become significantly involved in an investigation if they hope to be called as expert witnesses at trial. There are certainly cases where investigators need to consult with experts and seek input throughout the investigation.[193] Investigators should be encouraged to do their due diligence with regard to seeking this information from subject matter experts, especially given the utmost importance of guarding against wrongful convictions and against putting innocent individuals through the stress of facing unfounded charges in the first place. However, it is our recommendation that there should be a restructuring of police agencies in light of concerns raised in *White Burgess* and in the ensuing jurisprudence.

Although this is not yet required by the courts, we recommend that police agencies, public prosecution services, and governments take a proactive step by delineating — and then utilizing — two different streams of "experts." The first of these would be the in-house police expert stream (comprised of sworn officers as well as civilian employees of police agencies). However, rather than testify in court as expert witnesses, these in-house experts would focus solely on assisting with investigations and performing analyses. The second expert stream, comprised of experts that are meant exclusively to testify in court, would be entirely separate from police

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191 MacFarlane, "Convicting The Innocent", *supra* note 8 at 464.

192 *Ibid.*

193 The "swapping" of experts from different jurisdictions could also potentially be useful at this stage (for instance, having an expert from Alberta assisting investigators in New Brunswick at the consultative stage, with no expectation that this expert would be called to testify by the Crown as an expert at trial). This would allow the New Brunswick expert to testify at trial, as they would have no involvement whatsoever at the investigative stage. This could potentially be used as a stopgap measure before our other recommendations are implemented.

agencies. These experts would have no involvement whatsoever with the investigation and would only perform reviews and provide objective opinions for court purposes.[194] These experts would work within organizations with a completely separate management structure and budgets that are independent from police agencies.[195]

While there are certainly costs involved in switching to this model, these must be weighed against the increased likelihood for resource-intensive and time-consuming appeals stemming from a continuation of the current model, as shown in the canvassed jurisprudence post-*White Burgess*. We argue that it would be beneficial for police agencies, public prosecution services, and governments to recognize where the law is likely headed — toward recognition and denunciation of the concerns of unconscious bias in expert witnesses — and take steps in the near future to do everything possible to ensure that any experts called by the Crown at trial are unquestionably impartial, independent, and unbiased. After all, as articulated by the Supreme Court of Canada in *Boucher v The Queen*:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[196]

Given the recognition of the many access-to-justice challenges and power-imbalance issues stemming from the current system of using police officers and police employees as expert witnesses in criminal trials (as very few accused individuals have the practical ability to retain experts),[197] a transition to this two-stream expert model presents an opportunity to address multiple structural concerns relating to expert witnesses simultaneously.

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194 The expectation under this model would be for the Crown to, but for exceptional cases, use experts from this "court stream" rather than private "for-hire" experts.

195 MacFarlane, "Convicting The Innocent", *supra* note 8 at 464.

196 *Boucher v The Queen*, [1955] SCR 16 at 23–24.

197 Giffin, *supra* note 18 at 8–9.

V. Conclusion

In light of the Supreme Court of Canada's decision in *White Burgess*, along with several lower-court judgments since that seminal case, it is clear that courts are giving significant consideration to bias issues insofar as expert witnesses are concerned. This trend is likely to continue developing, with increased scrutiny being placed on the use of experts whose evidence may potentially be impacted by factors relating to unconscious bias. As Giffin has articulated, "unconscious cognitive bias is not something which can be blocked out by mere willpower on the part of the expert, so although an expert witness may have every intention of maintaining this oath, it can be beyond their reach to do so."[198] As with developing conflict-of-interest rules in the realms of business and government, the criminal justice system should recognize that it is vital to guard against unconscious biases impacting expert witnesses in order to ensure that Canadians have respect for the legal system and the enforcement of society's laws. As the Alberta Court of Appeal has articulated, "[i]t is trite law that justice must be seen to be done as well as being done."[199] In light of recent case law developments, it is time to recognize the potential for systemic risks associated with the current model of using police experts in criminal trials. Appropriate steps must be taken to mitigate these risks. It would be wise to adhere to the old adage: "An ounce of prevention is worth a pound of cure."

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198 *Ibid* at 5–6.

199 *Beier v Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338 at para 10.

Pungent Sound: Analyzing the Criminal Enforcement of Environmental Law in the Pacific Northwest

JOSHUA OZYMY AND MELISSA JARRELL OZYMY*

ABSTRACT

Violations of environmental law involving significant harm or culpable conduct may require the application of criminal enforcement tools to punish offenders and deter future offences. Yet, we know very little about how this enforcement apparatus has operated historically in the Pacific Northwest. We undertake content analysis of all 2,588 environmental criminal prosecutions resulting from EPA criminal investigations from 1983-2019. We select and analyze all 230 prosecutions adjudicated in Washington, Oregon, and Idaho, with the goals of understanding charging and sentencing patterns, as well as drawing out the broader themes that define such prosecutions over the last 37 years. We find that over $125 million in monetary penalties were assessed to defendants , as was some 753 years of probation, 139 years of incarceration, and over 10,000 hours of community service. Forty-three percent of prosecutions focused on water pollution, 18% hazardous waste, 10% air pollution, and 24% on state-level offences. We conclude with suggestions for bolstering the criminal enforcement apparatus in the name of strengthening the substance of environmental laws in the region, including greater resources, public salience, and community policing.

Keywords: EPA; Criminal Enforcement; Environmental Law; Pacific Northwest

I. INTRODUCTION

On June 10, 1999, a horrible explosion rocked the city of Bellingham, Washington, at 3:25 in the afternoon. A giant plume of smoke rose 30,000 feet into the air.[1] A pipeline owned by Olympic Pipeline ruptured, spilling 277,000 gallons of gasoline into Hanna and Whatcom Creeks. Liam Wood, 18, was fly fishing in the area when he was overcome by the fumes and perished. Two ten-year old boys, Wade King and Stephen Tsiorvas, were playing near the creek and suffered burns so severe they died the next day.[2] A criminal investigation by the U.S. Environmental Protection Agency (EPA) determined that the company's computer system indicated a likely rupture in the pipeline and employees started the pumping stations anyway, leading to the rupture. When the boys lit a butane lighter, they accidentally ignited the fumes.[3]

On September 13, 2001, Equilon Pipeline Company was charged with negligent violations of the U.S. *Clean Water Act* (*CWA*), and Olympic

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* Joshua Ozymy, Ph.D., Associate Professor of Political Science, University of Tennessee at Chattanooga. Melissa Jarrell Ozymy, Ph.D., Department Head, Social, Cultural and Justice Studies and Professor of Criminal Justice, University of Tennessee at Chattanooga.

1 Kira Millage, "Timeline of Bellingham pipeline Explosion" (7 June 2009), online: *The Bellingham Herald* <www.bellinghamherald.com/2009/06/07/938966/timeline-of-bellingham-pipeline.html>.

2 Daryl C. McClary, "Olympic Pipe Line accident in Bellingham kills three youths on June 10, 1999" (11 June 2003) online: *The Free Online Encyclopedia of Washington State History* <www.historylink.org/File/5468> [perma.cc/266B-9VK6].

3 *United States v Equilon Pipeline*, 2003 W.D. Washington CR01-338R.

Pipeline was charged with violating the *Refuse Act*.[4] On June 16, 2003, Equilon was sentenced to 60 months of probation, in addition to receiving a federal fine of $15 million and a $525 special assessment fee. Olympic was sentenced to 60 months of probation and subject to a $6 million federal fine and a $650 special assessment fee. Cumulative monetary penalties assessed at sentencing to both companies exceeded $21 million.[5]

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4 *Clean Water Act*, 33 USC §1251 (1972). The *Act* empowers the EPA to regulate the discharge of pollutants into the waters of the United States, including surface waters. The *Act* makes illegal the discharge of a pollutant from a point source without a permit issued by EPA under the National Pollutant Discharge Elimination System (NPDES). The *Act* helped to fund, modernize, and regulate water treatment facilities throughout the country known as publicly-owned treatment works (POTWs). The CWA does not regulate drinking water and does not do a robust job of empowering EPA to regulate nonpoint source pollution. See Laws & Regulations, "Summary of the Clean Water Act" (last modified 9 September 2020), online: *United States Environmental Protection Agency*, <www.epa.gov/laws-regulations/summary-clean-water-act> [perma.cc/S83R-GLSP]; National Pollutant Discharge Elimination System, "National Pretreatment Program" (last modified 10 September 2020), online: *United States Environmental Protection Agency*, <www.epa.gov/npdes/national-pretreatment-program> [perma.cc/L958-WHNT]; Polluted Runoff, "Basic Information about Nonpoint Source (NPS) Pollution" (last modified 7 October 2020), online: *United States Environmental Protection Agency*, <www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> [perma.cc/W23G-H6DB]; *Refuse Act*, 33 USC § 407 (1899). A section of the *Rivers and Harbors Act*, it prohibits dumping refuse into the navigable waters of the United States without a permit. See also "EPA and the Refuse Act Program" (1971), online: *Environmental Law Reporter* <elr.info/news-analysis/1/10133/epa-and-refuse-act-permit-program> [perma.cc/Y9WY-HYLZ].

5 Three company officials – Frank Hopf (manager), Kevin Dyvig (control center operator), and Ronald Brentson (supervisor of the computer control center) – were sentenced for their role in the disaster as follows: Hopf was sentenced to 6 months incarceration, 36 months probation, 200 hours of community service, and ordered to pay a $100 special assessment fee and a $1,000 federal fine; Dyvig was sentenced to 12 months probation and 150 hours of community service and ordered to pay a $25 special assessment fee; Brentson was sentenced to 1 month incarceration and 24 months probation and had to pay a $100 special assessment fee and a $1,000 federal fine. The supervisors were charged under the *Liquid Pipeline Safety Act Hazardous Liquid Pipeline Safety Act*, 49 USC § 60101 (1970). The *Act* regulates the transport of hazardous liquids and natural gas in the United States. For a discussion of federal pipeline safety laws in the United States, see Carol M. Parker, "Pipeline Industry Meets Grief Unimaginable: Congress Reacts with the Pipeline Safety Improvement Act of 2002" (2004) 44 Natural Resources J 243 at 243. See also "Officials Sentenced in Pipeline Blast" (19 June 2003), online: *The Daily News* <tdn.com/business/local/officials-sentenced-in-pipeline-blast/article_19ba2543-03c1-5cac-84e7-a9b5e8b8f008.html> [perma.cc/NFL7-AJKF].

Environmental crimes, such as the actions of the individuals and companies that led to the Bellingham Pipeline Disaster, require an appropriate legal response. Significant harm and culpable conduct are the overriding factors that prompt an environmental violation to be investigated and referred for possible federal criminal prosecution in the United States.[6] While the general goals of the federal environmental criminal enforcement system are to punish such offences and deter future ones, we know very little about how environmental laws have been enforced in the Pacific Northwest through the criminal process in the United States.[7] Our goal in this manuscript is to analyze the history of the prosecution of environmental crimes in the region to gain a better perspective on what crimes have occurred, charging statutes utilized, trends in penalties, and to draw out the broader themes that define criminal prosecutions. We begin with a discussion of the historical development of federal criminal enforcement tools for the environment, followed by a review of the empirical literature on environmental crimes and criminal sanctioning, then a discussion of our analytical strategy and results.

II. THE CRIMINAL ENFORCEMENT PROCESS

The evolution of developing a criminal enforcement apparatus to enforce federal environmental laws has been ongoing for over a century in the United States.[8] The initial foray into including provisions to punish environmental crimes in federal environmental statutes can be traced to the *Rivers and Harbors Act*, which sought to prevent the obstruction of the navigable waters of the United States and to prohibit dumping in its waters.[9] The *Lacey Act* soon followed, banning the unpermitted interstate wildlife

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6 Memorandum from Earl E. Devaney (12 June 1994), *The Exercise of Investigative Discretion* at 3–4, online: <www.epa.gov/sites/production/files/documents/exercise.pdf> [perma.cc/4M5G-L2Q3].

7 US, EPA, "U.S. Environmental Protection Agency Criminal Enforcement Program: America's Environmental Crime Fighters" (last visited 2021), online: <www.epa.gov/sites/production/files/documents/oceftbrochure.pdf> [perma.cc/G73R-PQLG].

8 The United States Department of Justice, "History" (19 June 2019), online: <www.justice.gov/enrd/history> [perma.cc/P275-VF5Z].

9 *Rivers and Harbors Act*, 33 USC, § 403 (1899). The *Act* prohibits the dredging, filling, or construction of bridges, dams, or other structures in the navigable waters of the United States without a permit. See *Rivers and Harbors Appropriation Act* (1899).

trade.[10] Both of these Acts contained misdemeanor punishments for environmental crimes. The Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ), the primary vehicle for enforcing civil and criminal environmental laws in the United States, was founded later as the Public Lands Division in 1909.[11]

Developing felony provisions and institutionalizing a process for the criminal investigation and prosecution of federal environmental crimes took some time. The passage or expansion of major environmental laws in the 1970s that managed air, water, and hazardous waste pollution – such as the *Clean Air Act* (CAA), *CWA*, and the *Resource Conservation and Recovery Act* (*RCRA*) – added a broader array of misdemeanors for environmental crimes into federal environmental law.[12] Felony provisions made their way into federal environmental law in 1984 with the passage of the Hazardous and Solid Waste Disposal Amendments to *RCRA*.[13] Penalties in major

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10 *Lacey Act*, 16 USC § 3371 (1900). The first U.S. law protecting wildlife and, as amended, provides for civil and criminal penalties for illegal trade or importation of certain animals and plants and their respective parts.

11 The United States Department of Justice, "Historical Development of Environmental Criminal Law" (13 May 2015), online: <www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> [perma.cc/A3QX-8UUC].

12 *Clean Air Act*, 42 USC § 7401 (1970). Empowered the EPA to regulate air pollution from mobile and stationary sources in the United States. The Act has been used to combat a series of national environmental problems, such as smog, ozone depletion, acid rain, and potentially climate change. Building upon a series of previous efforts, the CAA was the first significant federal environmental law to provide for citizen lawsuits and represented a change where the federal government would take the lead in managing air pollution as a national environmental problem. See US, EPA, *Overview of the Clean Air Act and Air Pollution* (30 November 2020), online: <www.epa.gov/clean-air-act-overview> [perma.cc/9KMY-FVNP]. The *Resource Conservation and Recovery Act*, 42 USC § 6901 (1976) gave EPA authorization to develop a national framework for the cradle-to-grave regulation of hazardous wastes and non-hazardous solid wastes in the United States. The *Act* banned open pit landfills in the country and EPA developed minimum federal standards for the operation of municipal waste and industrial landfills. See US, EPA, *Resource Conservation and Recovery Act* (2021), online: <www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> [perma.cc/U3JQ-7PKU].

13 Prior to these changes, it was difficult to hold corporate officers accountable for willful or knowing violations of environmental law under the *RCRA*. See David T. Barton, "Corporate Officer Liability Under RCRA: Stringent but not Strict" (1991) 4 BYUL Rev at 1548–50. The Amendments broadened EPA's regulatory scope over hazardous wastes in the United States. See William L. Rosbe & Robert L. Gulley, "The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages Its Hazardous Wastes" (1984) Envtl L Reporter at 10458–463.

environmental statutes were further strengthened a few years later. For example, certain misdemeanors in the *CWA* were upgraded to felonies in 1987, and changes were also made to the *CAA* in 1990 following guidelines issued by the U.S. Sentencing Commission that suggested enhancements in penalties for a variety of federal offences.[14] Today, most major federal environmental statutes contain criminal provisions and significant penalties for negligent and knowing violations, with particularly significant penalties for knowing endangerment.[15] These changes correspond with a global trend beginning in the 1980s to enhance statutory penalties for environmental offences.[16]

The early 1980s also represented a push to institutionalize the criminal investigative and prosecution apparatus with the founding of the EPA's Office of Enforcement in 1981 – later to be renamed the Office of Enforcement and Compliance Assurance (OECA) – and the DOJ's Environmental Crimes Section (DOJ-ECS) founded in 1982 and located within the ENRD.[17] The creation of these organizational entities allowed for the development of professional specialization among criminal investigators and prosecutors.[18] DOJ-ECS became an independent unit within ENRD in 1987 and now employs approximately 43 prosecutors and support staff specializing in the prosecution of environmental crimes.[19] The

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14 Washington Legal Fund, "Chapter 2, Environmental Protection Agency Criminal Enforcement Policies" at 2–3, online (pdf): <s3.us-east-2.amazonaws.com/washlegal-uploads/upload/Chapter2EPA.pdf> [perma.cc/G5TV-HCZZ].

15 US, EPA, *Criminal Provisions of Water Pollution* (21 August 2020), online: <www.epa.gov/enforcement/criminal-provisions-water-pollution> [perma.cc/34GS-GRWM]; US, EPA, *Criminal Provisions of the Clean Air Act* (12 March 2018), online: <www.epa.gov/enforcement/criminal-provisions-clean-air-act> [perma.cc/ABX7-9J49].

16 Michael R Pendleton, "Beyond the Threshold: The Criminalization of Logging" (1997) 10:2 Society & Natural Resources 181 at 191–93.

17 US, EPA, *Criminal Enforcement Program* (October 2011), online: <www.epa.gov/sites/production/files/documents/oceft-overview-2011.pdf> [perma.cc/V92W-WGBN].

18 Theodora Galactos, "The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion" (1995) 64 Fordham L Rev 587 at 590.

19 US, Department of Justice Environmental Crimes Section, *Historical Development of Environmental Criminal Law* (13 May 2015), online: <www.justice.gov/enrd/about-division/historical-development-environmental-criminallaw> [perma.cc/E33T-H37W].

Environmental Enforcement Section (EES) housed in ENRD was organized to oversee civil-judicial actions.[20]

EPA criminal investigators were deputized as Special Deputy U.S. Marshals beginning in 1984 and were given full law enforcement authority by Congress in 1988.[21] In 1995, The Office of Criminal Enforcement, Forensics and Training (OECFT) was established to house OECA and undertake investigative and forensics work.[22] Today, EPA's Criminal Investigation Division (EPA-CID) currently employs about 145 criminal investigators, located across roughly 41 offices throughout the United States.[23] Known as Special Agents or criminal investigators, they enjoy a high degree of autonomy in case selection and often work in conjunction with state, local, and other relevant law enforcement agencies when conducting investigations and/or participating in prosecutions.[24] Evidence for investigations tends to come from former employees of a company, other civil inspectors who notice violations, or official documents. [25] When EPA-CID investigators determine enough evidence is available to pursue criminal prosecution, they tend to approach prosecutors in DOJ-ECS or the U.S. Attorney's Office to convene a grand jury or file an information in District Court.[26]

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20 US, Department of Justice Environmental Enforcement Section (EES), *An Overview of Our Practice* (14 May 2015), online: <www.justice.gov/enrd/overview-our-practice> [perma.cc/C7AT-ENRW].

21 Criminal investigators were deputized by the U.S. Attorney General in 1984 as Special Deputy United States Marshals, which required regular renewal until 1988. See Memorandum from John Peter Suarez, Management Review of the Office of Criminal Enforcement, Forensics and Training (15 December 2003) online: <www.epa.gov/sites/production/files/documents/oceft-review03.pdf> [perma.cc/UD99-8WJY] [Suarez, "Memorandum"].

22 US, EPA, *Basic Information on Enforcement* (13 January 2021), online: <www.epa.gov/enforcement/basic-information-enforcement> [perma.cc/RQ5X-YT6B].

23 US, EPA, *U.S. Environmental Protection Agency Criminal Enforcement Program: America's Environmental Crime Fighters* (last visited 2021), online: <www.epa.gov/sites/production/files/documents/oceftbrochure.pdf> [perma.cc/KFY3-2LQS]; US, EPA, *Criminal Enforcement Area and Resident Offices* (last modified 6 December 2016), online: <snapshot.epa.gov/enforcement/criminal-enforcement-area-and-resident-offices_.html> [perma.cc/3852-2CDZ].

24 Suarez, "Memorandum", *supra* note 21 at 16.

25 Joel A. Mintz, "Treading Water: A Preliminary Assessment of EPA Enforcement During the Bush II Administration" (2004) 34 Envtl L Rep at 10912.

26 Criminal investigators tend to develop relationships with prosecutors and approach them to pursue cases. EPA employs attorneys for a variety of purposes, but cases are typically referred for prosecution to one of these units in DOJ. See Joel A. Mintz,

III. CRIMINAL SANCTIONING AND ENVIRONMENTAL CRIME

The overriding goal of criminal enforcement is to punish serious offences of environmental law and to deter future offenders.[27] Criminal guilt rests on a standard of beyond a reasonable doubt that a defendant committed a crime for which they are charged, as contrasted to a lower preponderance of the evidence standard for civil liability. In the U.S. system, civil enforcement actions may go to trial, but they can also be handled internally through a range of sanctions including administrative actions, injunctive relief, civil settlements, consent decrees, environmental mitigation plans, or supplemental environmental projects (SEPs).[28] Given the nature of most offences and the broad options for punishment than can be handled internally, it is unsurprising that most environmental violations are handled through a civil process.[29]

Enforcement at the EPA: High Stakes and Hard Choices, 2nd ed (Austin: University of Texas Press, 2012); Joel A. Mintz, "Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement" (2006) 36 Envtl L Reporter 10495.

27 A management review noted of the Division, "[t]o the extent any single pattern dominates, it is the law enforcement orientation of the Immediate Office, CID, and (to a lesser extent) LCRMD (Legal Counsel and Resources Management Division)." See Suarez, "Memorandum", *supra* note 21 at ii.

28 US, EPA, *Basic Information on Enforcement* (13 January 2021), online: <www.epa.gov/enforcement/basic-information-enforcement> [perma.cc/27VB-RLYF]. SEPs are projects undertaken by a violator that provide tangible environmental results and is related to the violation EPA is attempting to resolve. Injunctive relief generally takes the form of operational changes or physical improvements at a facility to ensure compliance with appropriate regulations. Injunctive relief can also take the form of mitigation actions to offset harm created as the result of past or ongoing actions. Consent decrees are legal arrangements entered into by EPA and DOJ on behalf of the United States with a responsible party to perform some action or series of actions. See US, EPA, *Supplemental Environmental Projects* (10 February 2021), online: <www.epa.gov/enforcement/supplemental-environmental-projects-seps> [perma.cc/4F78-FB2E]; Memorandum from Susan Shinkman, Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements, (14 November 2012), online: <www.epa.gov/sites/production/files/2016-08/documents/2ndeditionsecuringmitigationemo.pdf> [perma.cc/34RJ-5DVN]; US, EPA, *Consent Decrees and Settlement Agreements* (15 November 2017), online: <www.epa.gov/ogc/consent-decrees-and-settlement-agreements> [perma.cc/KNN7-BY5N].

29 Evan J. Ringquist & Craig E. Emmert, "Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation" (1999) 52:2 Political Research Q 7 at 12–13.

Research exploring environmental sanctioning centres on whether the probability of detection is adequate enough and the severity of punishment is sufficient enough to properly punish environmental offenders and set broader precedents across industries to produce a more general deterrent effect. For proper sanctioning to occur, there would need to be enough staff to police and prosecute environmental crimes, as well as the ability and willingness of prosecutors to seek substantial punishments at times and to prosecute enough crimes to maintain sufficient deterrence.[30] Criminal enforcement resources are limited. With only about 145 criminal investigators to investigate potential crimes in EPA-CID and roughly 43 specialized attorneys in DOJ-ECS or other DOJ attorneys that assist, the chance of being detected and prosecuted criminally for an environmental crime seems decidedly low. This assertion comports with empirical studies showing the historical probability of being punished criminally in the United States is very small.[31] It also fits with research findings that large penalties assessed at sentencing in environmental crime prosecutions are somewhat rare.[32] Recent work confirms this assertion, showing there may be a little less than 2,600 criminal prosecutions resulting from EPA-CID investigations in the United States since 1983.[33] The low number of prosecutions occurring over the last four decades may suggest that the swiftness of punishment (i.e., the chance of being prosecuted) and attached penalties are so low as to render the value of environmental criminal prosecution insufficient to have any broader deterrent effect among potential environmental offenders.[34]

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30 Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 J Political Economy 169 at 183; Richard A. Posner, "An Economic Theory of the Criminal Law" (1985) 85:6 Colum L Rev 1193 at 1193–1200.

31 Michael J. Lynch et al., "The Weak Probability of Punishment for Environmental Offenses and Deterrence of Environmental Offenders: A Discussion Based on USEPA Criminal Cases, 1983-2013" (19 May 2016) 37:10 Deviant Behavior 1095 at 1096–99.

32 Michael J. Lynch, "The Sentencing/Punishment of Federal Environmental/Green Offenders, 2000-2013" (31 October 2016) 38:9 Deviant Behavior 991at 991–95.

33 Joshua Ozymy, Bryan Menard & Melissa L. Jarrell, "Persistence or Partisanship: Exploring the Relationship between Presidential Administrations and Criminal Enforcement by the US Environmental Protection Agency, 1983-2019" (2021) 81 Public Admin Rev 49 at 49.

34 Carole M. Billiet & Sandra Rousseau, "How Real is the Threat of Imprisonment for Environmental Crime?" (2014) 37 Eur JL & Econ 183 at 183–88.

A related issue in the empirical literature is whether environmental law enforcement agencies are sufficiently motivated to pursue significant cases and penalties. Research demonstrates that federal prosecutors are typically motivated to seek criminal sanctions when environmental violations are serious, defined by the fact they almost always involve aggregating factors, such as deceptive or misleading conduct, chronic offences, actions involving significant harm, or illegally operating outside the bounds of the regulatory system.[35] Other studies show that crime severity in hazardous waste prosecutions are positively related to sanctioning outcomes.[36] Crime severity is found in other studies to be the best predictor of penalties in environmental crime prosecutions.[37]

While research may show that the statistical odds of being punished criminally for an environmental crime or receiving a substantial punishment at sentencing is decidedly low, this finding is buttressed by a series of studies showing that federal prosecutors are motivated and do prosecute serious crimes.[38] The deterrent value of criminal sanctioning must be placed within the context of civil fines and other remedies used by the EPA and DOJ to gain compliance with the law rather than seek criminal prosecution – the latter of which is costly, time-consuming, and ill-suited for many situations where a criminal violation has not occurred and/or a civil remedy is more appropriate to gain compliance with the law. Criminal enforcement should be thought of as one of many tools that can and is applied to significant crimes in a surgical manner, given the current and historical context of limited resources for criminal enforcement. Noting this point, the Director of the EPA's Office of Enforcement argued early on that EPA would have to maximize its presence through careful case selection to gain regulatory compliance and punish criminal behavior.[39]

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35 David M. Uhlmann, "Prosecutorial Discretion and Environmental Crime" (2014) 38:1 Harv Envtl L Rev 159 at 159.

36 Kathleen F. Brickey, "Charging Practices in *Hazardous Waste* Crime Prosecutions" (2001) 62 Ohio St LJ 1077 at 1077–99.

37 Joshua Ozymy & Melissa Jarrell, "Why do Regulatory Agencies Punish? The Impact of Political Principals, Agency Culture, and Transaction Costs in Predicting Environmental Criminal Prosecution Outcomes in the United States" (2016) 33:1 Rev Policy Research at 71–73.

38 See Uhlmann, *supra* note 35 at 159; Raymond Paternoster, "How Much Do We Really Know about Criminal Deterrence?" (2010) 100:3 J Crim L & Criminology 765 at 765–68.

39 Devaney, *supra* note 6 at 1–3.

We provide the first study to explore charging, sentencing, and punishment patterns in environmental crime prosecutions in the Pacific Northwest. We attempt to develop a greater perspective on the broader themes we see in these prosecutions since the federal criminal enforcement apparatus developed in 1983. We categorize what has been prosecuted with an eye towards understanding the broader themes in these prosecutions and sentencing patterns. Our results can speak to whether criminal prosecution may have a deterrent value to environmental crime in the region but cannot provide a sufficient answer to this complex question.

A. Data

We gathered data on all EPA-CID criminal investigations that led to criminal prosecution using the EPA's *Summary of Criminal Prosecutions Database*.[40] Using content analysis, we analyzed all cases in the database by EPA fiscal year (FY), beginning with the first case in FY 1983 through the end of calendar year 2019. Given that both DOJ-ECS and EPA-CID were founded in the years immediately prior, these 37 years of data give us significant insight into the history of federal environmental crime investigations and prosecutions, as well as state-level prosecutions stemming from EPA-CID investigations. We select out all cases occurring in the Pacific Northwest, defined as the U.S. states of Washington, Oregon, and Idaho. We collected data on all 2,588 prosecutions and selected all 230 cases completed in these states during this time period for the analysis. In reading the prosecution case summaries, we captured data on the following: state of occurrence, a narrative summary of each case, docket number, EPA fiscal year identifier, major environmental charging statutes used in the prosecution, the presence of other criminal charges (such as false statements, fraud, and conspiracy), whether defendants were charged with state-level environmental violations, whether at least one company was a named defendant in the case, the total number of defendants identified in the case, and punishments including total probation in months assigned to all individual and company defendants in each case, the total number of months incarceration assigned to all defendants in a case, the total monetary penalties including special assessments, fees, restitution, fines, community service payments, and any other monetary assessment.

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40 US, EPA, *Summary of Criminal Prosecutions Database* (10 May 2021), online: <www.epa.gov/enforcement/summary-criminal-prosecutions> [perma.cc/8S9D-CJMF].

Our content analysis strategy was to develop testing protocols by analyzing cases through FY 2015 with two coders. We met and discussed discrepancies weekly. After about four weeks, we felt comfortable developing our coding protocols for the project and moved forward. Coders analyzed data independently and the lead author would review for discrepancies between coders. We met and dialogued about any differences until consensus was met on the final values. Our inter-coder reliability for the dataset was approximately 95%.[41]

The limitations of our approach should be acknowledged, but none pose serious problems for our results. The first is that prosecutions stemming from EPA-CID investigations may be absent from the database. We assume this is not the case or it is not a serious problem, given we are working from the agency's official database. A second problem is that we seek to derive meaning from the prosecution summaries but cannot know in-depth details across all prosecutions, such as the role of the judge, prosecutors, defendants, or investigators. A third limitation is that if any changes in federal environmental laws occurred during this time period and affected the way prosecutors used certain statutes or how investigators approach their investigations, we cannot account for such changes. Given that we are examining broader trends over time, it is not imperative that we know what changed so much as the outcomes, which are properly captured.

B. Results

We begin the analysis by plotting the total number of criminal prosecutions adjudicated by EPA fiscal year across all three states, from 1983-2019. We find the first prosecutions adjudicated in FY 1985. Through the 1980s, there were 19 prosecutions adjudicated. In the 1990s, this number rises considerably to 53 prosecutions. From 2000-2010, there were 71 prosecutions adjudicated, and from 2011-2019, there were 87 prosecutions. The sum total of prosecutions adjudicated during these 37 years was 230, with an annual average of about 6.2 per fiscal year.

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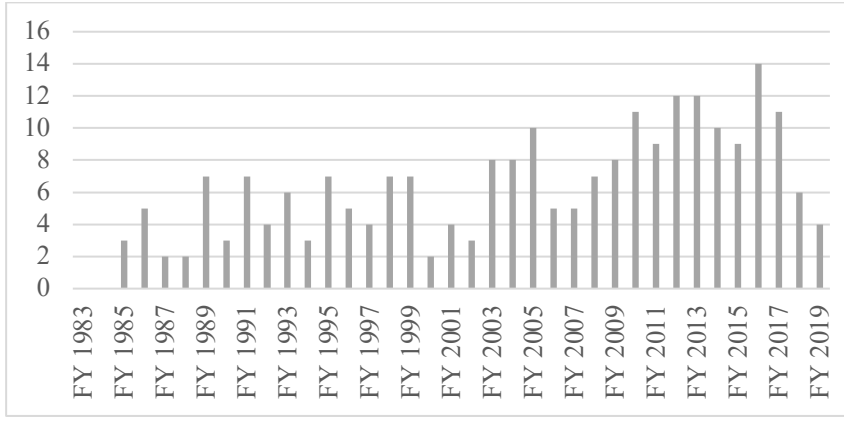
41 Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Boston: Addison Wesley, 1969) at 140.

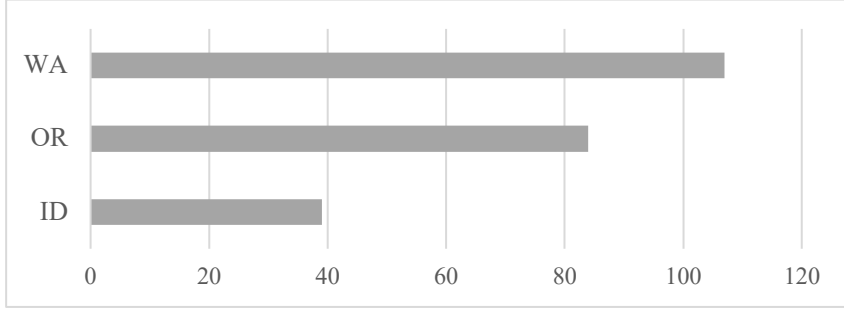
Figure 1: Total Environmental Crime Prosecutions by EPA Fiscal Year in the Pacific Northwest



Source: EPA Summary of Criminal Prosecutions Database

In Figure 2, we break down this data by state and examine total prosecutions adjudicated by fiscal year, from 1983-2019. Washington dominates the dataset with 107 prosecutions, or about 47% of total prosecutions, being undertaken in the region. A total of 84 prosecutions were adjudicated in Oregon or about 37% of total prosecutions. Seventeen percent of total prosecutions occurred in Idaho, where a total of 39 prosecutions occurred.

Figure 2. Total Environmental Crime Prosecutions in the Pacific Northwest by U.S. State



Source: EPA Summary of Criminal Prosecutions Database

In Table 1 we analyze trends in prosecutions across these three states by exploring charging patterns across major federal environmental statutes since 1983. We explore how many cases used *CWA*, *CAA*, *RCRA*, *Toxic Substances Control Act* (*TSCA*), and the *Federal Insecticide, Fungicide, and Rodenticide Acts* (*FIFRA*).[42] We also include the final column on the far right to denote the number of cases where at least one defendant in a case was charged with state-level environmental offences.

The most prevalent crimes were prosecuted under the *CWA*. In a total of 77 prosecutions, at least one defendant was charged with a *CWA* violation, representing roughly a third of all prosecutions since 1983. In Washington, 36 cases were prosecuted under the *CWA*: 24 in Oregon and 17 in Idaho. The second most prevalent federal environmental charging statute used in these prosecutions was the *RCRA*. A total of 38 *RCRA* prosecutions occurred across these states, representing about 17% of all prosecutions. Eighteen *RCRA* prosecutions occurred in Washington, 12 in Oregon, and eight in Idaho. In 16 cases, at least one defendant was charged with a *CAA* crime, representing about 7% of all cases in the data. Eight *CAA* prosecutions occurred in Washington, five in Idaho, and three in Oregon.

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42 *Toxic Substances Control Act*, 15 USC § 2601 (1976). Authorizes EPA to regulate chemical substances and mixtures that may present an unreasonable risk to human health or the environment. Updated in 2016 with the Frank Lautenberg Chemical Safety Act, the *TSCA* was heavily amended to require evaluation of existing chemicals using a risk-based standard. The *TSCA* has been criticized for rarely testing, banning, or restricting substances. See US, Centers for Disease Control and Prevention, *Toxic Substances Control Act and Workers' Health* (10 February 2017), online: <www.cdc.gov/niosh/chemicals/tsca.html> [perma.cc/NJS4-FLTM]; David Markell, "An Overview of TSCA: Its History, Key Underlying Assumptions, and Its Place in Environmental Regulation" (2010) 32 Wash UJL & Pol'y at 338–45. The *Federal Insecticide, Fungicide, and Rodenticide Act*, 7 USC § 136 (1976) gives EPA authority to regulate the registration, distribution, sale, and use of pesticides in the United States. See US, EPA, *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities* (16 February 2021), online: <www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act> [perma.cc/K349-SCMG]; "The Failure of US Law to Address the Ecological Considerations of Pesticide Use" (22 October 2015), online: *Law Explorer* <lawexplores.com/the-failure-of-us-law-to-address-the-ecological-considerations-of-pesticide-use/> [perma.cc/E6S2-SRGQ].

Only six *TSCA* and five *FIFRA* cases were prosecuted since 1983 across these three states. Second to only the *CWA*, a total of 57 prosecutions, or about 25%, ultimately resulted in at least one defendant charged with state-level environmental crimes. Twenty-eight such prosecutions occurred in Oregon, 25 in Washington, and four in Idaho.

Table 1: Charging Patterns in Environmental Crime Prosecutions in the Pacific Northwest by U.S. State

State	*CWA*	*CAA*	*RCRA*	*TSCA*	*FIFRA*	*State-Level Crime*
ID	17	5	8	0	2	4
OR	24	3	12	2	0	28
WA	36	8	18	4	3	25

Source: EPA Summary of Criminal Prosecutions Database

In Table 2 we explore prevalent criminal charges since 1983 occurring in conjunction with environmental crime prosecutions in Washington, Oregon, and Idaho. The most common offence is false statements. Whether this meant lying to investigators, submitting fraudulent reports, or fabricating outcomes and data in official documents, in 17% of cases, at least one defendant was charged in this manner. In one out of ten cases, at least one defendant was charged with conspiracy. We find ten cases involving fraud in the form of wire, mail, and conspiracy to defraud the government. In three cases, the defendants were charged with theft.

Table 2: Prevalent Criminal Charges in Environmental Crime Prosecutions in the Pacific Northwest

Charge	*Number*	*Percentage*
False Statements	38	17
Conspiracy	23	10
Fraud	10	4
Theft	3	1

Source: EPA Summary of Criminal Prosecutions Database

We now examine cumulative penalties assessed to all individual and company defendants in these states, from 1983-2019. We find that all individual defendants were cumulatively sentenced to pay over $53 million in fines, monetary assessments, restitution, special fees, and community service payments. Companies were cumulatively assessed over $72 million in such penalties at sentencing. All individual defendants were cumulatively sentenced to serve 6,520 months of probation and 1,669 months of incarceration. Companies were sentenced to 2,514 months of probation. Defendants were sentenced to a total of 10,304 community service hours since 1983.

Figure 3: Total Penalties Assessed in Environmental Crime Prosecutions in the Pacific Northwest

Monetary Penalties	*Probation*
$53,012,965 (Individuals) $72,511,327 (Companies)	6,520 Months (Individuals) 2,514 Months (Companies)
Incarceration	*Community Service*
1,669 Months	10,304 Hours

Source: EPA Summary of Criminal Prosecutions Database

In Table 3, we examine the most punitive monetary penalties assessed to corporations in Oregon, Washington, and Idaho since 1983. On January 2, 1985, a tank ruptured at the Pennwalt Corporations Tacoma Plant containing sodium chlorate used as a bleaching agent in the pulp and paper industry.[43] The solution illegally discharged into the Hylebos Waterway, eventually leading to Puget Sound. The company, and four corporate officers were indicted for a variety of offences including making false statements to investigators from the U.S. Coast Guard, negligent discharge into the navigable waters of the United States without a permit in violation of the CWA, and failure to notify officials of the release under the

[43] *United States v Pennwalt Corporation*, 1989 W.D. Washington CR-88-55T.

Comprehensive Environmental Response, Compensation, and Liability Act (*CERCLA*).[44] On May 2, 1989, the corporation agreed to pay a $500,000 fine and fund an environmental trust fund in the amount of $600,000.[45]

Table 3: Large Monetary Penalties Assessed to Corporate Defendants in Environmental Crime Prosecutions in the Pacific Northwest

Year	*Company*	*State*	*$ Penalty*
1989	Pennwalt Corporation	Washington	1,100,000
2003	Equilon Pipeline	Washington	21,001,175
2004	MMS Company	Oregon	1,000,800
2005	Fujitrans Corporation	Oregon	2,000,000
2005	Evergreen International	Oregon	25,000,000
2017	Gallia Graeca Shipping	Washington	1,500,000

Source: EPA Summary of Criminal Prosecutions Database

The MMS Company was prosecuted for operating an oceangoing vessel, the MV Spring Drake, whose chief engineer admitted to U.S. Coast Guard Investigators to bypassing the oil water separator and discharging oily waste overboard.[46] The company and employee, Shashank Pendse, were indicted for state environmental violations, as well as violations of the *Act to Prevent*

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44 The *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 USC § 9601 (1980) authorizes EPA to cleanup or remediate spills, accidents, or hazardous waste sites. EPA endeavors to find responsible parties to clean up or remediate spills or hazardous waste sites. The agency may decide to place a site on the National Priorities List (NPL) to guide EPA on which sites warrant further investigation for potential cleanup. If a responsible party cannot be located, EPA may decide to pay for remediation. Also known as the Superfund, the *Act* was paid for with a tax on industry, which Congress allowed to expire, meaning EPA often lacks funds for remediating known sites. See US, EPA, *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)* (27 July 2020), online: <www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [perma.cc/5AKR-5SQG]; US, EPA, *Superfund: National Priorities List (NPL)* (8 February 2021), online: <www.epa.gov/superfund/superfund-national-priorities-list-npl> [perma.cc/GL78-WQ25]; Norman W. Bernstein, "Superfund Reform Needs Dramatic Simplification" (1995) 25:1 Envtl L Reporter at 10008.

45 Timothy Eagan, "THE LAW; Putting a Face on Corporate Crime", *New York Times* (14 July 1989), online: <www.nytimes.com/1989/07/14/us/the-law-putting-a-face-on-corporate-crime.html> [perma.cc/6EVE-UDYJ].

46 *United States v MMS Company*, 2004 D. Oregon CR 04-173.

Pollution from Ships (*APPS*).[47] MMS pled guilty on February 14, 2004, and was sentenced to 48 months probation in addition to being ordered to pay an $800 special assessment, a $500,000 federal fine, and $500,000 in community service payments.[48] The Fujitrans Corporation operated the oceangoing vessel Cyngus to transport vehicles to the United States.[49] Investigators received a tip that employees were using a bypass valve to discharge oily wastes into the ocean and the crew had falsified the ship's Oil Record Book. On February 3, 2005, the corporation was charged with violations of the *APPS* and was sentenced to 36 months of probation and ordered to implement an environmental compliance program, pay a $1,050,000 fine to the State of Oregon, pay $335,000 to the State of California, make a $495,000 community service payment to the National Fish and Wildlife Foundation, and make a $165,000 payment to the Channel Islands National Park.[50]

Evergreen International SA was prosecuted in Oregon for failing to keep an accurate Oil Record Book for oceangoing vessel the M/V Ever Gleeful. The company was also charged for making a materially false statement to U.S. Coast Guard Investigators by presenting them with the inaccurate Book. The company's other oceangoing vessel the M/V Ever Group illegally discharged oil into the Columbia River in March 2001. On April 20, 2003, Evergreen was sentenced to 36 months of probation and ordered to pay a $15 million criminal fine and $10 million in community service payments.[51] Gallia Graeca Shipping LTD and the ship's operator,

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47 *Act to Prevent Pollution from Ships*, 33 USC § 1901 (1973). The *Act* is often used in conjunction with *CWA* violations to prosecute pollution from ships dumped in the navigable waters of the United States, and it implements the International Convention for the Prevention of Pollution from Ships (MARPOL). See US, EPA, *MARPOl Annex VI and the Act to Prevent Pollution from Ships (APPS)* (1 June 2021), online: <www.epa.gov/enforcement/marpol-annex-vi-and-act-prevent-pollution-ships-apps> [perma.cc/VVB9-P265].

48 "Companies Indicted for Ocean Dumping" (20 February 2004), online: *MarineLink* <www.marinelink.com/news/companies-indicted323554> [perma.cc/2N2Q-58SW].

49 *United States v Fujitrans Corporation*, 2005 D. Oregon CR04-469-KI.

50 "Japanese Company Plead Guilty to Illegal Dumping" (9 February 2005), online: *MarineLink* <www.marinelink.com/news/japanese-company-illegal316897> [perma.cc/YYT7-NQ7L].

51 In the case summary, the language appears to read that the company was sentenced to pay a total of $25 million in fines and payments and another $3 million to the District of Oregon and $2 million to the Oregon Governor's Fund, totaling $30 million in penalties. We coded it as such and include it in penalty totals, but the total was actually $25 million as listed in official reports. See US, Department of Justice, Environment

Angelakos (Hellas) S.A., were sentenced on October 21, 2016, to 180 months of probation and ordered to pay $1.3 million in fines and a $200,00 community service payment.[52] The ship's operator rendered its oil water separator device inoperable, falsified their Oil Record Book, and made false statements to U.S. Coast Guard Inspectors.[53]

Table 4: Significant Incarceration Assessed to Defendants in Environmental Crime Prosecutions in the Pacific Northwest

Year	Primary Defendant	State	Months Incarceration
2003	Alan Elias	ID	204
2017	Richard Estes	WA	105
2017	Nancy-Bush Estes	WA	73
2017	Scott Johnson	WA	97
2018	Donald Paul Holmes	WA	78

Source: EPA Summary of Criminal Prosecutions Database

Allen Elias knowingly instructed his employees to scrub a 25,000-gallon tank containing cyanide sludge. One worker was overcome by the fumes and when first responders and investigators arrived, Elias lied to them to cover up his crime. The man was left with permanent brain damage as a result. Elias also instructed workers to illegally dump 8,000 gallons of toxic sludge. [54] Elias was charged with knowing endangerment under *RCRA* and was sentenced to 204 months incarceration and 36 months of probation, as well as being ordered to pay $364,750 in restitution to the EPA and $6 million in restitution to the victim.[55]

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and Natural Resources Division, *Summary of Litigation Accomplishments Fiscal Year 2005* (2005), online: <www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/ENRD_2005_Accomplishments_Report_508.pdf> [perma.cc/F8CF-HJEY].

52 *United States v Gallia Graeca Shipping LTD*, 2017 W.D. Washington CR16-62JCC.

53 Peter Buxbaum, "Ship Owner, Operator, Engineers Convicted in Federal Court" (29 June 2016), online: *Global Trade* <www.globaltrademag.com/ship-owner-operator-engineers-convicted-in-federal-court/> [perma.cc/NP4X-TC77].

54 *United States v Alan Elias*, 2003 D. Idaho CR 98-070-BLW. Elias later appealed and the victim restitution was overturned. See *Elias v. United States*, 2002 01-1502.

55 "Supreme Court Rejects Appeal Over Cyanide Poisoning" (7 October 2002), online: *Water & Wastes Digest* <www.wwdmag.com/supreme-court-rejects-appeal-over-cyanide-poisoning> [perma.cc/L6FQ-3WMD].

Richard and Nancy-Bush Estes were both prosecuted for defrauding the U.S. biodiesel product credit system. The *2007 Energy Independence and Security Act* (*EISA*) encouraged the production of domestic biofuels.[56] When they generated new, renewable product, they could claim Renewable Identification Numbers (RINs) that could be used to sell renewable fuel credits to third parties, as well as claim federal tax credits for production. The defendants falsely claimed to produce biofuel from feedstock and claimed 60 million RINs from March 2013 to March 2014, received $42 million from the sale of the RINs, and claimed over $4.3 million in fraudulent tax credits.[57] On January 17, 2017, Richard Estes was sentenced to serve 105 months incarceration and three years of supervised release and had to pay over $4.3 million in shared restitution to the IRS.[58] On February 17, 2007, Nancy Bush-Estes was sentenced to 73 months incarceration and three years' supervised release and ordered to pay her share of the restitution to the IRS.[59] Scott Johnson was also prosecuted for biodiesel fuel credit fraud in the broader prosecution of Gen-X Energy Group that ensnared Richard Estes and Nancy bush-Estes. Johnson was the founder and CEO of the company. Johnson was sentenced to 97 months incarceration.[60] The vice president and COO of the company, Donald Paul Holmes, was convicted and sentenced to 97 months incarceration.[61]

If we take these punishments into the context of overall sentencing patterns, excluding these six large-penalty corporate cases, total monetary penalties assessed to all other companies is reduced to $21 million. Excluding these large incarceration sentences in Table 4, total incarceration to all other individual defendants drops to 1,112 months. Only the cases against Olympic and Evergreen were significant monetary penalties and outliers in the data, and all but one of the large incarceration penalty cases stem from the same biodiesel production credit fraud prosecution.

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56 *Energy Independence and Security Act*, 42 USC § 17001 (2007). P.L. 110-140. The most impactful part of the *Act* was to encourage alternative fuel development which, in the United States, led to a boom in the production of ethanol. See US, EPA, *Summary of the Energy Independence and Security Act* (6 May 2019), online: <www.epa.gov/laws-regulations/summary-energy-independence-and-security-act> [perma.cc/9PHU-VR4B].

57 Cameron Probert, "Biodiesel scam involving Pasco firm lands man in federal prison" (31 January 2017), online: *Tri-City Herald* <www.tri-cityherald.com/news/local/article129865869.html>.

58 *United States v Richard Estes,* 2017 E.D. Washington 4:15-CR-6048-SMJ-1.

59 *United States v Nancy Bush-Estes,* 2017 E.D. Washington 4:15-CR-6047-SMJ-1.

60 *United States v Scott Johnson,* 2017 E.D. Washington 4:15-CR-6042-SMJ.

61 *United States v Donald Paul Holmes,* 2017 E.D. Washington 4:15-CR-6044-SMJ-1.

We conclude the analysis by attempting to draw out the dominant themes we uncovered in our data. While many prosecutions involve using more than one charging statute, we attempt to organize all the cases by the strongest theme in each case or what we feel was the central crime that led EPA-CID to investigate the case and prosecutors to pursue charges. This analysis will help us to develop a broader, global view of the major kinds of federal environmental crimes historically chosen for prosecution. We cull together all 230 cases and bring forward the most salient themes across all environmental crime prosecutions in the Pacific Northwest, from 1983-2019. We examine every case and code it by the central crime we feel is at the heart of each prosecution and present the results in Figure 4.

By a large margin, prosecutors chose to pursue water pollution crimes more frequently than any other offence since 1983. We cataloged a total of 99 cases from of all the prosecutions as primarily centring on water pollution crimes. We find that 77 of these cases are primarily prosecuted under the *CWA*. Many of these cases involve ships and other oceangoing vessels illegally polluting waterways. We found 11 cases where *APPS*/MARPOL was used to prosecute offenders, five prosecutions using provisions of the *RHAA*, and two using the *Ocean Dumping Act*.[62] The central theme in water pollution crimes was the presence of companies and individuals illegally discharging harmful, toxic, and hazardous substances into sewer systems, rivers, creeks, the ocean, or, in some cases, altering or obstructing the navigable waters of the United States. We estimate that 43% of all federal environmental crime prosecutions occurring in the Pacific Northwest since 1983 centre on water pollution crimes.

In one case, the *Safe Water Drinking Act* (*SWDA*) was used as the charging statute, and in two cases, the *Endangered Species Act* (*ESA*) was used

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62 The *Marine Protection, Research, and Sanctuaries Act,* 16 USC § 1431 (1988), also known as the *Ocean Dumping Act*, prohibits the transportation of material into the United States for purposes of ocean dumping. See US, EPA, *Summary of the Marine Protection, Research, and Sanctuaries Act* (27 December 2018), online: <www.epa.gov/laws-regulations/summary-marine-protection-research-and-sanctuaries-act> [perma.cc/R9F3-AD72].

alongside the *CWA*.[63] Cory King was prosecuted in Idaho for violations of the *SDWA* and making false statements.[64] King was the farm manager and partial owner of Double C Ranch near Burley, Idaho. He instructed workers to inject surface fluids into agricultural irrigation wells without a permit. Gary West Jr. was prosecuted in Oregon for using a bulldozer to create a berm to divert the flow of the South Fork Little Butte Creek in violation of the *CWA*. He engaged in the illegal taking of the Coho Salmon, an endangered species, in violation of the *ESA*.[65] West was sentenced to 36 months of probation. Barton Randall Wilkinson was prosecuted for illegally altering a waterway of the United States in violation of the *CWA* when he and his co-defendants created a channel in Clear Creek near Kooskia, Idaho, violating the *ESA* by damaging a Steelhead Trout habitant.[66]

Figure 4: Dominant Themes in Environmental Crime Prosecutions in the Pacific Northwest

Water Pollution Crimes 43 Percent	*State-Level Crimes* 24 Percent
Hazardous Waste Crimes 18 Percent	*Air Pollution Crimes* 10 Percent

Source: EPA Summary of Criminal Prosecutions Database

63 The *Safe Drinking Water Act*, 42 USC § 300f (1974) authorizes EPA to regulate drinking water in the United States. EPA sets minimum standards for tap water and municipal water systems. EPA is not allowed to regulate fracking wells and wastewater pits from the U.S. hydraulic fracking industry, even though these activities may impact wells, aquifers, and other sources of drinking water. See US, EPA, *Summary of the Safe Water Drinking Act* (3 August 2020), online: <www.epa.gov/laws-regulations/summary-safe-drinking-water-act> [perma.cc/8Y5A-U2R2]; Mary Tiemann & Adam Vann, "Hydraulic Fracturing and Safe Water Drinking Act Regulatory Issues" (13 June 2015), online (pdf): *Congressional Research Service* <fas.org/sgp/crs/misc/R41760.pdf> [perma.cc/54W6-KRPJ]; *Endangered Species Act*, 16 U.S.C., 1973, §1531. Provides a regulatory framework to conserve endangered species and their habitat. See US, Fish & Wildlife Service, *Endangered Species Act Overview* (30 January 2020), online: <www.fws.gov/endangered/laws-policies/> [perma.cc/B5F8-E6MY].

64 *United States v Cory King*, 2010 D. Idaho CR08-0002-E BLW.

65 *United States v Gary West Jr.*, 2010 D. Oregon CR10-78-01-HA.

66 *United States v Barton Randall Wilkinson*, 2011 D. Idaho CR 09-CR-00203-EJL.

Outside of water pollution crimes, the second strongest theme we uncovered in these prosecutions was that 56 prosecutions, or about 24% of all prosecutions, in our dataset resulted in state-level prosecutions. These prosecutions tended to result from EPA-CID investigations often occurring in unison with state enforcement agents and the case ultimately led to state-level charges.[67] It is best to view these through the lens of state-federal cooperation on investigating and prosecuting environmental crimes. The finding that almost a quarter of all prosecutions result primarily in state-level charges indirectly suggest such cooperation is very common over time. A good example of such a case is John Charles Nelson who was prosecuted for dumping hazardous waste along the highway in the State of Washington. A taskforce including EPA and state officials investigated Nelson for hazardous waste disposal violations. He was charged on May 17, 1990, with first degree theft and attempted first degree theft. On April 19, 1991, Johnson was sentenced to four months incarceration and ordered to pay $9,000 in restitution to a landowner impacted by his illegal dumping.[68]

Sixty-seven percent of historical environmental crime prosecutions occurring in the Pacific Northwest since 1983 in our dataset stem from water pollution crimes or state-level environmental crimes. In 42 cases, or about 18% of all prosecutions occurring since 1983, we labelled as hazardous waste crimes. These cases primarily are charged via the *RCRA* for illegal storage, transport, or disposal of hazardous wastes. Cases were also prosecuted under the *CERCLA*, *TSCA*, and *FIFRA*. Quin Million was prosecuted in Washington for failing to report a spill containing polychlorinated biphenyls (PCBs). He was charged with failure to notify of the release of a hazardous substance under the *CERLA*, and was sentenced on February 3, 1997, to 12 months incarceration and 12 months of probation.[69] Drum Recovery was prosecuted in Oregon for transporting and dumping sodium hydroxide and improper labeling, storage, and disposal of PCBs. The company and its co-defendants were charged under the *CERCLA* for failure to notify and under the *TSCA* for the illegal disposal of PCBs.

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67 Our phrasing here might be termed taskforce crimes or cooperative prosecutions to denote the likelihood state and federal agents cooperated, but that cannot be discerned sufficiently from the case studies, so we will use the term "state-level crimes."

68 US, Environmental Protection Agency, *Enforcement and Compliance Assurance Summary of Criminal Prosecutions Resulting from Environmental Investigations* (1992) at 144, online: <nepis.epa.gov/> [perma.cc/5QXS-LRMD].

69 *United States v Quin Million,* 1997 E.D. Washington CR96-066WFN.

The charges against the company were dismissed.[70] Centex Limited emptied the contents of a containment pond containing pesticides and disposed of it on a 100 acre parcel they were renting. The company was charged under the *FIFRA* for illegal disposal of the hazardous pesticides and was sentenced on June 27, 1995, to 12 months of probation and was ordered to pay a $10,000 fine and supply $3,000 in chemicals to the City of Quincy, Washington.[71] The PureGro Company was prosecuted for the illegal storage, transport, and disposal of hazardous pesticides under the *RCRA* and illegal application of registered pesticides under the *FIFRA*. On September 17, 1991, the company was sentenced to 24 months of probation and received a $15,000 fine.[72]

The fourth major theme we uncovered was that 10% of prosecutions involve air pollution crimes. These prosecutions involved a range of crimes from illegal release of toxic air emissions, to illegal importation of vehicles to violate *CAA* emissions standards, to illegal demolition and disposal of asbestos prosecution under the National Emissions Standards for Hazardous Air Pollutants (NESHAP).[73] We found that 18 cases, or 78% of all cases in this category, are related to asbestos crimes. These include illegal removal, demolition, and disposal of asbestos, failure to obtain training and accreditation for workers engaging in asbestos removal, failure to inspect a building for asbestos, selling fraudulent asbestos training certificates, and not reporting releases of asbestos.

The five cases in our dataset that fall into this category and do not involve asbestos crimes include Fields Products Incorporated, a maker of roofing products in Tacoma, Washington. The company was prosecuted for releasing approximately 3,300 gallons of xylene and was prosecuted under the *CERCLA* for failure to notify officials of the release. On September 24, 1993, the company was sentenced to 60 months of probation and received a $200,000 fine.[74] Euro-Auto Ltd was prosecuted in Washington for an illegal automobile importation scheme to import gray market vehicles not complying with new emissions requirements in the 1980s under a five-year

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70 *United States v Drum Recovery, Inc.*, 1985 D. Oregon 84-00005.

71 *United States v Centex Limited*, 1995 E.D. Washington CR-95-025-JQL.

72 *United States v PureGro Company*, 1991 Incorporated: E.D. Washington CR-90-228-AAM.

73 US, EPA, *National Emissions Standards for Hazardous Air Pollutants Compliance Monitoring* (17 January 2020), online: <www.epa.gov/compliance/national-emission-standards-hazardous-air-pollutants-compliance-monitoring> [perma.cc/V6WW-5YHZ].

74 *United States v Fields Product, Incorporated*, 1993 W.D. Washington CR 93-2244T.

exemption. The company was sentenced on July 31, 1987, and ordered to pay a $10,000 fine and $4,300 to the Crime Victim's Fund.[75] The company and its owner, James Strecker, agreed to pay the U.S. Government $15,000 in storage charges for the illegally imported vehicles plus $125,000 to surrender ownership rights.

Dyno Nobel was prosecuted for releasing six tons of anhydrous ammonia near Columbia City, Oregon, over a three-day period beginning July 20, 2015. The releases caused by restarting the company's urea plant triggered numerous complaints from residents in the nearby city and the company was charged under the *CERCLA* for failure to notify. On June 14, 2018, the company was sentenced to pay a $250,000 fine and serve two years of probation.[76] John Myre was prosecuted in Idaho for supervising the cutting of steel beams on an old railroad trestle that were painted with lead paint. One of the workers became ill and was hospitalized due to lead poisoning because the blow torches they used caused the lead to vaporize and be released into the ambient air. Despite the worker being hospitalized, Myre continued the work resulting in diagnosed cases of lead poisoning. Myre was prosecuted for negligent endangerment under the the *CAA* and was sentenced on August 20, 2014, to three years of supervised release, 90 hours of community service, and ordered to pay a $3,000 fine.[77] William Nowak was prosecuted under the the *CAA* for performing fraudulent testing and certifying wood-burning stoves. The owner of Energy and Environmental System Performance Corp, Nowak's company, falsely certified ten of 21 models that would not meet Washington State air emissions standards. On September 26, 1996, Nowak was sentenced to 36 months of probation and 240 hours of community service.[78]

All the cases in our dataset, absent ten prosecutions, fall within one of the above four categories. Of the remaining cases, five of the ten involved generating fraudulent RINs and claiming tax credits under the U.S. biofuel production program under the *EISA*. Three cases involve the use or illegal sale of registered pesticides. Of the remaining two cases, Martin Glaves Kuna was prosecuted in Oregon for fraudulently representing himself as a certified lead-based paint inspector.[79] He was charged with wire fraud and

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75 *United States v Euro-Auto Ltd, Inc.*, 1987 W.D. Washington 86-95TB.
76 *United States v Dyno Nobel, Inc.*, 2018 D. Oregon 3:18-CR-63-SI.
77 *United States v John Myre*, 2014 D. Idaho 3:14-CR-27-EJL.
78 *United States v William Nowak*, 1996 W.D. Washington CR-96-218C.
79 *United States v Martin Glaves Kuna*, 2013 D. Oregon 313-CR-0050 SI.

sentenced on July 23, 2013, to 14 months incarceration and ordered to pay $2,372 in restitution to his victims.[80] Clifford Tracy was prosecuted in Oregon for operating an illegal gold mining operation that damaged U.S. Forest Service Property. He was warned to cease operations but continued and was jailed for 12 days. He was charged with unlawful use Forest Service land and was sentenced to 12 months of probation.[81]

IV. CONCLUSION

Our analysis of environmental crime prosecutions over 37 years in Washington, Oregon, and Idaho tells us much of how government enforces environmental laws that protect humans, animals, and the natural environment in the Pacific Northwest through a criminal process. Our results identify a few clear themes and outcomes for what the government chooses to prosecute and enforce. Our findings also tell us something about the potential deterrent value of these criminal enforcement remedies. All of these findings respond to the broader issues of the efficacy and substance of criminal enforcement in the literatures on environmental enforcement and green criminology.[82]

We find that water pollution crimes dominate criminal enforcement efforts. Some 43% of all EPA-CID investigations that led to prosecution involve prosecuting individuals and companies for mostly illegal discharges into public sewer systems, creeks, rivers, and other waterways of the United States, including the ocean. The use of criminal provisions in the *CWA* to

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80 The defendant received a fairly severe sentenced for an environmental crime because his actions lead to children ingesting lead-based paint and experienced increased levels of lead in their blood. See US, Department of Justice, *Vancouver Man Sentenced to 14 Months in Prison for Lying About His Ability to Conduct Lead Testing* (23 July 2013), online: <www.justice.gov/usao-or/pr/vancouver-man-sentenced-14-months-prison-lying-about-his-ability-conduct-lead-testing> [perma.cc/KM54-FRUP].

81 *United States v Clifford Tracy,* 2009 D. Oregon CR09-30041-01PA. Tracy persisted in his operations after being frustrated by the permitting process and was later incarcerated. See US, Department of Justice, *Southern Oregon Miner Sentenced to One Year in Prison for Unlawful Mining* (6 February 2012), online: <www.justice.gov/archive/usao/or/news/2012/20120206_Tracy.html> [perma.cc/JMS2-PEVP].

82 For a discussion of the deterrent value of criminal enforcement to environmental criminals see Billet & Rousseau, *supra* note 34 at 183– 86.

punish environmental criminals and enforce water pollution control laws proves to be an extremely important tool used over time in the region.[83]

We also find that cooperation between state and federal environmental investigators and prosecutors is likely a common occurrence in the Pacific Northwest. Almost a quarter of all prosecutions end up hinging on prosecuting environmental criminals using state-level charging statutes. While it is difficult to know if all of these involve cooperation, it tends to imply communication and collaboration between state and federal investigators to prosecute offenders in such a manner.[84]

About 28% of all other prosecutions involve hazardous waste crimes and air pollution crimes.[85] Particularly of note is the value of the *CAA* criminal provisions for punishing asbestos violations, which made up the bulk of all air pollution prosecutions. Undergirding most of these prosecutions is the need for physical evidence to police crimes with limited investigative staff. With illegal discharges into the air, water, and waste, investigators were able to gather evidence and prosecutors were successfully able to punish a range of environmental criminals using criminal provisions from these major federal environmental statutes.

With only 230 prosecutions occurring as the result of EPA-CID investigations across these three states over 37 years, the larger picture here is not one of overzealous prosecution, but possibly sub-optimal deterrence achieved with limited resources.[86] With less than 150 special agents to police

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83 For a comparison of these findings with *CWA* prosecutions occurring across the United States in a similar time frame, see Joshua Ozymy & Melissa L. Jarrell, "Illegal Discharge: Exploring the History of Charging and Sentencing Patterns in U.S. Clean Water Act Criminal Prosecutions" (25 March 2021) 32:2 Fordham Envtl LJ.

84 This finding has relevance, as there are very few studies in the United States that examine state or local environmental criminal enforcement. For qualitative work examining the organizational characteristics of environmental enforcement supports the coordinated nature of the enterprise, see Joshua C. Cochran et al, "Court Sentencing Patterns for Environmental Crimes: Is there a 'Green' Gap in Punishment?" (2018) 34 J Quantitative Criminology 37 at 38–40; Michael J. Lynch, "County-Level Environmental Crime Enforcement: A Case Study of Environmental/Green Crimes in Fulton County, Georgia, 1998-2014" (2019) 40:9 Deviant Behavior 1090 at 1090–104; Mintz, *supra* note 26 at 10495–497.

85 See Brickey, *supra* note 36 at 1077–80.

86 This finding speaks to the broader issue of whether limited enforcement staff in EPA-CID and DOJ-ECS can sufficiently investigate and prosecute enough cases to provide a specific and general deterrent value to individuals and companies within the regulated universe. The answer is complex, probably sometimes in particular cases where large penalties result that can deter similar actions by companies and individuals or change

the entire country, EPA-CID must cooperate with state agents to investigate environmental crimes, but even then, resources are limited. The number of criminal investigators has been declining over time, well below the statutory minimum.[87] For criminal enforcement to have sufficient scope and ability, EPA-CID must be able to hire at least the statutory minimum of 200 investigators, if not exceed that total set over three decades ago.[88] If criminal enforcement is to remain successful at policing and prosecuting serious, chronic, and willful violations of federal and state environmental crimes in the Pacific Northwest in the foreseeable future, additional resources are warranted.[89]

Extensive punishments for serious crimes have occurred, but these are far and few between. Very few defendants received significant prison sentences outside of the *EISA* fraud cases previously noted, and only a handful of large corporations received multi-million-dollar penalties.[90] There have always been disputes over prosecutorial discretion at DOJ-ECS and the use of criminal provisions to punish environmental crime.[91] Our

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corporate practices for fear of liability. Criminal enforcement has always dealt with limited staff and had to be strategic in its decision to police and prosecute certain offences and offenders. See Lynch et al, *supra* note 33 at 1096–97; Devaney, *supra* note 6 at 1–4.

87 "EPA CID Agent Count" (2019), online (pdf): *Public Employees for Environmental Responsibility (PEER)* <www.peer.org/wp-content/uploads/2019/11/11_21_19-Federal_Pollution_EPA_CID_Agent_Count.pdf> [perma.cc/S4GP-GKFU] [PEER, "Agent Count"].

88 As per *The Pollution Prosecution Act,* 42 USC § 13101 (1990). P.L. 101-593, which mandated EPA hire a minimum of 200 criminal enforcement agents by fiscal year 1995 and increase civil enforcement investigators. See "Pollution Prosecution Act of 1990" (last visited 2021), online: *Govtrack* <www.govtrack.us/congress/bills/101/s2176/summary> [perma.cc/DJ7G-MEWR].

89 EPA can persist with limited resources, but historically has managed to plug along across hostile and sympathetic presidential regimes. This is also true for the Trump Administration that did significant damage to agency morale and limited previous presidential actions and worked to change a variety of statutory guidelines and interpretations to reduce the reach of the agency but will not likely destroy its enforcement apparatus. See Joshua Ozymy & Melissa Jarrell, "Administrative Persistence in the Face of a Hostile Regime: How the EPA Can Survive the Trump Administration" (1 December 2017) 10:6 Environmental Justice 1 at 1–8; Mintz, *supra* note 25 at 10912.

90 These results may suggest the lack of large penalty sentences and limited cases reduce the deterrent value of federal criminal enforcement. See Lynch, *supra* note 33 at 99–93.

91 DOJ-ECS was criticized by Congress in the late 1980s and early 1990s for being too lenient on environmental offenders. As time progressed, and by the end of the 1990s,

results in these three states over almost four decades suggest overzealous prosecution is probably not the case.[92]

For criminal enforcement to be more effective, it arguably requires greater salience attached to its activities. Very few environmental crimes get reported by the media.[93] Without enhanced salience, the public and policymakers can easily overlook this important tool that enhances the robustness and application of environmental law in practice.

A final act would be to encourage greater community policing of environmental crimes. Understaffed investigators and enforcement staff are ill-equipped to monitor and police so many industrial sources of pollution in the region, let alone mobile sources and unpermitted facilities and individuals that violate the law. The EPA's Report a Violation website, for example, resulted in EPA-CID opening 35 cases, and six of those cases were successfully prosecuted in the decade since its inception; this could be expanded.[94] Additional work to encourage people living near industrial sources of pollution, such as environmental justice communities, would also potentially aid investigations. The EPA's Office of Environmental Justice (OEJ) spends millions of dollars including environmental justice communities in the stakeholder participation process and providing small grants to researchers and communities to study health effects and other issues.[95] Perhaps more work could be done to both train and react to data collected from affected communities that suffer disproportionate health

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the discussion had changed to impugn the agency for being overzealous and EPA received the same treatment. Increased penalties – particularly for knowing violations such as knowing endangerment – resulted from this desire by political principals at the time to give criminal enforcement agencies more teeth. For a discussion of the early politics behind funding and supporting federal criminal enforcement, see Judson W. Starr, "Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remain" (1991), 59:4 Geo Wash L at 900–02.

92 Limited empirical work shows that the decision to prosecute a federal environmental offence almost always involves a defendant or defendants that committed a crime with one or more aggregating factors, suggesting prosecutors choose cases involving serious, chronic, and/or willful violations. See Uhlmann, *supra* note 35 at 159.

93 Melissa L. Jarrell, "Environmental Crime and Injustice: Media Coverage of a Landmark Environmental Crime Case" (2009), 6:1 Southwest J Crim Justice 25 at 27–28.

94 US, EPA, *Criminal Enforcement Program Overview* (October 2011) at 6–7, online: <19january2017snapshot.epa.gov/sites/production/files/documents/oceft-overview-2011.pdf> [perma.cc/WM9S-WRLW].

95 US, EPA, *Factsheet on the EPA's Office of Environmental Justice* (2017), online: <www.epa.gov/sites/production/files/201709/documents/epa_office_of_environmental_justice_factsheet.pdf> [perma.cc/T6U2-WTVP].

burdens from these facilities and have the most to gain from deterring polluters from violating environmental laws.

The Biden Administration has made significant commitments on paper to enhancing environmental enforcement, particularly as it pertains to prioritizing environmental justice issues within the DOJ.[96] Such work will have to respond to systematic damage done to the EPA by the Trump Administration.[97] In addition to the damage to the agency's morale and organizational culture, other studies show that the Trump EPA significantly reduced civil enforcement actions and the number of criminal investigative staff.[98] Through the end of 2019, criminal prosecutions were down from the previous few years.[99] Overall funding budgetary and staffing support for EPA, however, were consistent with the post-2009 Financial Crisis funding from the Obama Administration.[100]

EPA has a lot of experience managing chronic instability in political and budgetary support. The Reagan Administration was terribly hostile to the agency. Anne Gorsuch was appointed to run the agency and quickly acted to slash budgets and enforcement, but EPA weathered the storm and maintained its enforcement prerogatives and did the same in the Clinton Administration that proved to be less of a supporter than expected.[101] In this vein, EPA often "treads water", but finds ways to maintain enforcement efforts, even though decades of chronic opposition and inconsistent support have severely reduced its morale and ability to properly function as

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96 "The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity" (2021), online: *Biden-Harris Campaign* <joebiden.com/environmental-justice-plan/> [perma.cc/8AND-T7QS].

97 Jay Michaelson, "The Ten Worst Things Scott Pruitt's EPA Has Already Done" (29 December 2017), online: *Daily Beast* <www.thedailybeast.com/the-ten-worst-things-scott-pruitts-epa-has-already-done> [perma.cc/N77Y-YUVF].

98 "Total Civil Enforcement Case Initiations and Conclusions" (2017), online (pdf): *PEER* <www.peer.org/wp-content/uploads/attachments/3_29_18_Civil_Enforcement_Case_Initiations_Conclusions.pdf> [perma.cc/9XE2-WAUF]; "Federal Criminal Enforcement: Environmental Protection Agency" (2018), online (pdf): *PEER* <www.peer.org/wpcontent/uploads/attachments/3_29_18_EPA_Crim_cases_Referred_Prosecuted_1986-2018.pdf> [perma.cc/T5AU-THX8]; PEER, "Agent Count", *supra* note 87.

99 Ozymy et al, *supra* note 33. See also David M. Uhlmann, "New Environmental Crimes Project Data Shows that Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration" (October 2020) Environmental Crimes Project 1.

100 US, EPA, *EPA's Budget and Spending* (24 June 2020), online: <www.epa.gov/planandbudget/budget> [perma.cc/X3WV-LZQR].

101 Mintz, *supra* note 26.

a regulatory enforcement agency.[102] If the Biden Administration wishes to achieve its loftier environmental goals – such as combatting climate change, reducing environmental injustices, and greening the economy while fixing the country's badly aging infrastructure – all the funding in the world or new laws passed by the U.S. Congress will mean little without proper enforcement.

[102] Mintz, *supra* note 25 at 10912; Joel A. Mintz, "Running on Fumes: The Development of New EPA Regulations in an Era of Scarcity" (1 June 2016) 46:6 Envtl L Reporter 10510 at 10510–519.

Talking to Strangers: A Critical Analysis of the Supreme Court of Canada's Decision in *R v Mills*

CHELSEY BUGGIE*

ABSTRACT

In *R v Mills*, an undercover officer acting without a warrant posed as a 14-year-old girl online and communicated with Mr. Mills through Facebook messages. The officer eventually arranged a meeting with, and arrested Mr. Mills who sought to have the message evidence excluded.

The Supreme Court unanimously ruled to allow the evidence. However, only Justice Martin agreed that Mr. Mills' s. 8 rights were engaged and infringed. This paper takes the position that the *Mills* decision is inconsistent with prior s. 8 jurisprudence regarding content neutrality and expectation of privacy in conversations. The type of sting operation used in *Mills* should have been classified as participant surveillance requiring a warrant.

In *Mills*, the Supreme Court unduly adjusted the balance of power to favour law enforcement. The result of the *Mills* decision is that law enforcement may continue to use this investigative technique unregulated, and unencumbered. Such an adjustment in favour of law-enforcement is not justified. Other investigative techniques are available to law enforcement and obtaining a warrant would not unduly hinder child luring investigations. Failure to oversee these operations could have a potential

* Chelsey Buggie recently obtained her Juris Doctor from the University of New Brunswick's Faculty of Law and is currently pursuing a Masters of Technology Management at Memorial University. Chelsey has a strong interest in privacy law, as well as the intersections of novel technologies and criminal law. The author is grateful to the three anonymous reviewers of this paper for their helpful comments. She would also like to extend her gratitude to Dr. Kerri Froc for her extensive feedback and support.

chilling effect on legitimate online relationships and reinforce stereotypes about hypersexualized youth online.
Keywords: Child Luring; Section 8; Search and Seizure; Participant Surveillance; the *Duarte* Principle

I. INTRODUCTION

In 1982, Compaq introduced the first "portable" computer. It was the size of a sewing machine and weighed 28 pounds. 1982 is also the year that the *Canadian Charter of Rights and Freedoms* came into force. S. 8 of the *Charter* guarantees that "[e]veryone has the right to be secure against unreasonable search or seizure."[1] Its purpose is to prevent unjustified searches from occurring, which can only be accomplished "by a system of prior authorization, not one of subsequent validation."[2] In *Hunter v Southam Inc*, the Supreme Court of Canada unanimously explained that s. 8 "must… be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[3] For example, in 1982, it would be difficult to imagine that Canadians would one day hold computing power in the palm of their hand and carry years' worth of written correspondence in their pockets.[4]

In 1997, just 22% of Canadian households owned one cellphone for personal use; by 2019, 89% of internet-users owned a smart-phone.[5] With the advancement of technology comes new methods of committing crimes. In the not-so-distant past, purchasing an illegal firearm likely involved meeting a stranger in a potentially unsafe location. Today, the same firearm can be purchased anonymously through the darknet using an untraceable cryptocurrency and be delivered directly to the buyer's doorstep. Law enforcement lament that the advancement of technology has outpaced their ability to solve crimes, calling on legislators and judges to "restore the pre-

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1 *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

2 *Hunter v Southam Inc*, [1984] 2 SCR 145 at 160, 11 DLR (4th) 641 [*Southam Inc*] [emphasis in original].

3 *Ibid* at 155.

4 Gerald Chan, "Text Message Privacy: Who Else is Reading This?" (2019) 88 SCLR Osgoodes Constitutional Cases Conference at 74 [Chan, "Text Message Privacy"].

5 *R v Canfield*, 2020 ABCA 383 at para 28 [*Canfield*].

digital status quo."[6] Equilibrium adjustment theory suggests that when changing technology expands police power, courts can tighten constitutional privacy protections to restrict police power and restore the status quo; conversely, when police power is overly restricted, courts can loosen protections to achieve the same goal.[7]

In the 2019 case of *R v Mills*,[8] an officer acting without prior judicial authorization (a warrant) posed online as a 14-year-old girl and engaged in conversations with Mr. Mills through Facebook Messenger and Hotmail, taking screenshots of the conversations. The officer also connected with other minors online to make the profile appear legitimate.[9] Eventually, the officer arranged a meeting where Mr. Mills was subsequently arrested and charged with child luring. Mr. Mills argued that he had a reasonable expectation of privacy in the conversation under s. 8 of the *Charter* and that the screen-shot evidence should be excluded. The Supreme Court allowed the screen-shot evidence to be admitted.

This paper will provide a critical analysis of the Supreme Court of Canada's decision in *R v Mills*, arguing that the decision is inconsistent with prior s. 8 jurisprudence and unduly shifts the balance of power to favour law enforcement. This paper reviews the s. 8 jurisprudence leading up to *Mills* on matters such as participant surveillance and the expectation of privacy in electronic conversations. Prior to *Mills*, the s. 8 analysis proceeded in a content-neutral manner. This paper takes the position that the *Mills* decision contradicts prior s. 8 jurisprudence in particular *Duarte* and *Marakah*. The decision creates ambiguity as to who constitutes a "stranger". This ambiguity, along with policing marginalized sexual communities could have the effect of chilling legitimate online communications. Finally, this paper will address why such a shift in the balance of power is unwarranted and argue that these operations should be subject to regulation.

Despite the fact that cellphones have been widely used for over a decade, the first cases addressing text-message privacy under s. 8 of the *Charter* did not reach the Supreme Court of Canada until the case of *R v*

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6 Steven Penney, "The Digitization of Section 8 of the Charter: Reform or Revolution?" (2014) 67 SCLR Osgoodes Constitutional Cases Conference at 505 [Penney, "Digitalization of Section 8"].

7 Owen S. Kerr, "An Equilibrium Adjustment Theory of the Fourth Amendment" (2011) 125 Harvard LR at 482.

8 *R v Mills*, 2019 SCC 22 [*Mills*].

9 Tamir Israel Samuelson-Glushko, *Digital Privacy in Emerging Contexts* (Canadian Internet Policy & Public Interest Clinic, 2019) at 11.

Marakah and its companion case *R v Jones* in 2017.[10] Both Marakah and Jones were accused of trafficking firearms and law-enforcement wished to obtain copies of their text-messages from consenting third parties without prior judicial authorization. In *Marakah*, a majority of the Supreme Court recognized that a reasonable expectation of privacy exists in a conversation, even after the message is no longer in the sender's control.[11] In *Jones*, the Supreme Court held that police require a production order to obtain copies of text messages from a service provider.[12] Chief Justice McLachlin (as she then was) wrote: "In consequence, the fruits of a search cannot be used to justify an unreasonable privacy violation. To be meaningful, the s. 8 analysis must be content neutral."[13]

Although the *Mills* decision is technically a unanimous decision as to the admissibility of the text-message evidence, it is anything but unanimous with respect to the principles in the case. Justice Brown, writing for a "pseudo-majority" of himself, Justices Abella and Gascon concluded that there is no expectation of privacy in messages sent to children who are strangers, therefore s. 8 was not engaged.[14] In a concurring judgement, Justice Karakatsanis with Chief Justice Wagner concurring determined that no search or seizure occurred as the undercover officer was the intended recipient. She writes that individuals cannot expect that their messages will be kept private from the person with whom they are communicating.[15] Justice Moldaver concurs with both assertions, writing "each set of reasons is sound in law."[16] Justice Martin found that the accused had a reasonable expectation of privacy in the messages, and that his s. 8 rights were infringed, but excluding the message evidence would bring the administration of justice into disrepute.[17] Such a divide in reasoning will almost certainly lead to confusion as to how lower courts should apply the law.[18]

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10 Chan, "Text Message Privacy", *supra* note 4 at 69.

11 *R v Marakah*, 2017 SCC 59 [*Marakah*].

12 *R v Jones*, 2017 SCC 60 [*Jones*].

13 *Marakah*, *supra* note 11 at para 48.

14 *Mills*, *supra* note 8 at paras 27–29.

15 *Ibid* at paras 36–37.

16 *Ibid* at paras 66–68.

17 *Ibid* at paras 72–73.

18 Peter McCormick, "When Judicial Disagreement Doesn't Matter" (15 November 2018), online: *Double Aspect* <doubleaspect.blog/2018/11/15/when-judicial-disagreement-doesnt-matter/> [perma.cc/XK8Q-UJC2]; Lee Ann Conrod, "Smart Devices in Criminal Investigations: How Section 8 of the Canadian Charter of Rights and

The decision of Justice Martin is arguably most consistent with prior s. 8 jurisprudence. The Supreme Court has routinely taken a firm stance against warrantless electronic police surveillance even where the target of said surveillance is participating in illegal activity. In *Wong*, the Supreme Court found that a person had an expectation that they would be free from police surveillance in a hotel room, even while hosting an illegal gambling event.[19] Later, in *Duarte*, the Court determined that police could not use a video camera to observe an undercover officer communicating with the accused without prior judicial authorization.[20]

In *Mills*, the Court abandons content-neutrality and considers the nature of the crime in the s. 8 analysis. Justice Martin asserts that this "put[s] courts in the business of evaluating the Canadian public's personal relationships with a view to deciding which among them deserve *Charter* protection under s. 8."[21] Ambiguity as to who constitutes a "stranger" could have a potential chilling effect on legitimate online communications.[22] The result of the *Mills* decision is that law enforcement may continue to use this sting technique unregulated, and unencumbered.[23]

II. Section 8 Jurisprudence

A. Framework for Evaluating Claims Under Section 8 of the *Charter*

S. 8 of the *Charter* guarantees that "[e]veryone has the right to be secure against unreasonable search or seizure."[24] In *Hunter v Southam Inc*, the Supreme Court unanimously agreed that the purpose of s. 8 is to prevent unjustified searches from occurring which can only be accomplished "by a system of prior authorization, not one of subsequent validation."[25] In most circumstances, judicial authorization must be obtained for searches and seizures.

Freedoms Can Better Protect Privacy in the Search of Technology and Seizure of Information" (2019) 24 Appeal 115 at 125.

19 *R v Wong*, [1990] 3 SCR 36, 120 NR 34 [*Wong*].

20 *R v Duarte*, [1990] 1 SCR 30, 65 DLR (4th) 240 [*Duarte*].

21 *Mills*, *supra* note 8 at 110.

22 Steven Penney, "*R v Mills*: Sacrificing Communications Privacy to Catch a Predator?" (2019) 54 Crim Reports 1 at 7–8 [Penney, "*R v Mills*"].

23 *Ibid* at 2.

24 *Charter*, *supra* note 1.

25 *Hunter v Southam Inc*, *supra* note 2 at 160.

Evaluating s. 8 claims is a two-step analysis; the first part of the analysis asks whether there was a search or seizure.[26] A court will determine that the state has conducted a search when it invades an area in which one has a reasonable expectation of privacy. In the context of informational privacy, a search occurs where the state obtains "personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state."[27] If there was a search, then the second portion of the test evaluates whether the search or seizure was reasonable. In order to be considered reasonable the search must be authorized by law, the law itself must be reasonable, and the manner in which the search is conducted must be reasonable.[28] Warrantless searches are considered *prima facie* unreasonable and the state must rebut this presumption by proving on a balance of probabilities that the search was authorized by law and was conducted in a reasonable manner.[29]

The onus is on the claimant to "establish a reasonable expectation of privacy in the subject matter of the search."[30] This means that the person subjectively expected that the subject matter would be private and that this expectation was objectively reasonable.[31] Courts may infer that unless there is evidence to the contrary, information on a person's cell phone attracts a subjective expectation of privacy.[32] On the other hand, objective reasonability tends to be the point of contention in many s. 8 analyses.[33] Whether the claimant's expectation of privacy was objectively reasonable is assessed using the non-exhaustive list of factors outlined by the Supreme Court in *R v Edwards*.[34] These factors include possession or control over the

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26 *R v Tessling*, 2004 SCC 67 at para 18; *R v Evans*, [1996] 1 SCR 8 at para 11, 131 DLR (4th) 654.

27 Chan, "Text Message Privacy", *supra* note 4 at 70.

28 *R v Collins*, [1987] 1 SCR 265 at 278, 38 DLR (4th) 508.

29 Chan, "Text Message Privacy", *supra* note 4 at 70.

30 *Canfield*, *supra* note 5 at para 59.

31 *Marakah*, *supra* note 11 at para 10; *Southam Inc*, *supra* note 2 at 159–60.

32 *Canfield*, *supra* note 5 at para 62; *R v Fearon*, 2014 SCC 77 at para 51 [*Fearon*].

33 Chan, "Text Message Privacy", *supra* note 4 at 76; Gerald Chan, "Search and Seizure of Private Communications" in Nader Hasan, ed, *Digital Privacy in Canada* (Toronto: LexisNexis Canada Inc, 2018) at 119 [Chan, "Search and Seizure"]; Leonid Sirota, "What was Equilibrium Like?" (31 May 2019), online: *Double Aspect* <doubleaspect.blog/2019/05/31/> [perma.cc/SXS8-EY43] [Sirota, "Equilibrium"].

34 Nader Hasan, "Searching the Digital Device" in Gerald Chan & Nader Hasan, eds, *Digital Privacy - Criminal, Civil and Regulatory Litigation* (Toronto: LexisNexis Canada Inc, 2018) at 5; *R v Edwards*, [1996] 1 SCR 128 at para 45, 132 DLR (4th) 31.

property searched, the private nature of the subject matter searched, and the place where the search occurred.[35] In the context of electronic communications, the "place" is not a physical location, but rather the sphere of the electronic conversation.[36] Where an individual's right to privacy has been infringed upon by the state, they may seek a remedy of exclusion under s. 24(2) of the *Charter*.[37]

The proceeding sections will review s. 8 jurisprudence leading up to the decision in *R v Mills*.

B. Early Informational Privacy Cases

The Supreme Court first addressed informational privacy in *R v Plant*.[38] The appellant was accused of having a marijuana-grow-operation. Police obtained his electricity records from his service provider, which he sought to have excluded. The majority found that electricity patterns did not "reveal intimate details of the appellant's life" and therefore were not sufficiently "personal and confidential" to attract protection under s. 8.[39] Justice Sopinka[40] (as he then was) discusses the values underlying s. 8 protection:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.[41]

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35 *Canfield*, *supra* note 5 at para 62; *Marakah*, *supra* note 11 at para 24; *R v Edwards*, *supra* note 34 at para 45.

36 *Marakah*, *supra* note 11 at para 27; Chan, "Text Message Privacy", *supra* note 4 at 72.

37 Chan, "Text Message Privacy", *supra* note 4 at 70.

38 *R v Plant*, [1993] 3 SCR 281, 12 Alta LR (3d) 305 [*Plant*].

39 *Ibid* at 293–94. Justice McLachlin strongly dissented, expressing that the information was not public, the police obtained it through a "special arrangement" and therefore should have been required to obtain a warrant. She disagreed as to the "sufficiently personal" threshold, as the records gave information as to what was happening inside a private dwelling, "the most private of places". She asserts that a reasonable person would conclude that such records should only be used for the purpose for which they were made, not divulged to strangers without legal authorization.

40 With former Chief Justice Lamer and Justices La Forest, Gonthier, Cory, and Iacobucci concurring.

41 *Plant*, *supra* note 38 at 293–294.

The idea of a "biographical core" places one's expectation of privacy on a spectrum. Information such as sexual orientation would be considered extremely personal and worthy of protection, whereas preference in hockey team is likely less so.[42]

The subsequent 5-4 split in *R v Gomboc*[43] on the significance of the biographical core creates a patchwork of reasons, resulting in confusion for law enforcement and lower courts alike.[44] Law enforcement requested that the electricity provider install a device which would record power consumption in order to determine whether it was consistent with a grow-operation. This information was used in order to obtain a search warrant for Mr. Gomboc's residence. Justice Deschamp[45] relied on the biographical core principle to determine whether there was a reasonable expectation of privacy. The concurring decisions of Justice Abella[46] and dissenting decision of Chief Justice McLachlin (as she then was)[47] representing five members of the court did not employ the biographical core principle to assert s. 8 protection. This indicates its use is limited in the context of informational privacy.[48] This divergence in reasons creates confusion:

> It is a challenge to prevent a breach when one cannot foresee how a judgment will split and where the majority will fall. When police are left with lengthy split judgments, it is difficult to understand the law. How is the Court going to handle new technology coming when they cannot even agree how to treat utility records?[49]

Similarly, the divergent reasons in *Mills* are also apt to create confusion for lower courts and law enforcement.

C. Surveillance and Neutrality

1. Third-Party Surveillance

There are two types of surveillance: third-party and participant. Third-party surveillance is the "capture of communications between two or more parties, none of whom were aware of the capture at the time it occurred",

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42 Penney, "Digitalization of Section 8", *supra* note 6 at 520.
43 *R v Gomboc*, 2010 SCC 55 [*Gomboc*].
44 Conrod, *supra* note 18 at 125.
45 Justices Charron, Rothstein, and Cromwell concurring.
46 Justices Binnie and LeBel concurring.
47 Also on behalf of Justice Fish.
48 Conrod, *supra* note 18 at 125.
49 *Ibid*.

for example, wiretapping.[50] S. 184(1) of the *Criminal Code* makes it an indictable criminal offence to wilfully intercept private communications.[51] The requirements for law enforcement to engage in wiretap operations are stringent. They must establish that there is probable cause to believe that a specified crime has been or will be committed and that the interception will afford evidence of the specified crime.[52] They must also establish investigative necessity.[53] The authorization must be signed by a provincial or federal Attorney General, the Minister of Public Safety, or their respective deputies.[54] In contrast, general warrants only require that the applicant establish reasonable grounds to believe an offence has been or will be committed.[55]

2. Consent Surveillance and the Duarte Principle

The second type of surveillance is participant, or "first party," surveillance wherein one party (such as an undercover officer or informant) is aware that the conversation is being recorded by the state and the other party is not.[56] Participant surveillance was at issue in *R v Duarte*. Police equipped an apartment with audio-equipment that recorded an informant and undercover officer discussing a cocaine transaction with the appellant.[57] The Supreme Court framed the issue as:

> [W]hether our constitutional right to be secure against unreasonable search and seizure should be seen as imposing on the police the obligation to seek prior judicial authorization before engaging in participant surveillance, or whether the police should be entirely free to determine whether circumstances justify recourse to participant surveillance and, having so determined, be allowed an unlimited discretion in defining the scope and duration of participant surveillance.[58]

Prior to the Supreme Court's decision in *Duarte*, participant surveillance operations were exempt from the requirement for judicial authorization.[59]

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50 Penney, "*R v Mills*" *supra* note 22 at 3.

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

52 *Ibid*, s 186(1)(a) [emphasis added].

53 *Ibid*, s 185(1)(h). In practice, this means disclosing whether other investigative procedures have been tried and failed, or why they are unlikely to succeed, or that urgency renders other investigative techniques impractical.

54 *Ibid*, s 185(1).

55 *Ibid*, s 487.01(a) [emphasis added].

56 Penney, "*R v Mills*", *supra* note 22 at 4.

57 *Duarte*, *supra* note 20.

58 *Ibid* at 42.

59 Penney, "*R v Mills*", *supra* note 22 at 4.

The Court emphasized that the regulation of electronic surveillance prevents not only the risk that our words will be repeated, but protects us against "the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words."[60] The Court found "no logical distinction" between third-party and participant surveillance.[61] The *Duarte* principle dictates that one party consenting to state interception of private communications does not waive the other parties' privacy interest.[62] The effect of the *Duarte* principle is that state must meet the wiretap threshold when obtaining a warrant for participant surveillance.

Similarly, in *R v TELUS Communications Co* (*TELUS*), the Supreme Court found that a general warrant was insufficient for law enforcement to prospectively obtain copies of customers' text message communications. Justice Abella writes: "The only practical difference between text messaging and the traditional voice communications is the transmission process. This distinction should not take text messages outside the protection of private communications to which they are entitled in Part VI."[63] This means that Canadians should be able to maintain the same expectation of privacy in text messages as in telephone calls, which require a wiretap warrant to intercept.

3. The Role of Probable Cause

As the above cases illustrate, the Court has regularly stressed the value of private communications. The *Duarte* principle dictates that participant and third-party surveillance are virtually indistinguishable.[64] Participant surveillance operations require law enforcement to establish probable cause to believe that a specified crime has been or will be committed and that the interception will afford evidence of the crime.[65] The purpose of this high threshold is to prevent the possibility that law enforcement will view recourse to electronic surveillance as a "routine administrative matter."[66] In *Duarte*, the Court held that the requirement for judicial authorization would not hamper police's ability to combat crime, but rather, would ensure that police restrict participant monitoring to cases where they can

60 *Duarte*, *supra* note 20 at 32.
61 *Ibid* at 33.
62 Penney, "*R v Mills*", *supra* note 22 at 5.
63 *R v TELUS Communications Co*, 2013 SCC 16 at para 5 [*TELUS*].
64 *Duarte*, *supra* note 20 at 33.
65 *Criminal Code*, *supra* note 51, s 186(1)(a).
66 *Duarte*, *supra* note 20 at 34.

demonstrate probable cause.[67] In *Mills*, the police engaged in highly personal conversations with Mr. Mills which resulted in the creation of an electronic record. Based on the aforementioned jurisprudence, this should have been classified as participant surveillance.

4. Neutrality

In *R v Wong*[68], the Supreme Court of Canada once again took a firm stance against police surveillance. Mr. Wong was accused of operating a "floating gaming house" from hotel rooms. Police installed a video camera in a room registered to Mr. Wong without prior judicial authorization. The Court frames the issue:

> Accordingly, it follows logically from what was held in *R. v. Duarte* that it would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.[69]

The Court further emphasizes that the *Duarte* principle is not limited to audio equipment but spans to all current and future means the state can use to electronically intrude on individual privacy.[70] Justice LaForest, writing for the majority[71] draws parallels to Orwellian dystopias, warning:

> While there are societies in which persons have learned, to their cost, to expect that a microphone may be hidden in every wall, it is the hallmark of a society such as ours that its members hold to the belief that they are free to go about their daily business without running the risk that their words will be recorded at the sole discretion of agents of the state.[72]

In *Gomboc*, the Court stressed that the focus of a s. 8 inquiry is not the "nature or identity of concealed items" but rather the "potential impact of the search on the person [or thing] being searched."[73] The decisions in *Duarte, Wong,* and *Gomboc* indicate that engaging in illegal activity does not preclude one's reasonable expectation of privacy under s. 8 of the *Charter*.

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67 *Ibid* at 33–34.

68 *Wong*, *supra* note 19.

69 *Ibid* at 49–50.

70 *Ibid* at 43–44.

71 Of former Chief Justice Dickson and Justices La Forest, L'Heureux-Dubé, and Sopinka.

72 *Wong*, *supra* note 19 at 46.

73 *Gomboc*, *supra* note 43 at para 39; Penney, "Digitalization of Section 8", *supra* note 6 at 511–12.

Later, in *Marakah*, the Supreme Court confirmed once again that s. 8 is to be interpreted in a content-neutral manner.[74]

D. Expectation of Privacy in Digital Devices and Communications

Courts may infer that unless evidence suggests the contrary, information on a person's cell phone attracts a subjective expectation of privacy.[75] In *R v Vu*, the Supreme Court held that a general warrant was insufficient justification for searching a persons' phone.[76] Similarly, in *R v Morelli,* Justice Fish (as he then was) asserts that it would be "difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer."[77] In *R v Cole*, the Supreme Court determined that a reasonable expectation of privacy exists even where there is not complete control over the subject-matter. A tech observed nude photos of a student on Mr. Cole's computer which were subsequently reported to law-enforcement. The Court determined that schools could search staff computers for the purposes of student safety, but law enforcement must still obtain a warrant for the search.[78]

Parallels can be drawn between s. 8 of the *Charter* and the American Fourth Amendment which protects people, their homes, and property against unlawful government search and seizure.[79] The Fourth Amendment is partially prefaced on the idea that "a man's home is his castle."[80] The home is viewed as a zone "beyond the reach of the modern regulatory state."[81] Today, mobile devices are likely to contain even more private

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74 *Marakah*, *supra* note 11 at para 11.

75 *Canfield*, *supra* note 5 at para 62; *Fearon*, *supra* note 32 at para 51.

76 *R v Vu*, 2013 SCC 60 [*Vu*]; Penney, "Digitalization of Section 8", *supra* note 6 at 515.

77 *R v Morelli*, 2010 SCC 8 at paras 2–3. In that case, a computer technician arrived unannounced at the Appellant's home to perform computer maintenance. The appellant was at home alone with his young daughter. The technician observed child pornography on the computer and immediately left. When he returned the next day, the computer had been "cleaned up". Nevertheless, he reported the issue to law enforcement who took away Mr. Morelli's computers for forensic examination.

78 *R v Cole*, 2012 SCC 53; Penney, "Digitalization of Section 8", *supra* note 6 at 515.

79 In cases such as *Wong* and *Duarte*, the Supreme Court draw parallels to Fourth Amendment Jurisprudence.

80 Jonathan L Hafetz, "'A Man's Home is His Castle?': Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries" (2002) 8:2 William & Mary J Race, Gender & Soc Justice 175 at 175.

81 *Ibid* at 176.

information than the home. Electronic conversations can paint a picture of one's financial situation, dating life, deepest thoughts, and insecurities. As Gerald Chan[82] points out, when we sit in the corner of a crowded room tapping away at our phones, "no one has any idea who we are communicating with (or if we are communicating at all)."[83] A similar analysis is put forth by Chief Justice McLachlin (as she then was) in *Marakah*:

> One can even text privately in plain sight. A wife has no way of knowing that, when her husband appears to be catching up on emails, he is in fact conversing by text message with a paramour. A father does not know whom or what his daughter is texting at the dinner table. Electronic conversations can allow people to communicate details about their activities, their relationships, and even their identities that they would never reveal to the world at large, and to enjoy portable privacy in doing so.[84]

Leonid Sirota[85] suggests that the blurring of lines between the spoken and written word leads to dispute over the level of privacy protection that ought to be granted.[86] For example, in *Marakah*, the issue was whether individuals could retain a reasonable expectation of privacy in their text messages once they are sent to and received on another person's device.[87] The Court answered the question in the affirmative, in particular as it relates to the state.[88]

In their submissions, the Crown attempted to draw parallels between text messages and letters as only the recipient of a letter has standing to challenge its search and seizure.[89] This argument was rejected by the Court, Chief Justice McLachlin reiterated that per *Wong*, s. 8 is meant to keep pace

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82 Gerald Chan is a partner at Stockwoods LLP where he practices criminal, constitutional, and regulatory litigation. He argued the cases of *Fearon*, *Marakah*, *Jones*, and *Mills* before the Supreme Court of Canada.

83 Chan, "Text Message Privacy", *supra* note 4 at 69.

84 *Marakah*, *supra* note 11 at para 36.

85 Leonid Sirota is a constitutional law scholar and the founder of the Double Aspect Blog. He teaches public law and legal philosophy at the Auckland University of Technology where he also directs the LLM program. He has a B.C.L /LL.B from McGill University, as well as an LL.M and J.S.D from the NYU School of Law.

86 Leonid Sirota, "Ceci est-il une conversation?" (13 December 2017), online: *Double Aspect* <doubleaspect.blog/2017/12/13/ceci-est-il-une-conversation/> [perma.cc/66G3-2J4Y].

87 Chan, "Text Message Privacy", *supra* note 4 at 72.

88 *Ibid*.

89 *Ibid* at 73; *Marakah*, *supra* note 11 at paras 86–87.

with technological development.[90] Instead, text messages were characterized as a "digital conversation", given the quantity of information they contain and the speed at which messages are transmitted.[91] The "place of the search" is the private electronic space created between the two parties to the conversation, and "control" is to be understood as the individual freedom to determine how, when, and to whom the sender discloses their information.[92]

Recall that the parties were corresponding about the sale of illegal firearms. Despite this fact the Supreme Court did not place a value-judgement on "Marakah's bad choice of friends or even worse, his bad judgment to deal drugs."[93] The fact that the parties were communicating about illegal activity was irrelevant to the s. 8 analysis.[94] This evaluation is consistent with *Duarte* and *Wong*.

The majority in *Marakah* held that parties obtain a reasonable expectation of privacy in their electronic communications, regardless of whether the police search the sender or recipient's device.[95] In its companion case *Jones*, the Court expanded upon their decision in *TELUS*. They clarified that police require a production order to obtain copies of historical text messages from service providers but must meet the requirements for a wiretap authorization when obtaining messages prospectively.[96] The differentiation was justified by the fact that allowing police surveillance of future messages under a general warrant alone could tempt the state into engaging in fishing expeditions.[97]

In *Marakah*, Chief Justice McLachlin indicates that s. 8 protections are not only applicable to text messages but extend to "technologically distinct" but "functionally equivalent" means of messaging such as iMessage and Blackberry Messenger.[98] On the other hand, communications shared to the

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90 *Marakah*, *supra* note 11 at para 86; *Wong*, *supra* note 19 at 44.

91 *Marakah*, *supra* note 11 at para 87.

92 Chan, "Text Message Privacy", *supra* note 4 at 72–73.

93 Lisa Silver, "A Look Down the Road Taken by the Supreme Court of Canada in R v Mills" (5 May 2019), online: *CanLii Connects* <canliiconnects.org/en/commentaries/66706> [perma.cc/V4U8-YQ34].

94 *Marakah*, *supra* note 11 at paras 11, 54.

95 Chan, "Text Message Privacy", *supra* note 4 at 70.

96 *Ibid*. See also *Jones*, *supra* note 12; *TELUS*, *supra* note 63.

97 Chan, "Text Message Privacy", *supra* note 4 at 80–81.

98 *Marakah*, *supra* note 11 at para 18.

digital "public square" such as social media posts and chatrooms are unlikely to fall under the umbrella of s. 8 protection.[99]

E. *R v Mills*

1. Background

In 2012, two separate officers of Royal Newfoundland Constabulary (RNC) created Hotmail and Facebook accounts posing as 14-year-old girls. Mr. Mills initiated contact with "Leann" (the first fake account) through Facebook. The RNC took screenshots of the conversations. The officers created a second account "Julie" who then initiated contact with Mr. Mills.[100] In order to make the profile appear more legitimate, the officers also communicated with minors who interacted with LeAnn's profile and provided their personal information to the officers.[101] Eventually Mr. Mills and "Leann" agreed to meet in a park, where Mr. Mills was arrested and charged with child-luring. At issue was whether this investigative technique amounted to a search or seizure under s. 8 of the *Charter*, and whether the police had intercepted a private communication without prior judicial authorization.[102]

While this decision is technically "unanimous", it is anything but. All justices reached the conclusion that the messages should be admitted, but for wholly different reasons. As Peter McCormick writes: "Putting the point as starkly as possible: the outcome really matters only to the immediate parties, but the reasons matter to everybody. This is because it is the reasons, not the outcome, that constitute the precedent that constrains the immediate court and instructs the lower courts."[103] The reasons in *Mills* are highly divergent and apt to cause confusion for lower courts.

2. Reasoning

Justice Brown writes for himself, Justices Abella and Gascon forming a "majority". They found that Mr. Mills could not claim an objectively reasonable expectation of privacy when "communicating with someone he

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99 Penney, "*R v Mills*", *supra* note 22 at 5.

100 *R v Mills*, [2014] NJ No 392 at paras 3–12, 2014 CarswellNfld 392; *Mills*, *supra* note 8 at paras 5–7.

101 Samuelson-Glushko, *supra* note 9 at 11.

102 *Mills*, *supra* note 8 at para 1.

103 McCormick, *supra* note 18.

believed to be a child, who was a stranger to him."[104] Justice Brown characterizes objective reasonableness as a "normative question about when Canadians ought to expect privacy given the applicable considerations. On a normative standard, adults cannot reasonably expect privacy online with children they do not know."[105] Justice Brown justifies departing from the standard of content neutrality based on the fact that the police knew that the relationship was fictitious and therefore LeAnn was a "stranger" to Mr. Mills.[106]

Justice Karakatsanis, writing for herself and Chief Justice Wagner found that there was no search or seizure, and thus no need to undertake a s. 8 analysis. She writes "because it is not reasonable to expect that your messages will be kept private from the intended recipient (even if the intended recipient is an undercover officer)."[107] The conversation "necessarily took place in a written form", therefore the screen captures were a mere copy of a written record, not a separate and surreptitious permanent record created by the state.[108] She attempts to distinguish the case from *Duarte* by suggesting that participants in electronic conversations know that the record will be created and create it themselves as opposed to the state doing so.[109]

Justice Moldaver found the reasons of both Justice Brown and Justice Karakatsanis "sound in law" forming a proper basis for dismissing Mr. Mills' appeal.[110]

Justice Martin frames the issue as whether it would be reasonable for those in a free and democratic society to expect that the state will only access electronic recordings of private communications where they have sought the authorization to do so.[111] Justice Martin departs from her colleagues in determining that a search occurred, and that because that search occurred without a warrant, it was unreasonable.[112] Individuals have a reasonable

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104 *Mills*, *supra* note 8 at para 22.
105 *Ibid.*
106 *Ibid* at paras 20, 22, 27.
107 *Ibid* at paras 36–37.
108 *Ibid* at paras 36–37, 45.
109 *Ibid* at para 47.
110 *Ibid* at paras 66–67.
111 *Ibid* at para 133.
112 *Ibid* at para 76.

expectation that surreptitious electronic recordings of their communications cannot be acquired by the state at its sole discretion.[113]

Justice Martin recognizes that means of communication have shifted from oral to text-based conversations. In fact, written electronic communications are a "virtual prerequisite" for participation in modern society.[114] This shift should not waive the state's duty to obtain prior judicial authorization in order to access electronic recordings of private communications. She asserts that this duality should "support, not undermine the protection of privacy rights, because a recording exists and the state has unrestricted and unregulated access to it."[115] Given that electronic conversations have "characteristics of permanence, evidentiary reliability, and transmissibility", she characterizes them as analogous to surreptitious electronic recordings.[116]

Although Justice Martin found that Mr. Mills' s. 8 rights were infringed, she would have allowed the evidence under s. 24(2) given that the seriousness of the breach was minimal and excluding the evidence would bring the administration of justice into disrepute.[117]

III. Implications of the *Mills* Decision

A. Overturning or Equilibrium?

In *Marakah*, Chief Justice McLachlin (as she then was) asserts that "the fruits of a search cannot be used to justify an unreasonable privacy violation."[118] Similarly, the nature of the crime in *Mills*, though abhorrent, cannot be used to justify the Supreme Court's departure from decades of precedent. In the limited literature regarding *R v Mills*, two distinct schools of thought have emerged. Professor Steven Penney[119] argues that the reasons of Justices Brown and Karakatsanis effectively overturn the principles

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113 *Ibid* at para 72.

114 *Ibid* at para 96.

115 *Ibid* at para 93.

116 *Ibid* at para 91.

117 *Ibid* at para 149.

118 *Marakah*, *supra* note 11 at para 48.

119 Steven Penney obtained an LL.M. from Harvard Law and is a professor of various criminal law topics at University of Alberta. He researches, teaches, and consults in the areas of criminal procedure, evidence, substantive criminal law, privacy, technology.

established in *Duarte* and *Marakah*.[120] Sirota disagrees with this analysis and characterizes the *Mills* decision as an attempt at equilibrium adjustment.[121]

Equilibrium adjustment theory suggests that states will calls on courts to restore the technological status quo.[122] As Kerr writes:

> Equilibrium-adjustment acts as a correction mechanism. When judges perceive that changing technology or social practice significantly weakens police power to enforce the law, courts adopt lower Fourth Amendment protections for these new circumstances to help restore the status quo ante. On the other hand, when judges perceive that changing technology or social practice significantly enhances government power, courts embrace higher protections to counter the expansion of government power. The resulting judicial decisions resemble the work of drivers trying to maintain constant speed over mountainous terrain. In an effort to maintain the preexisting equilibrium, they add extra gas when facing an uphill climb and ease off the pedal on the downslopes. [123]

In *Duarte*, Chief Justice Dickson (as he then was) writes: "A reasonable balance must therefore be struck between the right of individuals to be left alone and the right of the state to intrude on privacy in furtherance of its responsibilities for law enforcement."[124] This concept of balance is oft repeated in s. 8 jurisprudence.

Both the *Marakah* and *Mills* decisions are attempts at equilibrium adjustment. In *Marakah*, the Court "intended to preserve the previously undoubted privacy of the exact content of personal conversations" whereas in *Mills* the Court sought to retain some distinction between oral and electronic communications.[125] Sirota suggests that all justices in the *Mills* decision frame their reasons as a means to "preserve or restore a balance of privacy that these developments threaten to disrupt."[126] He points to Justice Brown's contention that the means used in *Mills* "would not significantly reduce the sphere of privacy enjoyed by Canadians."[127] He describes Justice Karakatsanis' reasons as "less explicit" in her effort at adjustment. She

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120 Steven Penney, "'To Catch a Predator' Reasonable Expectations of Privacy in R v Mills" (23 April 2019), online: *University of Alberta, Faculty of Law Blog* <ualbertalaw.typepad.com/faculty/2019/04/to-catch-a-predator-reasonable-expectations-of-privacy-in-r-v-mills.html> [perma.cc/55W3-YQEJ] [Penney, "Reasonable Expectations"].

121 Sirota, "Equilibrium", *supra* note 33.

122 Kerr, *supra* note 7.

123 *Ibid* at 487–88.

124 *Duarte*, *supra* note 20 at 41–42.

125 Sirota, "Equilibrium", *supra* note 33.

126 *Ibid*.

127 *Ibid*. See also *Mills*, *supra* note 8 at para 20.

insisted that written communications should not be treated as akin to oral communications and that any alternative conclusion would "significantly and negatively impact police undercover operations, including those conducted electronically."[128] Sirota interprets Justice Martin's decision as suggesting that "regardless of the parties' status, and all conversations, regardless of the means used to carry them out, were entitled to privacy protections."[129] Sirota agrees with Justice Karakatsanis that an electronic conversation between a suspect and undercover officer is not a meaningfully greater intrusion on privacy than if it were to occur in person.[130]

In prior s. 8 cases, the Crown has called on the Court to restore the status quo through the use of backward-looking analogies. In *Duarte*, the Crown suggested that the use of recording-equipment was merely an expansion on the memory capacity of police.[131] In *Vu*, the Crown compares information stored on phones to that stored in filing cabinets or cupboards.[132] In *Marakah*, the Crown compared text messages to sending letters.[133] All of these arguments were summarily rejected by the Court. Despite this fact, in the *Mills* decision Justice Karakatsanis still compares electronic conversations to letters writing "if Mills had sent a letter or passed a note to an undercover officer, s. 8 would not require the officer to get a warrant prior to reading it."[134] This is far from the only conflict between the *Mills* decision and prior s. 8 jurisprudence.

Professor Penney argues that the *Mills* decision has effectively overturned *Duarte* and *Marakah*.[135] The *Duarte* principle has held steady for over three decades, covering both telephone and in-person conversations, even where one party consents to the recording.[136] Penney argues that the investigative technique used in *Mills* differs from *Duarte* only insofar that the communications were electronic text as opposed to oral statements.[137] If the undercover officer were communicating with Mr. Mills by phone, they would have been required to obtain prior judicial authorization to record

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128 *Mills*, *supra* note 8 at para 52; Sirota, "Equilibrium", *supra* note 34.
129 Sirota, "Equilibrium", *supra* note 34.
130 *Ibid*.
131 *Duarte*, *supra* note 20 at 41–42.
132 *Vu*, *supra* note 76 at paras 1, 24.
133 *Marakah*, *supra* note 11 at paras 86–87.
134 *Mills*, *supra* note 8 at para 45.
135 Chan, "Search and Seizure", *supra* note 33 at 120.
136 Penney, "*R v Mills*", *supra* note 22 at 5.
137 *Ibid*.

the call.[138] The only factor distinguishing *Mills* from *TELUS* is that law enforcement effectively cut out the middleman by engaging in the conversation.[139] The police were thus engaging in participant surveillance, which per *Duarte*, is not legally distinct from third-party surveillance.

Penney disputes Justice Karakatsanis' contention that because messages are automatically recorded, the expectation of privacy within them is lower.[140] In fact, such an argument was already rejected by the Supreme Court in *Marakah* in recognizing the inherently private nature of text messages.[141] Justice Martin is also skeptical of this argument, asserting that the electronic recording of personal communications should support rather than undermine the protection of privacy rights.[142] She argues that "A general proposition that it is not reasonable for individuals to expect that their messages will be kept private from the intended recipient cannot apply when the state has secretly set itself up as the intended recipient."[143] This contention is highly reasonable. Mills' conduct and expectation of privacy would be based on his assumption that he was interacting with another private individual.[144] Justice Martin characterizes Justice Karakatsanis' finding that s. 8 was not engaged because of state participation as undermining the purpose of privacy rights.[145]

B. The Stranger Exception and Content Neutrality

A person is able to operate an illegal gambling ring behind a closed hotel door, yet still maintain an expectation of privacy under s. 8 of the *Charter*.[146] A person can converse (either in person or through text) about trafficking without fear of their words being recorded at the sole discretion of police.[147] Yet, an adult conversing with youth online could be opening themselves up to a judicial analysis as to the social value of their relationship.

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138 Chan, "Text Message Privacy", *supra* note 4 at 81.
139 *Ibid* at 82.
140 Penney, "*R v Mills*", *supra* note 22 at 5.
141 Penney, "Reasonable Expectations", *supra* note 120 at 5–6.
142 *Mills*, *supra* note 8 at para 93.
143 *Ibid* at para 101.
144 Samuelson-Glushko, *supra* note 9 at 10.
145 *Mills*, *supra* note 8 at para 107.
146 *Wong*, *supra* note 19.
147 *Marakah*, *supra* note 11; *Duarte*, *supra* note 20.

Both Penney and Sirota agree that Justice Brown's decision is narrower in scope. S. 8 protection does not apply to text communications with strangers believed to be children.[148] However, the term "stranger" is ambiguous.[149] When does an online persona transition from being a stranger to being familiar? Is an offline-world meeting required or are prior oral conversations (with or without video) sufficient? What level of identity verification is required?[150]

Mills' not having met the undercover officer in person is the only distinguishing factor between *Mills* and *Marakah*. Chan argues that not having met someone in person should not negate a reasonable expectation of privacy. He points to online dating, seeking medical advice from online doctors, and prospective e-mails between clients and lawyers as intensely private online conversations.[151] Not protecting these communications because the participants had never met in person would result in a bizarre outcome.[152] Today, communications cannot be "neatly separated into 'offline' and 'online' boxes." To treat text conversations between strangers differently would be "anachronistic" in an age of increasing levels of online communication between people who have never met.[153]

Justice Martin is also unimpressed with Justice Brown's stranger exception. She explains that the value of a personal relationship is not an appropriate object of a s. 8 inquiry.[154] A reading of s. 8 indicates that the right is guaranteed to everyone and it is not the court's role to analyze those relationships with a view of denying protection to certain classes of people.[155] To find otherwise would be to put "courts in the business of evaluating personal relationships" and entirely disregards content neutrality.[156] Justice Martin writes:

> Indeed, this concept of "relationship" is built upon two ideas that have already been rejected by this Court. First, the concept of "relationship" is really a proxy for "control" and is based in risk analysis reasoning that this Court has rejected.

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148 Penney, "*R v Mills*", *supra* note 22 at 6; Sirota, "Equilibrium", *supra* note 33.
149 Penney, "*R v Mills*", *supra* note 22 at 5.
150 *Ibid* at 6.
151 Chan, "Text Message Privacy", *supra* note 4 at 81.
152 *Ibid*.
153 Chan, "Search and Seizure", *supra* note 33 at 120.
154 *Mills*, *supra* note 8 at para 129.
155 *Ibid*.
156 *Ibid* at para 110.

> Second, "relationship" is also used to target illegal activity, and is not therefore content neutral.[157]

She concludes that it is inappropriate to insert judicial (dis)approbation of an accused's lifestyle into the s. 8 analysis. Courts should not create "*Charter*-free zones" in certain people's communications on the basis that they may be criminals whose relationships are not socially valuable.[158] Chan suggests the issue should be framed as whether Canadians have an expectation of privacy in their electronic messages, not whether there is an expectation of privacy in the message's illegal content.[159] This proposition is consistent with prior Supreme Court jurisprudence such as *Marakah* which roots privacy expectations in the private electronic conversation, as opposed to conversations between criminals or about crime.[160]

The crime of "child luring" is quite rare with only 122 cases occurring in Canada between 2011 and 2019.[161] Despite being rare, the crime of child luring creates a serious risk of harm for victims. In her judgement, Justice Martin turns her mind to this fact:

> The sexual exploitation of a minor is an abhorrent act that Canadian society, including this Court, strongly denounces. In an online context, adults who prey on children and youth for a sexual purpose can gain the trust of these young people through anonymous or falsified identities, and can reach into their homes more easily than ever before, from anywhere in the world. Children and youth are therefore particularly vulnerable on the internet and require protection.[162]

There is no doubt that society has an interest in protecting children from sexual predation. Yet, there is little evidence to suggest that accused captured by these stings would have perpetuated child luring offences on real victims without police intervention. In contrast, "the evidence demonstrates that police contact likely induced the offence."[163] Further, proactive investigations allow officers to co-create the evidence they need to secure a conviction.[164] This could have the effect of artificially inflating the

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157 *Ibid.*

158 *Ibid* at paras 110–11.

159 Chan, "Search and Seizure", *supra* note 33 at 121.

160 Samuelson-Glushko, *supra* note 9 at 9.

161 Lauren Menzies & Taryn Hepburn, "Harm in the Digital Age: Critiquing the Construction of Victims, Harm, and Evidence in Proactive Child Luring Investigations" (2020) 43:3 Man LJ at 398.

162 *Mills*, *supra* note 8 at para 69.

163 Menzies & Hepburn, *supra* note 161 at 28.

164 *Ibid* at 29.

perceived risk of child-victimization and unnecessarily increasing public anxiety.[165] By framing s. 8 in terms of societal expectations, the Court put themselves in the position of policing morality. Instead of disregarding content neutrality in s. 8, the Court could have addressed the public's interest under s. 24(2), as Justice Martin did. Justice Martin found that to exclude "relevant and reliable evidence in a child-luring case" would bring the administration of justice into disrepute.[166]

C. The Potential Chilling Effects of *Mills*

The Supreme Court has long recognized the correlation between privacy and freedom of expression. For example, Chief Justice Dickson wrote in *Canada (Human Rights Commission) v Taylor*, "the freedoms of conscience, thought and belief are particularly engaged in a private setting."[167] As Chan eloquently states: "Private communications are where we experiment with embryonic ideas, share our intimate thoughts, and express our rawest emotions."[168] The inherently private nature of online communications was recognized by Chief Justice McLachlin in *Marakah*, providing the example of a wife being unaware her husband was conversing with a paramour.[169] As the Court expressed in *Duarte*, "Countenancing participant surveillance, strikes not only at the expectations of privacy of criminals but also undermines the expectations of privacy of all those who set store on the right to live in reasonable security and freedom from surveillance, be it electronic or otherwise."[170]

The "child stranger" exception put forth in *Mills* could have the effect of chilling legitimate and socially beneficial online conversations:

> If these adults are aware (as they presumably will be after *Mills*) that a minor seeking to communicate with them might actually be a police officer, they will be less likely to enter into such conversations in the first place, reasonably fearing the disclosure of intimate (and potentially stigmatizing) personal information.[171]

Similarly, Justice Martin found that the exemption would cast "suspicion on an entire category of human relationship" thus exposing meaningful

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165 *Ibid* at 18–19, 28.

166 *Mills*, *supra* note 8 at para 155.

167 Chan, "Text Message Privacy", *supra* note 4 at 71; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577.

168 Chan, "Text Message Privacy", *supra* note 4 at 71.

169 *Marakah*, *supra* note 11 at para 36.

170 *Duarte*, *supra* note 20 at 34.

171 Penney, "Reasonable Expectations", *supra* note 120 at 8.

relationships to unregulated electronic surveillance.[172] Justice Martin provides several examples of these beneficial relationships such as adults providing guidance to youth who are struggling with addictions, bullying, or their sexual identity.[173]

One such example of a socially beneficial relationship would be LGBTQ+ youth who receive online support from LGBTQ+ adults. A 2017 study found that LGBTQ youth use Facebook to explore new friendships and relationships, but do not commonly use the platform to meet people. Participants reported feeling more comfortable communicating through social media. The platform provided a safe space for youth to both seek support and explore their gender / sexual identities.[174] Youth may wish to hear others' experiences coming out to their family, and for those with a difficult living situation, whether life improved upon moving out of their childhood home. The adult may be one of the few people that the youth can turn to for support.[175]

Similarly, proactive child-luring investigations can intrude upon legitimate online spaces where adults seek to express their sexuality. Officers may hold a bias against a particular sexual preference (such as BDSM) or sexual orientation leading them to inflate risk of harm. For example, in *R v Gowdy*, officers in a rural area responded to an ad from someone looking for a "young" guy "under 35", such as a "married" or "college guy" who was open to receiving fellatio.[176] Clearly, the terms "married" and "college guy" are inconsistent with seeking a sexual relationship with a minor. Menzies and Hepburn suggest that police were not aiming to protect youth but were instead "responding to Gowdy's sexuality in a small town."[177] Similarly, police have set up operations on kink sites which only allow users over the age of eighteen, as well as adult-only escort sites.[178] The purported aim of these operations is to "protect children", yet, the investigations are occurring in spaces where predators are unlikely to be looking for victims.[179]

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172 *Mills*, *supra* note 8 at para 126; Penney, "*R v Mills*", *supra* note 22 at 7.

173 *Mills*, *supra* note 8 at paras 122–26.

174 Leanna Lucero, "Safe Spaces in online places: social media and LGBTQ youth" (2017) 9:2 Multicultural Education Rev 117.

175 Penney, "*R v Mills*", *supra* note 22 at 7.

176 *R v Gowdy*, 2014 ONCJ 592; Menzies & Hepburn, *supra* note 161 at 14.

177 Menzies & Hepburn, *supra* note 161 at 14.

178 *Ibid* at 15, 29.

179 *Ibid* at 29.

The effect is the policing of legitimate online sexual expression based on what individual officers deem to be moral.[180]

Professor Penney expressed concern that adults may be reluctant to support youth online for worry that they may be speaking with an undercover officer.[181] Conversely, would marginalized youth continue to seek support from adult "strangers" with the knowledge that their conversation could be open to state scrutiny? Would adult members of marginalized sexual communities feel comfortable seeking online communication with other adults, knowing that the person on the other end could be a police officer? What justification is there in a free and democratic society for denying such intimate interactions an expectation of privacy?[182]

IV. ELECTRONIC SURVEILLANCE MUST BE REGULATED

Based on the decisions in *Wong*, *Duarte*, *TELUS*, and *Marakah*, law enforcement's activity in *Mills* should have been characterized as participant surveillance. In order to conduct participant surveillance operations, law enforcement must establish that there is probable cause to believe that a specified crime has been or will be committed and that the interception will afford evidence of the crime.[183] The probable cause threshold recognizes that intrusion into Canadians' private lives should not be considered a routine matter.[184] In *Duarte*, the Court held that requiring a warrant to engage in participant surveillance would not hamper police ability to combat crime. Instead, a warrant would ensure police restrict participant monitoring to cases where they can demonstrate probable cause.[185]

In contrast, allowing the police to undertake such operations in an unregulated manner is bound to have consequences:

> A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.[186]

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180 *Ibid* at 4, 6.
181 Penney, "Reasonable Expectations", *supra* note 120 at 8.
182 Samuelson-Glushko, *supra* note 9 at 10.
183 *Criminal Code*, *supra* note 51, s 186(1)(a).
184 *Duarte*, *supra* note 20 at 34.
185 *Ibid* at 33–34.
186 *Ibid* at 44.

There is a risk that such warrantless investigations could have a chilling effect on legitimate online conversations. Technology allows for easy scalability of these operations. This creates the risk of their being seen as "routine" matters. The effect of *Mills* is to allow police to create as many virtual child profiles as they wish enticing people to unwittingly converse with them, and all without any oversight.[187] Is the breaking point 100, 1000 or 100,000 profiles?[188]

As Justice Martin writes in *Mills* "[t]o be constitutionally compliant, state acquisition in real-time of private electronic communications requires regulation."[189] Such regulation is "necessary to preserve the quantum of communications privacy that Canadians enjoyed in the pre-digital era."[190] Requiring a warrant to undertake participant surveillance in the context of online conversations aligns with s. 8 jurisprudence and would not unduly impact police's ability to combat crime.

To leave these operations unregulated leaves room for abuse. In the case of *Mills*, the officer had no clear policies to guide his investigation. Instead, he "created policy on his own, with undesirable consequences."[191] The officer communicated with minors in order to give the fake profile an air of legitimacy.[192] Such proactive investigations can "cast a wide net of electronic surveillance, resulting in innocent members of the public, many of whom may be youth, unwittingly sharing sensitive personal information with the police."[193] As previously mentioned, this can lead to officers disproportionately targeting marginalized sexual communities such as BDSM enthusiasts. Further, a lack of regulation creates potential for officers to use the guise of anonymity to create trust-based online relationships with vulnerable minors. Even if the conversations are not inappropriate in content, the act of deceiving a minor into communication is reprehensible. If not prohibited, at minimum, this practice should be subject to significant oversight.

Proactive child luring investigations purportedly aim to protect minors from harm. However, in the context of internet communications, rather than being characterized as "victims", teenage girls are often considered

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187 Penney, "*R v Mills*", *supra* note 22 at 7.
188 *Ibid*.
189 *Mills*, *supra* note 8 at 143.
190 Penney, "*R v Mills*", *supra* note 22 at 3.
191 *Mills*, *supra* note 8 at para 147.
192 Samuelson-Glushko, *supra* note 9 at 11.
193 *Mills*, *supra* note 8 at para 147.

"sexual provocateurs putting men at risk of prosecution."[194] Proactive child-luring investigations allow officers to play into an "ideal victim" stereotype. The typical "victim" is portrayed as being "naive, curious, interested in trying various sexual activities, highly agentic and independent, and, depending on their age, often somewhat experienced."[195] These operations contribute to the characterization of adolescent girls as hypersexualized, willing participants.[196]

In *Mills*, the officer used photos he obtained from the internet of a young girl. The girl did not know about this investigation, nor did she consent to the use of her photo. Thus, she was "unwittingly conscripted into a police investigation."[197] Impersonating a young woman online without her consent could potentially lead to harm in both the cyber, and "real" worlds. Social media profiles create lasting first impressions. Use of an individual's photo in conjunction with sexually explicit messaging could result in reputational damage or barriers to finding future employment.[198] Further, use of the photo could expose its subject to cyber-stalking or harassment. For example, in 2013 a San Diego woman was stalked after a fake account used her photo.[199]

These operations should be governed by existing wiretap regulations. Police claim that requiring a warrant would inhibit their investigations.[200] This is completely false. Recall that in *Marakah*, Chief Justice McLachlin (as she then was) implies that communications occurring in the digital "public square" such as social media posts and chatrooms are unlikely to fall under the umbrella of s. 8 protection.[201] Following this logic, police could begin their operations in chatrooms without a need to establish any probable cause, and then retain a warrant once the communication moves to a private medium.[202] In fact, many child luring sting operations already proceed in

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194 Jane Bailey & Valerie Steeves, "Will the Real Digital Girl Please Stand Up? Examining the Gap Between Policy Dialogue and Girls' Accounts of Their Digital Existence" in Hille Koskela, ed, *New Visualities, New Technologies: The New Ecstasy of Communication* (Taylor & Francis Group, 2013) 41 at 54.

195 Menzies & Hepburn, *supra* note 161 at 12.

196 *Ibid* at 4, 12.

197 *Mills*, *supra* note 8 at para 147.

198 Colleen M Koch, "To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation" (2017) 88:1 U Colo L Rev 233 at 243.

199 *Ibid* at 244.

200 Chan, "Search and Seizure", *supra* note 33 at 129.

201 Penney, "*R v Mills*", *supra* note 22 at 5.

202 Chan, "Search and Seizure", *supra* note 33 at 129.

this manner.[203] Further, law enforcement may avail themselves of other methods to combat child luring, including relying on the complaints of inappropriate contact from parents, teachers and children.[204]

V. CONCLUSION

Prior to the *Mills* decision, the Supreme Court routinely took a firm stance against state surveillance. Further, it was a well-established principle that a privacy interest exists in conversations, regardless of the criminal content therein. The *Mills* decision has the potential to confuse lower courts and law enforcement, not just because the justices diverge in their reasoning, but also because it contradicts prior s. 8 jurisprudence. For example, the *Mills* decision evaluates the s. 8 claim in the context of relationships. This has the effect of removing content neutrality from the decision and puts the Court in the position of determining which relationships are worthy of protection. Justice Brown suggests that the stranger exception will only apply in a narrow set of circumstances. It would be prudent for future researchers to undertake a systematic review of post-*Mills* jurisprudence to determine whether this is in fact the case. Points of inquiry could include how frequently law enforcement rely on these types of operations and whether the *Mills* framework permits these proactive operations in other contexts such as drug-trafficking.

Prior jurisprudence such as *Duarte* and *TELUS* lend support to the theory that these types of operations are participant surveillance and thus should require prior judicial authorization. By determining that s. 8 was not engaged in *Mills*, the Court effectively exempted law enforcement from any meaningful regulation when engaging in these types of stings. The consequence of this decision may be an increase in electronic state surveillance and subsequent chilling of online communications. For example, marginalized youth seeking support online may feel less comfortable engaging with an adult "stranger" knowing that their communication could be open to state scrutiny.

The officers' communication with other minors in *Mills* was exploitative, lending support to the conclusion that such operations must be regulated. Existing wiretap provisions are sufficient to regulate these operations and limit the investigations in time and scope. Further, these

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[203] Chan, "Text Message Privacy", *supra* note 4 at 83.

[204] Penney, "*R v Mills*", *supra* note 22 at 7.

provisions would prevent law enforcement from embarking upon fishing expeditions made easier by the scalability of this technique.

While some argue that the *Mills* decision is merely the Court's attempt at restoring equilibrium, such action was unnecessary and disproportionate to the consequences. Child luring cases are rare. There is little evidence to suggest that accused caught in proactive investigations would have committed child luring offences against real victims. Officers have other less intrusive means available to them to pursue these types of investigations. Leaving this practice unregulated renders these investigations open to abuse. In other words, the ends do not justify the means.

Detained on Sight: The Socioeconomic Aspect of Social Context in *R v Le*

LEWIS WARING

ABSTRACT

Reasonable-person psychological detention is an area of criminal law that has been subject to a number of jurisprudential innovations in the 21st century. This work responds to a current gap in the literature regarding the importance of socioeconomic factors to the crystallization of detention in accordance with s. 9 of the *Canadian Charter of Rights and Freedoms*. The thesis of this paper is that socioeconomic factors are foundational to understanding the social context in which police interactions sometimes crystallize into detention. The socioeconomic aspect of social context reveals the way police interact with individuals in a certain space. Racial aspects of social context are postulated to be tied to socioeconomic aspects insofar as the racialization of individuals tends to occur in certain spaces – namely, high-crime, low-income neighbourhoods.

The methodology of this work includes an analysis of trends in detention case law beginning with the 2009 decision of *R v Grant* and ending with the 2020 decisions of *R v Thompson* and *R c Dorfeuille*. Secondly, this work investigates the Honourable Michael H. Tulloch's *Report of the Independent Street Checks Review*. Thirdly, this work investigates a series of studies conducted by Yunliang Meng, a geography scholar who analyzed the Toronto Police Service's racialization of individuals as a function of space. In conclusion, this paper recommends modifications to police practices that require officers to make explicit statements at the outset of interactions with individuals which determine whether or not the individual is detained.

I. INTRODUCTION

The killing of George Floyd and other tragedies of the 21st century in which racialized individuals have been arbitrarily killed by police officers demand a sea change in law. As such killings have become more publicized, society has started to organize in response to police violence against racialized minorities. In some ways, recent case law has suggested that the Canadian judiciary has begun to take notice.

R v Le[1] – a case in which a racialized youth was arbitrarily detained when police officers entered his friend's private backyard – significantly affected the right against arbitrary detention under s. 9 of the *Canadian Charter of Rights and Freedoms*.[2] *Le*'s contribution to *Charter* detention jurisprudence largely derived from its recognition that social context is relevant to the question of whether a detention had crystallized despite a lack of physical coercion or legal obligation under the common law test developed in *R v Grant*.[3] According to *Le*, whether a detention has crystallized at any given moment is dependent upon racial and socioeconomical aspects of the state's interaction with the individual. Namely, racialized and socioeconomically marginalized individuals have a different perspective on police interactions which must be a factor in the question of whether and when a detention has crystallized.

While *Le*'s racial implications have been addressed in academic literature, its socioeconomical implications have thus far been ignored. Unlike a racial investigation, a socioeconomical investigation reveals the significant influence of space – i.e., location – upon the perspective of a reasonable person. Namely, when a person is located in a heavily policed neighbourhood, their reasonable expectations of police interactions are different from when the same person is in a neighbourhood that is not heavily policed. Heavily policed neighbourhoods tend to be low-income neighbourhoods in which immigrant communities tend to cluster for socioeconomic reasons. As a result, overrepresentations of minorities in high-crime, low-income neighbourhoods create a racialization of inhabitants of neighbourhoods which police tend to dedicate a disproportionate amount of resources.

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1 2019 SCC 34 [*Le*].

2 *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, s 9 [*Charter*].

3 2009 SCC 32 at para 30 [*Grant*].

When analyzed in tandem with the socioeconomic marginalization that occurs in high-crime, low-income neighbourhoods, this racial profiling can be understood more deeply as "race-and-place" profiling.[4] That is, a socioeconomical investigation into police racialization reveals that such racialization occurs disproportionately in high-crime, low-income neighbourhoods in which police focus a majority of their resources through "hot spot" crime reduction strategies.[5] Thus, racialization and socioeconomic marginalization are inextricably intertwined, a reality which was recognized in *Le* and later jurisprudence but has thus far been unaddressed in the academic literature.

An investigation of race-and-place profiling – which reveals the importance of the socioeconomical status of the location in which police officers interact with individuals – is crucial to understanding the *ratio decidendi* of *Le* – namely, that the crystallization of a psychological detention is informed by its social context, consisting of both racial and socioeconomical aspects of interactions with police.

In *Le*, the social context of the police interaction with Tom Le revealed to the Majority of the Supreme Court of Canada that officers of the Toronto Police Service (TPS) were under an enhanced responsibility to individuals while it patrolled the high-crime neighbourhood in which Tom Le was located at the time of their interaction.[6] However, the Majority failed to apply this enhanced responsibility in its analysis insofar as it failed to guarantee Tom Le any protections beyond the protection against unlawful violations of the private property rights guaranteed to "everyone" in Canada.[7] That is, any enhanced responsibility the state might have in high-crime neighbourhoods could not possibly be fulfilled by the state's observation of their standard responsibility to observe guaranteed private property rights in all of Canada's neighbourhoods.

In conclusion, a socioeconomic investigation into *Le* reveals that police officers under an enhanced responsibility in a high-crime neighbourhood

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4 Yunliang Meng, "Racially biased policing and neighborhood characteristics: A Case Study in Toronto, Canada" (2014) *Cybergeo: European J of Geography* at para 6 [Meng, "Racially biased policing"].

5 Sunghoon Roh & Matthew Robinson, "A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops" (2009) 12:2 Police Q 137 at 138; Meng, "Racially biased policing", *supra* note 4 at para 7.

6 *Le*, *supra* note 1 at para 60.

7 *Charter*, *supra* note 2, s 9.

who interact with an individual in circumstances that would lead a reasonable person to "conclude that his or her freedom to choose whether to cooperate or not has been removed"[8] are required to take a positive action which explicitly confirms whether or not an individual is detained to avoid the crystallization of an arbitrary detention under s. 9 of the *Charter*. As a result, Canadian police departments are recommended to develop statements to be read to individuals in locations in which the state assumes an enhanced responsibility to avoid detaining an individual against their rights under ss. 9 and 10 of the *Charter*.

II. PROCEDURE OF INVESTIGATION

Firstly, this investigation will include a review of recent jurisprudence on the issue of reasonable-person psychological detention (RPP detention). This review of jurisprudence will reveal a trend of findings post-*Grant* that RPP detention may crystallize instantly as the result of a single act at the outset of an interaction with police. These findings of single-act crystallization are distinct from the gradual multi-factored crystallization which occurred in *Grant*. This post-*Grant* distinction is not the result of factual differences between *Grant* and *Le*. Instead, the distinction is the result of the Court's finding in *Le* that social science evidence is relevant to the crystallization of RPP detention. This review of jurisprudence also confirms that the social context relevant to the crystallization of detention recognized in *Le* is not merely a question of racial factors but also of socioeconomical factors.

Secondly, this investigation will include an inquiry into the spatiality of police racialization. This second inquiry will analyze the sociological aspect of social context implicit in *Le*, which largely consists of the fact that *Le* occurred in low-income housing within one of the City of Toronto's poorest neighbourhoods. This second inquiry will then explore empirical evidence that low-income neighbourhoods tend to include disproportionate levels of racialized individuals as well as disproportionate levels of crime. The effects of this spatial correlation between racialized individuals and crime in low-income neighbourhoods on police policy and practice are analyzed by reliance upon the *Report of the Independent Street Checks Review* by the Honourable Michael H. Tulloch (*Tulloch Report*), which explored the practice of "carding" utilized by the Toronto Anti-

8 *Grant*, *supra* note 3 at para 41.

Violence Intervention Strategy (TAVIS) in response to a spike in gun violence in the City of Toronto.[9] This second inquiry then explores the way in which carding became a tool for racial profiling in certain spaces by reliance on two studies by Dr. Yunliang Meng, a geography scholar, which analyzes the spatial dimension of TPS carding data. This second inquiry finally analyzes news reporting on Project Post, the specific project of TAVIS, which was responsible for the police interaction between TPS officers and Tom Le.

Thirdly, this investigation applies the findings of Dr. Meng's studies and the *Tulloch Report* to the findings in *Le*, seeking to understand how the socioeconomic aspect of social context alters the findings of the crystallization of RPP detention undertaken by the Majority. This third inquiry illustrates the Majority's failure to incorporate the socioeconomic aspect of social context into its detention analysis. The effects of this failure are explored, illustrating that the failure to incorporate the socioeconomic aspect of social context led to a misunderstanding of the perspective of a reasonable person in the circumstances and ultimately to a misunderstanding of the time at which the detention of Tom Le crystallized.

III. Review of Jurisprudence: Reasonable-Person Psychological Detention

A. *R v Grant*

In 2009, the rules of detention under ss. 9 and 10 of the *Charter* were significantly advanced under *Grant*, which established that "[d]etention under ss. 9 and 10 and of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint."[10] Psychological restraint may arise due to "a legal obligation to comply with the restrictive request or demand" or "where [...] a reasonable person [in the individual's circumstances] would conclude by reason of the state conduct that he or she had no choice by to comply."[11] This interference with an individual's freedom triggers informational obligations

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9 Ontario, The Honourable Michael H Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018) [*Tulloch Report*].

10 *Grant*, *supra* note 3 at para 44.

11 *Ibid.*

under s. 10 of the *Charter* – namely, the obligation to promptly inform the individual of the reasons for their detention and their right to counsel without delay.[12] If the state detains an individual without fulfilling its s. 10 *Charter* obligations, the detention is arbitrary under s. 9.[13]

The perspective of the reasonable person was assessed in *Grant* in accordance with three factors. According to *Grant*, an individual's interaction with police may "crystallize"[14] into a detention when the "circumstances giving rise to the encounter," the "nature of the police conduct," and the individual's "particular characteristics or circumstances" [15] would lead a reasonable person to conclude that they were not "free to choose to break off the encounter."[16] *Grant* thus established an analytical framework (*Grant* test) for RPP detention, which arises despite the lack of a legal obligation to comply with a police interaction.

In *Grant*, the Majority found that a detention crystallized due in part to the fact that officers had taken "tactical adversarial positions" behind the officer questioning him.[17] This tactical positioning consisted of the officers forming a "small phalanx blocking the path in which the appellant was walking."[18] However, in *Grant*, this tactical positioning intended to force Donnohue Grant to stop walking was not on its own sufficient to result in a detention. Instead, the tactical positioning of the officers was one of three factors that altogether created a detention, the other two being the embarking on "a pointed line of questioning" and an order to "keep his hands in front of him."[19]

B. *R v Omar*

In 2019, this three-factored approach was replicated in *R v Omar*,[20] in which a 20-year-old Black male was approached by officers while "walking down a street in Windsor, Ontario at around 1 a.m.."[21] In *Omar*, the

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12 *Supra* note 2, s 10.
13 *Ibid*, s 9.
14 *Supra* note 3 at para 10.
15 *Ibid* at para 44.
16 *Ibid* at para 173.
17 *Ibid* at para 49.
18 *Ibid* at para 183.
19 *Ibid* at paras 52, 189.
20 *R v Omar*, 2018 ONCA 975 at para 91 [*Omar* 2018]; *R v Omar*, 2019 SCC 32 [*Omar* 2019].
21 *Supra* note 20 at para 5.

officers parked next to the accused, shone a flashlight at him, asked him to approach the police cruiser, and began asking him questions.[22] Detention arose in *Omar* as it did in *Grant* despite the fact that the officers' interaction with the accused was "material[ly]"[23] different in two ways. That is, the officers had not taken tactical adversarial positions, and the accused had not been singled out with questions of whether he "had anything" or if he had committed a crime.[24]

C. *Grant* and *Omar*: Gradual Multi-Factored Detention

Despite and, indeed, through their factual distinctions, *Grant* and *Omar* establish a firm factual precedent for RPP detention consisting of tactical positioning, questioning, and an order to restrict the motion of one's hands. However, *Grant* noted that, in certain circumstances, "a single forceful act or word may be enough" to instantly crystallize an interaction into a detention.[25] Such an instantaneous crystallization was found in *Le*.

D. *R v Le*

In 2019, *Le* made significant developments in the *Grant* test, finding that "the research now shows disproportionate policing of racialized and low-income communities" and "it is in this larger social context" that RPP detention must be analyzed.[26] *Le*'s significance is partly due to its recognition of the relevance of racial and socioeconomical aspects of social context to the *Grant* test. The *ratio decidendi* of *Le* – which held that the *Grant* test must take into account the empirically proven fact that "[y]outh, especially Indigenous, Black and other racialized youth, and youth in low-income housing, are disproportionately impacted by street checks" – thus took into account both racial and socioeconomic aspects of the social context of a police interaction to determine whether an RPP detention had crystallized.

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22 *Supra* note 20 at para 8.
23 *Supra* note 20 at para 105.
24 *Omar* 2018, *supra* note 20 at paras 8–11.
25 *Supra* note 3 at para 42.
26 *Supra* note 1 at para 97 [emphasis added].

E. *R v Thompson*

In 2020, the Court of Appeal for Ontario (ONCA) in *R v Thompson* found that police had detained an individual in his car before the officers had even left their cruiser.[27] In *Thompson*, "a black man sitting in his car at night in Brampton [...] was obstructed without apparent reason by two marked police cruisers."[28] Specifically, the police officers "parked two police cruisers directly behind it – boxing in the appellant so he could not drive away."[29]

In *Thompson*, the ONCA conducted the *Grant* test with explicit reference to *Le*.[30] Regarding the "nature of the police conduct," the ONCA in *Thompson* found that the officers' "physical proximity in blocking his car" contributed to the crystallization of detention.[31] In fact, the ONCA in *Thompson* found that the physical – that is, spatial – aspect of the police's conduct alone crystallized detention "from the outset."[32]

Thompson's instant crystallization of detention derived from the "authoritative" nature of the police's "obstructing the movement" of the appellant's car.[33] This obstruction "[sent] the message that the appellant was not free to leave until the police decided otherwise."[34] Notably, this messaging sent from the police was unrelated to "the officers' intentions as they blocked the appellant." Instead, detention crystallized because "a reasonable person would not perceive this action as "assisting in meeting needs or maintaining basic order" but instead as "singling out the individual for focussed investigation."[35] In *Thompson*, the ONCA found that "a reasonable person would know only that the police showed up late at night and for no apparent reason obstructed the appellant's car."[36] Thus, *Thompson* held that the way that police position themselves in relation to an individual could itself potentially crystallize detention, regardless of the reason they position themselves in that fashion.

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27 *R v Thompson*, 2020 ONCA 264 at para 63 [*Thompson*].
28 *Ibid*.
29 *Ibid* at para 2.
30 *Ibid* at paras 54, 58–59, 63, 73–75.
31 *Ibid* at para 58.
32 *Ibid* at para 55.
33 *Ibid*.
34 *Ibid*.
35 *Ibid a*t para 54; *Grant*, *supra* note 3 at para 44.
36 *Supra* note 27 at para 54.

F. *Le* and *Thompson*: Instant Single-Act Detention

In comparison to *Grant* and *Omar*'s gradual multi-factored crystallization, the detention in *Thompson* crystallized solely due to officers' physical positioning, which restricted the movements of Tom Le and O'Neil Thompson at the beginning of their interactions.[37] In this sense, the detention in *Thompson* factually departed from the detention in *Omar* and *Grant* in a significant way. In *Thompson*, as well as in *Le*, a detention crystallized instantly based solely on how a reasonable person would interpret the officers' physical positioning – that is, the spatial aspects of the interaction – at the interaction's "outset."[38] In other words, the way in which the officers in *Le* and *Thompson* entered the space surrounding Tom Le and O'Neil Thompson, respectively, instantly crystallized a detention.

Unlike *Grant* and *Omar*'s multi-factored crystallization, *Thompson*'s crystallization did not rely upon an authoritative order to "keep [your] hands in front of [you]"[39] in the context of focussed questions and tactical positioning. Instead, it merely analyzes the way a reasonable person would understand the police's "physical proximity"[40] at the "outset" [41] of the interaction. The ONCA in *Thompson* found that mere proximity, if it creates an "atmosphere that would lead a reasonable person to conclude that the police were taking control of the situation and that it was impossible to leave," may on its own crystallize detention.[42]

Thompson's instantaneous detention factually reflects the detention in *Le*. Namely, the Court in *Le* found that Tom Le was detained before he "was asked what was in his satchel."[43] Instead, detention crystallized in *Le* when officers "entered the backyard and made contact."[44] Like in *Thompson*, where a detention crystallized due to a single forceful act of boxing-in an individual's car,[45] detention did not crystallize gradually in *Le* but instantly upon the officers' "single forceful act" of entering private property.[46] In that

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37 *Ibid* at para 55.
38 *Le*, *supra* note 1 at para 66.
39 *Ibid.*
40 *Supra* note 27 at para 58.
41 *Ibid* at para 55.
42 *Ibid* at para 58, citing *Le*, *supra* note 1 at para 50.
43 *Supra* note 1 at para 30.
44 *Ibid* at para 30.
45 *Supra* note 27 at para 48.
46 *Supra* note 1 at para 66.

sense, the Court in both *Le* and *Thompson* found that detention may arise instantly based only upon the spatial layout of an interaction at its outset. While detention arose in *Thompson* upon officers boxing-in an individual's car,[47] detention arose in *Le* when officers entered a "small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a housing co-operative."[48]

Furthermore, in both *Thompson* and *Le*, the spatial aspect of the single forceful acts communicated to the persons affected that they were "not free to go."[49] In *Le*, the officer's entrance into private property "as trespassers" was sufficient to establish the "power dynamic needed to ground a detention."[50] When the officers in *Le* walked into a certain space, a detention crystallized through that act's communication of authority. In other words, an officer's act of trespass sent a clear message that the police were asserting control over Tom Le. In *Thompson*, the spatial aspect of the boxing-in of O'Neil Thompson's car communicated the necessary power dynamic by "eliminat[ing] his choice to drive away unless and until the police decided otherwise."[51] In other words, an officer's act of physically cutting off freedom of movement by car sent a clear message that the police were asserting control over O'Neil Thompson.

G. Comparing *Grant* to *Le* and *Thompson*: Social Science Evidence

Grant was very similar factually to both *Le* and *Thompson* in the sense that Donnohue Grant's freedom of movement was also restricted – namely, by the first officer's "standing on the sidewalk directly in his intended path" and the other two officers' taking of "tactical adversarial positions" behind the first officer.[52] Despite the Court's recognition in *Grant* that a "single forceful act"[53] was sufficient to crystallize RPP detention, neither the first nor the second and third officers' acts of entering the space proximate to Donnohue Grant crystallized into detention on its own. Yet, these initial acts were more restrictive than those of the officers in *Le*, whose entrance

47 *Supra* note 27 at para 48.
48 *Le*, *supra* note 1 at para 97.
49 *Grant*, *supra* note 3 at para 31.
50 *Supra* note 1 at paras 44–45.
51 *Supra* note 27 at para 64.
52 *Supra* note 3 at paras 6, 49.
53 *Ibid* at para 42.

into private property was more clearly intentional than parking behind an individual's car. However, despite the particularly restrictive and forceful acts of the officers in *Grant*, even in comparison to those in *Le* and *Thompson*, detention did not arise instantly in *Grant*. The reason that detention arose in *Le* and *Thompson* but not in *Grant* was not due to a difference in the police action but instead due to the admission of social science evidence such as the *Tulloch Report*,[54] which advocated for the importance of systemic racialization in determining the social context of a police interaction.

The recognition of systemic trends such as systemic racialization through the admission of social science evidence thus changed the nature of the *Grant* test by seemingly lowering the threshold which single acts must meet before crystallizing a police interaction into a detention. The officers' entrance into a private backyard in *Le* and the officers' parking behind a car in *Thompson* were not factually more egregious than the officers' tactical positioning in *Grant*. However, the analysis in *Grant* did not take into account a social context of systemic racism which influenced police conduct. It is likely that, if systemic racism had been actively weighed as in *Le*, detention in *Grant* might have crystallized instantly when the first officer stood directly in Donnohue Grant's path. [55] A key distinction between *Grant* on one hand and *Le* and *Thompson* on the other hand was thus the recognition that systemic racism in police conduct had created a super-charged social context which was ripe for RPP detention. Unlike in *Grant*, *Le* and *Thompson* were decisions that recognized that Blacks were living with "feelings of fear/trauma, humiliation, lack of trust and expectations of negative police treatment" that would lead a reasonable person to expect negative police treatment in any interaction.[56] This recognition of systemic racism single-handedly altered the nature of the RPP detention analysis, recreating the notion of social context to reflect systemic truths which might only be revealed through the admission of social science evidence.

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54 *Le*, *supra* note 1 at para 83.
55 *Supra* note 3 at paras 6, 49.
56 *Le*, *supra* note 1 at para 93.

H. *R c Dorfeuille*: The Socioeconomic Aspect of Social Context

In 2020, the Court of Appeal of Québec (QCCA) in *R c Dorfeuille* recognized that *Le* incorporated both racial and socioeconomic aspects into the detention analysis by its appeal to Justice Binnie's statement in *Grant* that "[t]he growing body of evidence and opinion tends to show that visible minorities and marginalized people are at greater risk of being subjected to unwarranted 'covert' police interventions."[57] *Dorfeuille* also noted *Le*'s intent to incorporate both racial and socioeconomic aspects of the social context of a police interaction by its appeal to the *Tulloch Report*, which found that police "carding" practices disproportionately affect "Indigenous, Black and other racialized communities, as well as youth and people from lower socioeconomic groups."[58]

However, while academics have rightfully noted *Le*'s "crucial sensitivity to the role of race,"[59] the socioeconomic aspect of the social context of a police interaction remains unaddressed in the literature. While the social context of the police interaction in *Le* had crucial racial aspects, it also had important socioeconomic aspects that yield distinct observations about social context. Unlike racial discrimination, which is often the drawing of an assumption based on the way that an individual appears, socioeconomic marginalization is often the drawing of an assumption based on where a person is located. Thus, whereas a racialization fits within the third factor of the *Grant* test – the "particular characteristics [...] of the individual" – a socioeconomical marginalization fits within "the place where the interaction occurred" and is thus a question of the "nature of the police conduct."[60] As a matter of place, the socioeconomic aspect depends upon the socioeconomic status of the location of a police interaction.

I. Summary

The evolution of the *Grant* test in *Le* thus consists of a factual precedent for single-act detentions, which crystallize not solely due to the actions taken by the police but instead due to the social context in which the

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57 *Grant*, *supra* note 3 at para 154; *R c Dorfeuille*, 2020 QCCS 1499 at paras 39–40 [*Dorfeuille*] [emphasis added].

58 *Supra* note 9 at 4; *Dorfeuille*, *supra* note 57 at para 40.

59 Amar Khoday, "Ending the Erasure?: Writing Race Into The Story of Psychological Detentions – Examining *R. v. Le*" (2021) 100 SCLR (2d) 165 at 166.

60 *Grant*, *supra* note 3 at para 44.

actions take place. The reality of single-act detention found by the Court in *Le* was confirmed in *Thompson*, solidifying a post-*Grant* trend towards the recognition of detentions which crystallize instantly when police interact with individuals in the midst of a certain social context. Post-*Le* jurisprudence has confirmed what was explicitly stated in *Le*, that the social context which may inform the RPP detention analysis has both racial and socioeconomic aspects. Furthermore, post-*Le* jurisprudence has also confirmed that the socioeconomic aspect requires distinct alterations to the RPP detention analysis of social context, namely, alterations which result in an analysis based upon not only the appearance of an individual affected by a police interaction but also the location in which a police interaction occurs. In *Le*, the socioeconomic aspect of the social context of Tom Le's interaction with TPS officers was recognized, but the Majority did not analyze its implications on the crystallization of detention. The recognition of the relevance of the socioeconomic aspect of social context, along with the failure to analyze that aspect, thus requires an inquiry into the implications of the socioeconomic aspect of the location in which the interaction between Tom Le and TPS officers took place.

IV. Spatiality of Racialization

A. The Socioeconomic Aspect of Social Context in *R v Le*

On May 25, 2012, Tom Le was detained in the Atkinson Housing Co-Operative (Atkinson Co-op) in the neighbourhood of Kensington-Chinatown in downtown Toronto.[61] In 2006, official municipal data found that Kensington-Chinatown had the fifth-highest rate of low-income families in the City of Toronto, with 38.4% of the population being of low-income status.[62] In the southern portion of Kensington-Chinatown, Atkinson Co-op was built in 1973, originally as a public housing project named the Alexandra Park Co-Operative.[63] In 2003, the Alexandra Park

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61 *R v Le*, 2014 ONSC 2033 at para 1 [*Le* 2014].

62 Ontario, Social Policy Analysis and Research, *Profile of Low Income in the City of Toronto* (Toronto: Social Development, Finance and Administration Division, 2011) at 10.

63 "Our History" (last visited 21 December 2020), online: *The Alexandra Park Co-Operative* <www.alexandrapark.ca/history.html> [perma.cc/AMG2-U4PM].

Co-Operative converted from a public housing project into a tenant-managed co-operative and was re-named.[64]

Thus, the socioeconomic aspect of *Le* included the fact that Tom Le was detained in a low-income housing co-op within one of Toronto's poorest neighbourhoods. This socioeconomic status is presumably the exact type of status which *Le* meant to address, insofar as impoverished urban neighbourhoods are vulnerable. Assuming that the socioeconomic aspect in *Le* is thus relevant to the overall social context, how the socioeconomic aspect of social context relates to its racial aspect is a question that arises. The answer to this question is that the racial aspect of social context is heavily dependent upon the socioeconomic aspect. That is, the socioeconomic profile of a location dictates whether or not a racialized individual will be subject to disproportionate police interactions.

B. Spatial Clustering of Newcomers in High-Crime, Low-Income Neighbourhoods

In large cities like Toronto, newcomer immigrant communities tend to spatially cluster in low-income neighbourhoods next to central business districts.[65] This clustering presumably represents the low-income status of many new immigrants and a desire to be close to public transportation and job opportunities. Urban, low-income neighbourhoods in which newcomers reside often tend to be those which feature crime "hot spots" – that is, neighbourhoods which feature relatively high crime rates.[66] Thus, neighbourhoods in which newcomers tend to settle are simultaneously low-income and high-crime neighbourhoods. As a result of this correlation, low-income neighbourhoods in urban areas tend to also be neighbourhoods housing disproportionate numbers of immigrants and featuring high levels of crime.

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64 "Atkinson Co-op" (last visited 21 December 2020), online: *Co-operative Housing Federation of Canada* <chfcanada.coop/success-stories/atkinson-co-op/> [perma.cc/PBH3-6B4K].

65 J David Hulchanski, *The Three Cities Within Toronto: Income Polarization Among Toronto's Neighbourhoods, 1970-2005* (Toronto: Cities Centre Press, 2010) at 26–27; Eric Fong, "Residential Segregation of Visible Minority Groups in Toronto" in Eric Fong, ed, *Inside the Mosaic* (Toronto: University of Toronto Press, 2006) 51 at 52.

66 Roh & Robinson, *supra* note 5 at 138.

C. Hot Spot Policing in High-Crime, Low-Income Neighbourhoods

Hot spot policing's focusing of resources towards high-crime areas results in more police patrols in high-crime neighbourhoods than in others.[67] As a result, a majority of police stops occur in high-crime areas.[68] Empirical evidence has suggested that low-income neighbourhoods tend to feature disproportionate levels of crime and thus, low-income neighbourhoods, which also happen to house disproportionate amounts of newcomers, tend to be heavily policed.[69] Accordingly, the heavy policing of newcomers is perhaps not a product of explicitly racist police strategy but, instead, the strategic focus of resources in high-crime areas. This correlation nonetheless systemically creates a racial disparity in policing – namely, that newcomer populations tend to be more heavily policed than other populations. Hot-spot policing, which results in disproportionate policing of racial minorities, is thus an example of systemic racism in the sense that such practices, by their very design, lead to disproportionate policing of racialized individuals.

D. Summary

The socioeconomic aspect of social context in *Le* includes the fact that the interaction between Tom Le and TPS officers occurred in Atkinson Co-op, a low-income housing complex in Kensington-Chinatown, one of Toronto's poorest neighbourhoods. Evidence suggests that low-income neighbourhoods such as Kensington-Chinatown tend to feature clusters of racialized individuals, as well as high levels of crime. The tendency of low-income neighbourhoods in Toronto to be crime hot spots has led TPS to focus resources on low-income neighbourhoods. As a result of TPS efforts to reduce crime by targeting high-crime neighbourhoods, TPS officers consequently police racialized individuals disproportionately. Thus, TPS officers' targeting of racialized individuals is not necessarily a result of individual racist beliefs but instead the result of the systemic policy of TPS. At its foundation, the tendency of TPS officers to target racialized minorities is therefore best understood as systemic racism instead of individual racism.

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67 Meng, "Racially biased policing", *supra* note 4 at para 7.

68 *Ibid*; Roh & Robinson, *supra* note 5 at 144.

69 Roh & Robinson, *supra* note 5 at 138.

This systemic racism was recently the subject of two studies of police stop data from Field Information Reports – otherwise known as "208 cards" – between 2004 and 2008, the product of a police policy known colloquially as "carding."[70]

V. CARDING

The carding system, which originated in Canada after World War I as a means of tracking Bolsheviks and Nazis,[71] has since remained a fixture of Canadian policing tools. Carding is the police practice of filling out cards that contain information gathered at a police stop, including "contact ID, person ID, age, gender, place of stoppage, contact time, birth place, skin colour, and stop reason."[72] Carding is a specific type of street check, the latter being, broadly, "information obtained by a police officer concerning an individual, outside of a police station, which is not part of an investigation."[73] All street checks, including carding, are means of gathering intelligence in order to maintain a "safe and peaceful community."[74]

A. Carding Under the Toronto Anti-Violence Intervention Strategy

In response to a 2006 spike in gun violence in Toronto, TPS devised TAVIS, an "intensive community mobilization strategy" which used "intelligence-led policing information" to focus "high-visibility policing" in "high-crime and high-risk" neighbourhoods.[75] TAVIS employed and ultimately revolutionized the tool of carding by creating "208 cards."[76] Under the TAVIS program, "[a]ny interaction that took place when TAVIS was in force constituted a valid reason for completing a 208 card."[77]

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70 Meng, "Racially biased policing", *supra* note 4 at para 14.

71 *Tulloch Report*, *supra* note 9 at 38.

72 Meng, "Racially biased policing", *supra* note 4 at para 14.

73 *Tulloch Report*, *supra* note 9 at 36.

74 *Ibid* at 37.

75 Public Safety Canada, "Toronto Anti-Violence Intervention Strategy (Synopsis)" (last modified 1 August 2013), online: <www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cnmcs-plcng/ndx/snpss-en.aspx?n=72> [perma.cc/TWL5-B7BN].

76 Roger Rowe, "Allegations of profiling: how much disclosure of investigative records is appropriate?" (last visited 21 December 2020) at 1, online (pdf): *Roger Rowe Law* <www.rogerrowelaw.com/document/pdf/Cases/Buckley_Trial_Paper_by_Roger_Allegations_of_Profiling.pdf> [perma.cc/S7MZ-L4Z6]; Public Safety Canada, *supra* note 75.

77 *Tulloch Report*, *supra* note 9 at 38–39.

Accordingly, the tool of "carding" evolved from targeting Bolsheviks and Nazis to targeting "anyone who the police deemed 'of interest' during the course of their duties."[78] Individuals stopped were often not suspected of committing a crime, and they were rarely acting suspiciously.[79] Essentially, the TAVIS carding system aimed to reduce gun violence in Toronto by randomly and indiscriminately stopping and questioning people in high-crime areas.

Carding statistics were utilized as an indicator to measure officers' job performance. As a result, officers came under intense pressure to conduct more random stops and fill out more 208 cards.[80] In fact, the pressure put on officers to stop and question people was so "extraordinary" that one officer "collected names from tombstones in a cemetery and identified them as people that they had street checked in order to meet their performance targets."[81]

1. Benefits

The *Tulloch Report* recognized the benefits of the TAVIS carding system in high-crime areas, referencing evidence from New York City's "stop, question, frisk program" ("stop-and-frisk"), which resulted in the removal of "50,000 guns from the streets in its first three years."[82] This undeniable benefit for New York City, however, came at a cost. The "vast majority" of individuals stopped through stop-and-frisk were "young black and Latino men."[83] This systemic racism "eroded trust of the police in black and Latino neighbourhoods," ultimately leading a former mayor of New York City, Michael Bloomberg, to apologize for the vast expansion of the program under his tenure.[84] The *Tulloch Report* noted similar benefits in the TAVIS carding system.

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78 *Ibid* at 38–39.

79 *Ibid*.

80 *Ibid*.

81 *Ibid*.

82 *Ibid* at 40.

83 Ashley Southall & Michael Gold "Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods", *The New York Times* (17 November 2019), online: <www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> [perma.cc/YN5A-459U].

84 *Ibid*.

2. Costs

i. Inefficiency

The *Tulloch Report* also noted that, regarding the TAVIS carding system, "the rate at which guns were found was extremely low in relation to the number of people stopped and searched."[85] The TAVIS carding system, in other words, was recognized to be inefficient insofar as it required significant costs before the program's benefits could be realized. In practical terms, this inefficiency derived from the fact that a massive number of innocent individuals needed to be stopped before a criminally involved individual could be identified. In fact, sorting through an entire community is the root strategy of carding. This inefficiency is thus unavoidable and, indeed, inherent in the TAVIS carding system.

ii. Carding, Slave Pass, and Off-Reserve Pass Systems

Black persons described the TAVIS carding system as analogous to the "historic practice of the issuance and mandatory enforcement of slave passes," which were slips that allowed slaves to leave their owner's plantation for a limited time and travel to a limited area.[86] Indigenous persons described the system as analogous to the Off-Reserve Pass System, which prohibited such persons from leaving the reserve without the permission of an Indian Agent.[87]

Neither the carding system, the slave pass system, nor the Off-Reserve Pass system required an authority figure to have any minimum level of suspicion of wrongdoing to stop a racialized individual. On the contrary, these systems were all built upon the principle of "random indiscriminate requesting of personal identifying information by the state."[88] The *Tulloch Report* noted that "random carding in its current form shared fear-inducing characteristics with these historic practices by showing Indigenous, Black, and other racialized people that their presence in certain spaces was always in question."[89] This fear in all three cases was that an individual could be stopped on sight by an officer.

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85 *Tulloch Report*, *supra* note 9 at 40.
86 *Ibid* at 37.
87 *Ibid*.
88 *Ibid* at 35, 37.
89 *Ibid* at 37.

B. Race-and-Place Profiling in the TAVIS Carding System

In a series of studies in 2014 and 2017, an Assistant Professor of Geography at Central Connecticut State University gathered TPS stop data from 208 cards created between 2004 and 2008,[90] gathering the results of 7,062 drug-related 208 cards filled out by 6,595 individuals.[91] The studies found that racial disparity between Black persons and white persons in police stops in Toronto tended to be higher in areas where certain neighbourhood racial characteristics and crime patterns were also present.[92]

Specifically, these studies showed "a medium and positive spatial correlation between the racial disparity in police stops and the percentages of whites in the population and a statistically significant spatial correlation between the [racial] disparity in police stops and crime rate measured at the neighbourhood level."[93] In other words, these studies found that "disproportionately more stops against blacks are more likely to happen in less racialized neighbourhoods and/or neighbourhoods with higher crime rates."[94] The finding that carding happens disproportionately in certain locations or places in which certain demographics existed led the studies to refer to racial profiling instead as "race-and-place" profiling.[95] Race-and-place profiling thus suggests that the racialization of minorities by police does not occur equally in all places throughout a city. Instead, it tends to occur in certain places – namely, neighbourhoods which either have an abundance of crime or a relatively small presence of minorities. A racial minority thus would be more likely to be treated discriminately by police officers if they were located in a high-crime neighbourhood or a white-dominated neighbourhood.

1. Statistical Distortions

These studies noted that "[r]ace-and-place profiling of Blacks in Toronto could produce hidden distortions in crime statistics, since this

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90 Meng, "Racially biased policing", *supra* note 4 at para 14.

91 *Ibid.*

92 Yunliang Meng, "Profiling minorities: police stop and search practices in Toronto, Canada" (2017) 11:1 J of Studies and Research in Human Geography 5 at 14 [Meng, "Profiling minorities"].

93 *Ibid.*

94 *Ibid.*

95 Meng, "Racially biased policing", *supra* note 4 at para 6.

disproportionate number of stops may lead to more arrests."[96] In other words, the fact that Black persons were stopped more often than non-Black persons led to more detection of crime among Black communities. Police data thus created the impression that Black communities committed more crime than white communities. In other words, TAVIS carding data created an illusory empirical basis for an inference that Black people were more likely to commit crime than white people.

2. Psychological Effects

These studies also noted that the TAVIS carding system resulted in psychological effects on Blacks in high-crime or white-dominated neighbourhoods. As police resources disproportionately targeted Black communities as potential criminals, Black communities responded with a lack of respect and trust for the justice system.[97] Additionally, the knowledge that police were targeting Black communities presented a real-life danger and threat to a Black individual's freedom and produced anxiety.[98] Thus, by conducting indefinite random stops in high-crime neighbourhoods, the TAVIS carding program created psychological harm and mistrust of police among Black individuals.

3. Systemic Racism

These studies finally noted that race-and-place profiling of Blacks was "a department-wide phenomenon rather than the behaviour of few police officers."[99] This systemic racism proliferated despite TPS's "reasonable job" of ensuring that recruitments to the police force do not display "overt racial bias."[100] Despite such anti-racist recruitment policies, the TAVIS carding system itself produced "unintentional and intentional forms of prejudice and discrimination."[101] That is, the systemic production of racism is not a willful TPS strategy but instead is an undesirable by-product of systemic crime-reduction strategies.

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96 *Ibid* at para 24.
97 *Ibid.*
98 *Ibid.*
99 *Ibid* at para 26.
100 *Ibid.*
101 *Ibid.*

i. Race-and-Place Profiling by TPS Officers

Furthermore, the studies found that "[f]or the police, race and socio-economic conditions [was] strongly tied to their knowledge of place" and "[s]uch knowledge [was] a resource for constructing the meaning of place."[102] In other words, as officers spent a disproportionate amount of time patrolling high-crime neighbourhoods, they spent a disproportionate amount of time interacting with low-income racialized minorities. Over time, officers were presented with the fact that high-crime neighbourhoods tend to be occupied by low-income racialized minorities. This correlation thus created an opportunity for individual officers to draw an empirical observation that high-crime neighbourhoods are poor Black neighbourhoods and that, *vice versa*, poor Black neighbourhoods tend to be high-crime neighbourhoods.

ii. Circularity

These findings suggest that, despite implementing anti-racist recruitment policies to prevent the hiring of individual officers with racist beliefs, Toronto police departments themselves gradually and systematically created individual racism by participating in the TAVIS carding system. Paradoxically, the hot spot strategy appeared to imbue anti-racist officers with racist beliefs, which were empirically founded on police data and experientially founded on a wealth of experience with poor Blacks in high-crime neighbourhoods. Officers then enacted these empirically founded racist beliefs in those same high-crime neighbourhoods. This empirically founded individual racism was observed by low-income communities that officers patrolled. Over time, Black persons in low-income neighbourhoods learned through experience that TPS officers were systematically targeting them and inherently suspected them of criminality. Thus, by enacting a policy of stopping an infinite number of individuals in low-income, high-crime neighbourhoods, the TAVIS carding system created a circular system in which individual racism was systematically generated and reinforced. This individual racism was a by-product generated by the practice of carding in crime hot spots and was produced regardless of – and indeed in spite of – the original beliefs of the TPS officers. As a result, Black individuals correctly learned over time that TPS officers were targeting them based on their race.

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[102] *Ibid* at para 5.

C. Project Post: TAVIS Targets Atkinson Co-op

On Friday, May 25, 2012, at approximately 10:40 PM, 84 Vanauley Walk in Atkinson Co-op was a direct target within a TAVIS hot spot.[103] 84 Vanauley Walk, where Tom Le was detained, is a townhouse which sits at the end of a cul-de-sac on the southern end of Atkinson Co-op, the only entrance to the cul-de-sac being from the north.[104] Early in 2012, Atkinson Co-Op had seen "a marked increase in gun-related incidents," leading to a "disproportionate amount of gun violence in that area."[105] This violence derived from "a number of guns being discharged in the Vanauley Walk [...] area" related to two rival gangs – "Project Originals" and "Sic Thugs."[106] In response to this uptick in gun violence, 14 and 51 Divisions of TPS set up a TAVIS initiative called "Project Post," a concerted effort to increase street presence within Atkinson Co-Op and, specifically, on Vanauley Walk.[107] Residents of Atkinson Co-op were reportedly concerned that "ramped up police presence could create tension between teens and authorities" and that "the innocent are going to be targeted unnecessarily."[108] Thus, the well-known existence of Project Post created an atmosphere of tension in Kensington-Chinatown between TPS officers and residents of Atkinson Co-op.

On May 25, 2012, TPS 14 Division officers were enacting Project Post in Atkinson Co-op by searching for Nicholas Dillon-Jack, an individual "associated with violent crimes" who "frequent[ed]" 84 Vanauley Walk as he "liked to hang out there with the [...] 'Project Original Boys.'"[109] This specific action by TPS officers was the action that led to their interaction with Tom Le. In other words, the townhouse where Tom Le stood at the time *Le* occurred was a direct target of Project Post. As TPS officers walked

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103 *Le* 2014, *supra* note 61 at paras 1, 9, 10.

104 "Google Maps" (last visited 23 December 2020), online: *Google* <maps.google.com> [perma.cc/5JHB-G5P9].

105 Justin Skinner, "Project Post aims to reduce crime-related activity in 14 Division", *City Centre Mirror* (30 August 2012), online: <www.toronto.com/news-story/1309520-project-post-aims-to-reduce-crime-related-activity-in-14-division/> [perma.cc/9GS6-QXMK] [Skinner, "Project Post"].

106 *Ibid.*

107 *Ibid.*

108 Justin Skinner, "Rising gun incidents spur police crackdown in Alexandra Park neighbourhood", *City Centre Mirror* (14 June 2012), online: <www.toronto.com/news-story/78802-rising-gun-incidents-spur-police-crackdown-in-alexandra-park-neighbourhood/> [perma.cc/WE7C-SEJD] [Skinner, "Rising gun incidents"].

109 *Le* 2014, *supra* note 61 at paras 10, 11.

down the winding path of Vanauley Walk towards 84 Vanauley Walk, their purpose was to locate a known suspect at a location pinpointed as a drug trafficking hot spot. As they came into view of Tom Le at the southern end of a cul-de-sac deep within the heart of Atkinson Co-Op and away from the public eye, a question of how a reasonable person in his circumstances would have viewed the impending interaction arises. A reasonable person, according to interviews with members of the Atkinson Co-op community at the time, would likely have viewed TPS claims of taking a "measured approach" with "skepticism."[110]

D. Summary

The RPP detention in *Le*, which the Majority recognized as having crystallized due to the racial aspect of its social context, occurred at a specific place with a crucial socioeconomic aspect. When *Le* occurred, Atkinson Co-op had been targeted by the TAVIS system's Project Post, a program recognized as generating systemic racism against Blacks in high-crime neighbourhoods. The tendency of high-crime neighbourhoods to be low-income neighbourhoods reveals that the socioeconomic aspect of the social context of *Le* created the foundation for the racialization of Tom Le by TPS officers. In this sense, the racialization of Tom Le by TPS officers can be understood at a deeper level by an analysis of the socioeconomic status of the place at which it occurred. The socioeconomic aspect of *Le* grounds and informs its racial aspect by more deeply explaining how a reasonable person in Tom Le's circumstances – that is, being a racialized individual located in a low-income, high-crime neighbourhood specifically targeted by TPS – would have behaved.[111]

The socioeconomic aspect of the social context in *Le* reveals that the interaction between Tom Le and TPS officers was the product of a specific project of a TPS strategy to respond to a spike in gun crime by stopping an indefinite number of individuals in certain neighbourhoods. This strategy, which yielded undeniable benefits in crime reduction, created racialization as a systematic by-product by requiring officers to interact disproportionately with, and thus detect more crime amongst, racial minorities. This discriminatory targeting produced police data which created racist statistical distortions, psychological effects among racialized

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110 Skinner, "Rising gun incidents", *supra* note 108.

111 *Grant*, *supra* note 3 at para 44.

communities, and individual racist beliefs among TPS officers. In this sense, TAVIS created a bootstrapping system which generated a circularity of racism as it led to a reduction of gun crime in Toronto. This circular system of racism is only revealed through an analysis of the socioeconomic aspect of the social context of Tom Le's interaction with TPS officers. The Majority's recognition of the existence of a socioeconomic aspect of social context thus requires that an analysis of *Le* itself incorporates race-and-space profiling into a determination of when the detention of Tom Le by TPS officers occurred.

VI. THE MAJORITY'S CONTRADICTION

A socioeconomic investigation which questions the impact of low-income housing is a question of "the place where the interaction occurred" and is thus a question of the "nature of the police conduct."[112] *Le*'s analysis, which includes a discussion of place under the nature of police conduct, analyzed the factor of place in two ways. First, the Majority observed that "[l]iving in a less affluent neighbourhood in no way detracts from the fact that a person's residence, regardless of its appearance or its location, is a private and protected place."[113] The Majority, in other words, recognized that the fact that Tom Le was located within a low-income neighbourhood did not reduce his right to be free from "brazen" warrantless entry of the police in a private backyard.[114] The Majority further recognized that, although Kensington-Chinatown "experiences a high rate of violent crime,"[115] police are not thereby licensed to "enter a private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime."[116] This was "no novel insight;"[117] this first insight merely held that s. 9 of the *Charter* gives individuals the same rights regarding detention regardless of the socioeconomic status or level of criminality in their neighbourhood. This first insight recognized that s. 9 of the *Charter* guarantees "[e]veryone"[118] the same standard of detention rights.

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112 *Ibid.*
113 *Supra* note 1 at para 59.
114 *Ibid* at para 59.
115 *Ibid* at para 60.
116 *Ibid.*
117 *Ibid* at para 59.
118 *Supra* note 2, s 9.

Second, the Majority noted that, in fact, officers policing a high-crime neighbourhood – one that is "policed more heavily" – have a "responsibility [...] to be vigilant in respecting the privacy, dignity and equality of its residents who already feel the presence and scrutiny of the state more keenly than their more affluent counterparts in other areas of the city."[119] The Court in *Le* thus found that police have an enhanced responsibility in high-crime neighbourhoods which requires that officers behave differently than in other neighbourhoods. In high-crime neighbourhoods where the state has an enhanced responsibility under s. 9 of the *Charter*, officers must take a more cautious and measured approach.

A. Section 8 Property Rights

In accordance with s. 8 of the *Charter*, police officers "cannot enter private property or take things from others unless they can show that they have a clear legal reason."[120] Thus, the officers' entry into private property in *Le* would have triggered detention in any neighbourhood and was not specific to the social context of *Le*. The crystallization of detention upon TPS officers' entry into private property was not the product of an enhanced responsibility in high-crime neighbourhoods but was instead merely the product of protections offered by s. 8 of the *Charter*. Thus, the socioeconomic aspect of *Le's* social context raises a question of how the enhanced responsibility that officers must observe when patrolling a high-crime neighbourhood affects the protections afforded to its residents. According to the Majority, TPS officers were not required to behave any differently than they would have in any other social context. Instead, the Majority took the position that the officers were merely required to observe the right of Canadians to private property.

B. Additional Onus of the State in High-Crime Neighbourhoods

This contradiction in the reasoning of the Majority creates an issue in its detention analysis. If this enhanced responsibility of the state in high-

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119 *Le*, *supra* note 1 at para 60 [emphasis in original].

120 Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms" (last modified 8 June 2020), online: <www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> [perma.cc/642U-UFQN].

crime neighbourhoods under s. 9 of the *Charter* has any value, it must require something additional of officers patrolling high-crime neighbourhoods. This enhanced responsibility is not fulfilled merely by refraining from warrantless entry onto private property because respect for private property is part of the state's standard responsibility to everyone in Canada. This enhanced responsibility also is not fulfilled merely by "inform[ing] the person that he or she is under no obligation to answer questions and is free to go,"[121] which is also required as part of the state's standard responsibility to everyone in Canada.

This enhanced responsibility under s. 9 of the *Charter* thus requires the observance of an additional onus in order to avoid a crystallization of detention when patrolling high-crime neighbourhoods. This additional onus of the state in high-crime neighbourhoods necessarily arises out of the recognition in *Le* of the socioeconomic aspect of social context because a reasonable person living in a high-crime neighbourhood which is "policed more heavily"[122] would be more likely to feel that they are not "free to go"[123] in a police interaction. Thus, the recognition of an additional onus on officers in high-crime neighbourhoods reveals that such an onus is required due to the necessary perception of individuals who reside in those neighbourhoods. That is, individuals residing in high-crime neighbourhoods, due to a history of disproportionate interactions with police and the observance of racism and socioeconomic marginalization, tend to have a more skeptical and wary perspective of the police in general. This tendency must therefore inform the perspective of a reasonable person of any police interaction which occurs in a high-crime neighbourhood. As a result, the socioeconomic aspect of the social context in *Le* must take into account the fact that an individual located in a low-income, high-crime neighbourhood would have certain presumptions about police officers.

1. The Reasonable Person in Le

At the time of *Le*'s occurrence, an atmosphere of tension between residents of Atkinson Co-op and TPS officers existed due to the well-publicized existence of TAVIS's Project Post. Individuals living in Atkinson Co-op stated that "ramped up police presence could create tension between teens and authorities" and that "the innocent are going to be targeted

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121 *Grant*, *supra* note 3 at para 39.

122 *Supra* note 1 at para 60.

123 *Grant*, *supra* note 3 at para 39.

unnecessarily."[124] This documented atmosphere of tension derived from the empirically guided belief that Black male youth were the exact targets of Project Post's mission to address rival gang violence on Vanauley Walk. This atmosphere of tension would have informed the perspective of a reasonable person in the circumstances.

Furthermore, a reasonable person in the circumstances of Tom Le was, in fact, a reasonable racialized male youth who socialized at 84 Vanauley Walk, known to co-op management as a "problem address" with "concerns of drug trafficking in the rear yard."[125] Such a reasonable person would know that he was standing in a location that may be "surgically"[126] targeted by TPS 14 Division. Such a reasonable person would thus know upon sight of TPS 14 Division officers that he had "been taken into the effective control of the state authorities."[127]

In other words, such a reasonable person at 84 Vanauley Walk at 10:40 PM on a Friday night, upon sight of 14 Division officers, would not perceive the officers as conducting "general neighborhood policing" but instead as "effectively [having] taking control" of the cul-de-sac from which there was no exit. The spatial layout of Vanauley Walk, and the way officers positioned themselves in that space, created a situation in which Tom Le was effectively trapped.[128] Such a reasonable person in the circumstances would therefore presume that they were not free to go and were, in fact, detained upon sight by 14 Division officers. A reasonable person would also know that they were at the end of a cul-de-sac with one exit, which Division 14 officers were currently occupying.[129] Whether 14 Division officers actually were seeking to detain Tom Le would have been irrelevant to the perspective of such a reasonable person, who would have assumed that they were based upon an empirically grounded presumption.

2. Additional Onus of the State in Le

Due to the perspective of such a reasonable person – that is, a reasonable racialized youth at 84 Vanauley Walk, who was within a super-

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124 Skinner, "Rising gun incidents", *supra* note 108.

125 *Le* 2014, *supra* note 61 at para 9.

126 Skinner, "Project Post", *supra* note 105.

127 *Grant*, *supra* note 3 at para 22.

128 "Google Maps", *supra* note 104; "Bing Maps" (last visited 23 December 2020), online: <www.bing.com/maps> [perma.cc/F3AW-QBBB].

129 "Google Maps", *supra* note 104; "Bing Maps", *supra* note 128.

charged social context ripe for RPP detention – the additional onus of the state must have created some type of obligation on TPS 14 Division officers conducting a "walkthrough" down Vanauley Walk. This obligation must have required TPS 14 Division officers to do more than merely refrain from questioning Black male youth on an isolated cul-de-sac in the heart of Atkinson Co-op. Instead, TPS 14 Division officers' duty to avoid crystallization of an arbitrary detention, which arose upon sight of a racialized male youth in an isolated cul-de-sac out of the public eye on Vanauley Walk, required some positive action. Such a positive action was required by the additional onus on the state in high-crime neighbourhoods in order to assure Tom Le that he was not being targeted by Project Post for questioning.

i. When the State's Additional Onus Arose

This additional onus on TPS 14 Division officers must have arisen before the police's standard duty – that standard duty merely requiring officers to tell an individual they are free to go during questioning, which might cross "the line between general questioning and focussed interrogation amounting to detention."[130] That is, this additional onus must have arisen prior to any actual verbal interaction between TPS 14 Division officers and Tom Le. Instead, the obligation to take positive action required of TPS 14 Division officers arose at the moment that Tom Le came into view.

ii. Form of the State's Additional Onus

This additional onus, which required positive action instead of mere restraint upon sight of Tom Le, required TPS 14 Division officers to state that Tom Le was not being detained. That statement could take one of two forms. Namely, the statement could confirm that Tom Le was detained or it could inform him that he was not detained. If a TPS 14 Division officer with this additional onus failed to make either statement as soon as Tom Le came into sight, Tom Le would thereby be detained upon sight.

In general, a super-charged social context in which socioeconomical and racial aspects would convince a reasonable person that they were presumed to be detained unless told otherwise by an officer creates an obligation on the state to take positive action in the form of a statement

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130 *R v Suberu*, 2009 SCC 33 at para 23; *Omar* 2018, *supra* note 20 at para 79; *Omar* 2019, *supra* note 20.

that confirms whether or not the individual is detained. If such an individual is not explicitly informed by such an officer, an RPP detention will crystallize.

VII. CONCLUSION

Le's recognition of the "disproportionate policing of racialized and low-income communities" marked a crucial post-*Grant* development of the rules of detention under ss. 9 and 10 of the *Canadian Charter of Rights and Freedoms*.[131] While academics have rightfully discussed the racial implications of *Le*, its socioeconomic implications remain unexamined. This gap is out of step with the Majority's analysis in *Le*, which doubted that "officers would have 'brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community.'"[132]

To ignore the socioeconomic aspect of the social context of police interactions is to ignore the spatial foundation on which police engage in racialization. Socioeconomic marginalization occurs within certain locations – namely, high-crime, low-income neighbourhoods, which serve as areas or "jurisdictions" in which racialization occurs. In this sense, the socioeconomic status of the location in which an interaction occurs largely determines whether or not police officers will disproportionately stop racialized individuals.

Economic needs tend to drive newcomers immigrant communities to spatially cluster in downtown low-income neighbourhoods next to business districts, which leads to the overrepresentation of minorities in low-income neighbourhoods such as Kensington-Chinatown in Toronto.[133] Such low-income neighbourhoods also tend to be high-crime neighbourhoods and thus the focus of hot-spot policing.[134] As a result of this dedication of resources, minorities tend to be stopped more frequently by police, leading to more crime being detected among minorities. This tendency of racialization within certain socioeconomic spaces has been demonstrated in a series of studies that analyzed the TAVIS carding system. This very

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131 *Supra* note 1 at para 97; *supra* note 2, ss 9, 10.

132 *Supra* note 1 at para 59 [emphasis added].

133 Hulchanski, *supra* note 65 at 52.

134 Roh & Robinson, *supra* note 5 at 138; Meng, "Racially biased policing", *supra* note 4 at para 7.

same TAVIS initiative produced Project Post, a TPS hot-spot program intending to target Black male youth in response to a 2012 spike in Toronto gun crime.

The correlation between minority status and criminal activity, which results systemically from hot-spot policing strategies such as the TAVIS initiative, creates an empirically based illusion that racial minorities tend to engage in criminal activity more often than whites. By way of this correlation, systemic racism may transform into explicit racism as officers interact disproportionately with minorities in high-crime, low-income neighbourhoods. This presumption of criminality is notably similar to presumptions made against Indigenous persons off the reservation and slaves off the plantation. In all three cases, an individual's presence within a certain space is inherently in question until proven otherwise.

Le, followed by *Thompson*, recognized the relevance of racialization of minorities by police officers, finding that a social context with aspects of racism and socioeconomic marginalization can instantly crystallize a police interaction into a detention if, in such a super-charged context, officers enter space in proximity to an individual in a way which communicates that the individual is not free to leave. These single-act detentions are only possible because racial and socioeconomic trends in policing have created a context in which the potential for detention is particularly ripe.

In *Le*, which took place in a hot spot surgically targeted by TPS amid a spike in gang-related gun violence in 2012, socioeconomic trends in Toronto policing in 2012 were clearly significant. In fact, based on the newly minted Project Post, which targeted two rival gangs in response to spikes in gun violence in the City of Toronto, the potential for detention of racialized low-income persons was particularly ripe. The significance of hot spot policing of high-crime, low-income neighbourhoods to the social context – which *Le* itself recognized as relevant to the crystallization of detention – requires consideration of the socioeconomic environment in which Tom Le was detained by 14 Division TPS officers.[135]

The Majority in *Le* recognized that this super-charged social context required an enhanced responsibility from 14 Division Officers. However, the Majority failed to apply that enhanced responsibility by merely appealing to the state's standard responsibility not to arbitrarily enter private property. The Majority's application of the *Grant* test, which failed to account for the state's enhanced responsibility, therefore failed to analyze

[135] *Le* 2014, *supra* note 61 at para 9.

how that enhanced responsibility would affect the crystallization of Division 14 TPS officers' interaction with Tom Le into a detention.

Due to the state's enhanced responsibility in the circumstances, the 14 Division Officers in *Le* had an onus deriving from s. 9 of the *Charter*. That onus could only require the 14 Division officers to do something that they would not otherwise be required to do in another context. In other words, this onus required positive action to discharge that additional responsibility. One simple way 14 Division officers could have discharged such an onus would have been to explicitly inform Tom Le either that he was detained and had rights under s. 10 of the *Charter* or else that he was not detained.

VIII. RECOMMENDATIONS

Canadian police departments are recommended to prepare standardized statements which must be read during patrols within high-crime areas when, due to the specific spatial circumstances, a reasonable person might conclude that they are detained upon sight. Such circumstances may arise for reasons similar to those present in *Le* – namely, in a space isolated from public view where officers block the only exit. In such circumstances, a detention will or will not arise dependent upon the explicit choice made by the officer as communicated to the individual.

The main issue of this solution seems to be its creation of uncertainty for officers who cannot be entirely sure when a detention may crystallize in a super-charged social context. However, this ambiguity is not a result of this solution *per se* but instead is a feature of RPP detention itself. *Omar* described this inherent ambiguity when it held that "[u]ncertainty about when a detention occurs has existed throughout *Charter* jurisprudence, in large part because of the inclusion of the psychological element in the concept of detention."[136]

Thus, the solution of requiring officers to explicitly state whether an individual in detained in a super-charged social environment does not create additional ambiguity and indeed addresses the ambiguity which is inherent in RPP detention. By requiring officers to state their intentions in contexts in which the potential for detention is ripe, the ambiguous question of whether a detention exists is thereby resolved.

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[136] *Supra* note 20 at para 5.

As such, requiring an explicit statement that either establishes a detention and fulfills informational obligations under s. 10 of the *Charter* or else explicitly informs an individual that they are free to go resolves some of the ambiguity inherent in RPP detention and, additionally, supports the *Charter* principle of the "rule of law"[137] by putting the onus on the state to ensure that its legal obligations under ss. 9 and 10 of the *Charter*[138] are fulfilled in super-charged social contexts where the potential for a crystallization of RPP detention is ripe.

137 *Supra* note 2, Preamble.
138 *Supra* note 2, ss 9, 10.

11(e) Shattered: The Historic and Continued Breaching of Indigenous Persons Right to Reasonable and Timely Bail

SEAN GALLOP

I. INTRODUCTION

S. 11(e) of the *Charter* states that "any person charged with an offence has the right not to be denied reasonable bail without just cause."[1] Canada's bail provisions and bail system have historically created barriers to Indigenous[2] peoples accessing reasonable bail in Canada.[3]

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1 *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, s 11(e) [*Charter*].

2 The term Aboriginal and Indigenous will be used interchangeably throughout this paper. Much of the legislation uses the term Aboriginal. However, the writer's understanding is that Indigenous is a more appropriate term. Therefore, Indigenous will be used when not required by the wording of legislation or quotations of others cited.

3 Alberta, Justice on Trial, *Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta,* vol 1 (Alberta: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, March 1991) at 3–5, 4–44 [*Alberta Task Force Report*]; Canada, Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality Respect and the Search for Justice,* (Ottawa: Law reform Commission of Canada, 1991) at 97 [*Aboriginal Commission of Canada Report*]; Manitoba, Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba,* (Manitoba: Aboriginal Justice Inquiry, 1991), online: <www.ajic.mb.ca/volumel/toc.html> [*Manitoba Inquiry*]; Manitoba, Aboriginal Justice Implementation Commission, *Aboriginal Justice Implementation Commission Final Report* (Manitoba: Aboriginal Justice Implementation Commission, 2001), online: <www.ajic.mb.ca/reports/final_toc.html> [*Manitoba Final report*]; Canada, Canadian Civil Liberties Association, *Set up to Fail: Bail and the revolving Door of Pre-trial Detention*, by Abby Deshman & Nicole Myers (Canada: Canadian Civil Liberties Association, 2014), online (pdf): *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> [perma.cc/QM8M-W6NX].

Recent changes in the bail provisions have attempted to address some of these issues.[4] However, recent jurisprudence has demonstrated that the access to justice issue regarding reasonable bail in Manitoba for Indigenous persons is deep-rooted and multifaceted.[5] This paper will look at the historical access to justice issues regarding reasonable bail for Indigenous peoples, the current attempts to address this issue, and the challenges that still need to be addressed.

II. HISTORICAL ACCESS TO JUSTICE ISSUES REGARDING REASONABLE BAIL FOR INDIGENOUS PEOPLES

The historical issue of barriers to reasonable bail for Indigenous persons is intertwined with the historical and current crisis of the over-representation of Indigenous persons in the correctional system.[6] The over-representation of Indigenous persons in remand custody is a growing concern and a serious access to justice issue. Across Canada, Indigenous peoples comprise approximately 3% of the general population and 21% of the remand custody population.[7] As stated recently in *Myers*, "in our criminal justice system, Indigenous individuals are overrepresented in the remand population, accounting for approximately one quarter of all adult admissions."[8] One can see between *Rogin's* statistics reported in 2014 and the Supreme Court of Canada's statistics from *Myers* in 2019 that there was an increase in the percentage of Indigenous peoples being held in remand custody.

A. Report of the Task Force on the Criminal Justice System and Its Impact on the "Indian" and Metis Peoples of Alberta

The *Alberta Task Force Report* drew the following conclusions from their interim judicial release (bail) review for Indigenous accused persons: (1) Aboriginal accused persons are less likely to be released than non-

4 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 42nd Parl, 2019, (1st Sess), (assented to 21 June 2019), SC 2019, c 25 [Bill C-75].

5 *R v Balfour and Young*, 2019 MBQB 167 [*Balfour & Young*].

6 *R v Gladue*, [1999] 1 SCR 688 para 65, 171 DLR (4th) 385 [*Gladue*].

7 Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325 at 326.

8 *R v Myers*, 2019 SCC 18 at para 27 [*Myers*].

Aboriginals;[9] (2) they (Indigenous persons) do not understand the process and are more likely to be found guilty; (3) they are overrepresented in the jail population; (4) they do not have money for cash bail. Many Aboriginals simply plead guilty to "get it over with" because remand time is regarded as dead time or simply a waste of time; and (5) consequently, the judicial interim release process bears heavily on them as a group.[10] In the conclusions of these reports, we can see that the bail system in Alberta, as reported at that time, was having a disproportionately negative effect on Indigenous peoples applying for release. This is highlighted in the 1986 Native Counselling Services Alberta study that stated, "[t]he greatest disparity between Native and non-Native experience of bail outcomes (in Edmonton) is the fact that many more non-Natives (31.5%) as compared to Natives (5.6%) were released on their own undertaking or on a recognizance."[11]

The 1986 Native Counselling Services Alberta study also stated that the single biggest problem many Natives face when going through a bail hearing is their general inability to understand the bail hearing procedure.[12] This issue is also closely related to inadequate self-representation before a Justice of the Peace at a bail hearing.[13] 17.6% of Indigenous and 11% of Non-Indigenous report problems representing themselves before Justice of the Peace at a bail hearing. It follows that, if you do not understand the process you are engaged in, it will be more difficult to provide the information required to represent your case effectively.

The Native Counselling Services of Alberta bail hearing studies were divided between Edmonton and Calgary. The summary from Edmonton included three major findings. First, several individuals had difficulty understanding the bail hearing procedure and appeared to be bewildered by the experience. Second, Indigenous persons were not able to represent themselves adequately during their bail hearing. Lastly, some Indigenous persons were unable to raise the bail money necessary for their release. The

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9 *Alberta Task Force Report, supra* note 2 at 4–44, term Indian being used as it is in the title of the report.

10 *Ibid.*

11 *Ibid* at 4–42, citing Alberta, Native Counselling Services of Alberta, *A Study of Bailling Hearings in Edmonton and Calgary*, (Alberta: Native Counselling Services of Alberta, December 1986) at 3–5.

12 *Ibid* at 12.

13 *Ibid* at 4–43.

Calgary study summary included the following three major issues. First, despite some contradictory evidence, the Justice of the Peace obtained adequate information and a fair outcome through careful questioning of the accused. Second, young Native female offenders were over-represented in the sample. Lastly, a number of young offenders could not be released because they were unable to contact a responsible adult who was willing to supervise them.

Also, coming from within the *Alberta Task Force Report*, the Lesser Slave Lake Indian Regional Council stated that there is a perception of bias or racism by "white" Justices of the Peace. They state that there are instances where bail has been denied to Indigenous persons living on reserve whose residency, employment, and lack of criminal record were all favourable indicators of risk mitigation with respect to the opposed grounds of release. Observations made by the authors show that simple inquiries into these situations to the band office would have sufficed. The council also lamented that issues of language are a contributing factor.[14] Another brief submitted to the Task Force stated that bail is set too high for a Indigenous persons modest income and that issues related to unemployment, poverty, transient housing, and criminal involvement paint the Indigenous accused as untrustworthy for bail.[15] The link between denial of bail and the fact that this will significantly affect the likelihood of a conviction and severity of a sentence was addressed in the *Task Force Report*.[16] These are significant access to justice issues directly affecting Indigenous persons. The idea that Indigenous peoples are being denied reasonable bail because of systemic issues resulting from *Gladue* factors can be described in these early reports. The Elizabeth Fry Society of Calgary's contribution to the *Albert Task Force Report* is an excellent illustration of the historical issues of being denied reasonable bail without just cause:

> Even though the courts have deemed a person to be manageable in the community pending trial, the lack of financial resources or a bail assistance program keeps those with a low socio-economic status in prison. Metis and Native peoples are highly representative of this group who cannot meet bail, even though available.[17]

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14 *Ibid.*
15 *Ibid* at 4–44.
16 *Ibid.*
17 *Ibid.*

The *Alberta Task Force Report* recommendations regarding bail were first to reinstate the Elizabeth Fry Society of Calgary Bail Assistance Program and be modified to be specific to Aboriginals because of their specific problems with respect to bail.[18] This was to address the issue that Indigenous peoples were being denied reasonable bail regardless of their criminal records and the type of offence(s) they were charged with.[19] The second recommendation was that culturally sensitive bail criteria be developed for Aboriginal accused persons.[20] This was important as the study showed that cultural barriers, including language and lack of understanding the process, created barriers in releasing Indigenous persons who satisfied all the other *Criminal Code* grounds for release but due to lack of culturally appropriate bail provisions, were being held in custody.[21]

Along the same vein as culturally sensitive bail criteria and tailored bail support programs was the idea of Elder Sponsorship as an alternative to bail.[22] It was recommended that this be studied and developed. The last two recommendations dealt with cash bail requirements. The first one suggested that where cash bail was required that it not be applied to poor Aboriginal accused persons, particularly those living on welfare.[23] The second is where cash bail is appropriate, Band Councils establish a fund for assistance to Reserve residents.[24] Finally, other recommendations not directly related to the bail portion of the report were still helpful by informing the general problem related to access to justice for Indigenous peoples. The task force recommended cultural and anti-racism training for police officers. They also recommended that the cultural training be delivered by members of the relevant Indigenous community. The task force also recommended there be a real effort to recruit Aboriginal peoples to the police force and for officers to spend time in Aboriginal communities in a non-enforcement capacity.[25]

In summary, looking back at *Alberta Task Force Report* regarding access to reasonable bail and Indigenous peoples, the Report identified some key

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18 *Ibid.*
19 *Ibid* at 4–41.
20 *Ibid* at 4–45.
21 *Ibid* at 4–42.
22 *Ibid* at 4–45.
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*

reasons for Indigenous peoples being held in custody more often than non-Indigenous people, including issues such as poverty, unemployment, and cultural barriers. It was a report from its time that there was little connection between what we would now call *Gladue* factors – such as poverty, unemployment, low education, substance use issues – and the Colonial policies/laws that created those systemic factors. *The Alberta Task Force Report* is an example of what I would call identifying the symptoms of high rates of bail denial for Indigenous persons but not the underlying conditions. Overall, the recommendations did not deal with systemic factors, nor did they deal with the outcome that s. 11(e) of the *Charter* is breached by denying so many Indigenous peoples reasonable bail, despite qualifying for release.

B. Report on Aboriginal Peoples and Criminal Justice: Equality Respect and the Search for Justice

Staying in the same time period (1991) but moving the scope of analysis from a provincial one to a nationwide one, we now examine the *Aboriginal Commission of Canada Report* treatment on the subject of Indigenous persons being denied reasonable bail in Canada.[26] The Minister of Justice asked the Law Reform Commission of Canada to look at the *Criminal Code* and related statutes to examine the extent to which Indigenous persons and cultural and religious minorities have equal access to justice. A total of 15 recommendations were made in the report on Aboriginal peoples and criminal justice.[27] The issue of equal access to reasonable bail was examined in section V and was followed with recommendation number 12. Before addressing the bail recommendations, it would help to put the overarching recommendations that came from this report into context. A general conclusion was that Indigenous persons should have the authority to establish Indigenous justice systems. A similar overarching recommendation from the *Alberta Task Force Report* is to bring more Indigenous peoples into working within the justice system and expand cultural training for all persons currently employed in the justice system. There was also a focus on alternative sentencing and having Indigenous community involvement on sentences.[28] The general recommendations

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26 *Supra* note 3.
27 *Ibid.*
28 *Ibid* at 61.

from both the Alberta Report and Nationwide Report heavily focused on addressing the inequality and the access to justice issues of over-representation of Indigenous peoples in the criminal justice system by having more input from Indigenous persons and implementing an Indigenous perspective. Looking at both reports and their conclusions that cultural bias and racism were strong factors in the creation of some of the barriers, it is understandable how believing that having more Indigenous involvement, input, and engagement, may help address the issue of ignorance and non-connection, which can be a factor in cultural bias and racism.

1. The Recommendations

The *Aboriginal Commission of Canada Report* recommendation 12(1) was to address the issue that some Indigenous persons were being arrested and detained on warrants that were not specifically or expressly deemed endorsed.[29] Therefore, the arresting officers did not know if they were to be held or released once arrested. This especially affected people in the North who would be detained and transported to the general detention in the south in order to have a bail hearing. The recommendation was that legislation should expressly require that a Justice consider making an endorsement when issuing an arrest warrant.[30] This change did occur. When a Justice issues a warrant, regardless of the type of offence, they consider whether it will be endorsed or unendorsed. Counsel and Crown, if present, are also allowed to make submissions before the decision is made. However, it still dependant on the Justice of the Peace to decide on whether the person will be held or not. Therefore, all the issues regarding Indigenous peoples' decision-making and how their alleged offences and previous convictions (especially for administration of justice offences) are still in play.

Recommendation 12(2) was intended to give more release power to lower-ranking police officers.[31] The intention was to give more discretion to the officer in the field to lead to less needless detention.[32] However, it has also been recognized in the Report that ultimately, the success of the recommendation depends on the officer in the field using their discretion

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29 *Ibid.*
30 *Ibid.*
31 *Ibid* at 62.
32 *Ibid.*

in a manner consistent with favouring release rather than detention.[33] This increased discretion, coupled with the increasing scope of police powers through expanding ancillary police powers, has led Justice Stribopoulos, to state that there is a risk of being unjustifiably arrested and detained for considerable periods before the deficiency of the case against them ultimately leads to charges being withdrawn or dismissed.[34] One could argue that this increased discretion of low-level police officers to make decisions regarding release on "any crime," as opposed to oversight by officers in charge, can increase the opportunities for Indigenous persons being detained – especially in areas with high levels of cultural bias and racism. In summary, recommendation 12(2) is well-intentioned. However, I would suggest that for it to be in alignment with the Constitutional standard of s. 11(e) of the *Charter*, the last line should read, "[a] peace officer must be required to release the person unless specific grounds of detention are satisfied."[35]

Recommendations 12(3)(a)(b)(c), (4) dealt with conditions of release. Their recommendation was an attempt to raise awareness for those imposing bail conditions on Indigenous accused in situations where conditions were routinely being applied with no real consideration of whether they were necessary or appropriate.[36] One example of this is where conditions were imposed to stay away from particular areas of the city, which, in many cases, were also areas where most Indigenous peoples congregated or lived, therefore resulting in unintended banishment of the accused from their community.[37] The application of abstaining conditions where Indigenous persons were known to be alcohol dependant created unreasonable conditions.[38] Non-Contact orders on Indigenous peoples who were living in smaller communities where contact was almost unavoidable were difficult to follow.[39] The restriction of firearms was especially inconvenient for Indigenous persons making a living by hunting

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33 *Ibid.*

34 James Stribopoulos. "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta LR at 293.

35 *Aboriginal Commission of Canada Report, supra* note 3 at 62 [emphasis added]. This is in contrast to the wording "should be required...."

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

and trapping.[40] The requirement to regularly report to a probation officer is also very inconvenient.[41] The recommendations did not suggest that these conditions were never to be applied, just that the court recognized the impact of these conditions on Indigenous peoples. They did recognize that the *Criminal Code* already contained s. 515(4)(f) (at the time), which referred to "reasonable conditions," and if a condition is clearly one with which the accused cannot comply, then it is not a reasonable condition.[42] They also recommend that the *Criminal Code* provide a clearer standard to guide the imposition of reasonable conditions.[43] We will later see the case *Antic* and codification of the least restricted condition principle that this issue was elaborated on.[44] These recommendations were progressive because they identified that imposing conditions on Indigenous accused required special consideration in light of their unique cultural and geographical circumstance.[45] However, it did not deal with the connection between the imposition of conditions of release in the sense of breaching the s. 11(e) *Charter* right to reasonable bail. The argument is that when imposing overly stringent bail conditions or imposing non-relevant bail conditions, you deny reasonable bail without just cause.[46] Just because bail is granted does not mean it was reasonable. This can be seen when examining how there is a conflation between sentencing hearing principles and bail hearing principles for many Indigenous persons.[47] The *Aboriginal Commission of Canada Report* was well-intentioned but short-sighted on the breadth of violation of s. 11(e) *Charter* rights to Indigenous persons regarding the imposition of bail conditions.

Recommendations 12(5)(6)(a)(b)(c)(d), (7), (8), (9), (10) dealt with cash bails sureties and the rules and regulations around them. They recommended that there be no criminal liability for breaching non-monetary conditions of release besides the alleged breaching offence itself.[48] They recognized the surface issue of the difficulty of Indigenous peoples

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40 *Ibid* at 63.
41 *Ibid.*
42 *Ibid.*
43 *Ibid*
44 *R v Antic*, 2017 SCC 27 [*Antic*].
45 *Aboriginal Commission of Canada Report*, *supra* note 3 at 62.
46 *Rogin*, *supra* note 7 at 333.
47 *Ibid.*
48 *Aboriginal Commission of Canada Report*, *supra* note 3 at 64.

gaining sureties, but they appeared to minimize the issue. They acknowledged that the economic status for Indigenous persons was a factor and that the issue was compounded by the fact that Indigenous persons cannot individually own their land, such that they cannot post a house as collateral.[49] This greatly understates the issues related to lack of surety which are unemployment, poverty, family dislocation, lack of community supports, mental health, and substance use issues. These are also considered systemic issues of colonization and *Gladue* factors. This Report not only failed in making the connection between *Gladue* factors and surety issues, but also understated the listing of reasons for lack of surety specific to Indigenous persons. This is important because one of the principles of *Gladue* is the over-representation of incarcerated Indigenous persons.[50] It is elementary to reason that if one group is overrepresented in one area – such as having a criminal record – their ability to access things – such as being a surety, which requires no criminal record – would be lessened. This is not considered fully in the recommendations. In their defence, this report predates *Gladue* by nine years. We start to see how the lack of in-depth analysis concerning systemic issues regarding the denial of reasonable bail to Indigenous persons affects Indigenous persons' access to justice. There was an attempt to bring attention to the fact that the suitability of an intended surety for Indigenous accused should be analyzed differently with specific considerations such as finical resource, character and nature of previous convictions, proximity to the accused, and other relevant matters.[51] There was also an attempt to limit the liability of the surety.[52] I am suggesting these recommendations did not go far enough.

C. Report of the Aboriginal Justice Inquiry of Manitoba and Aboriginal Justice Implementation Commission Final Report

The final historical Inquiry we will look at is the *Manitoba Inquiry* and the *Manitoba Final Report.*[53] The purpose of the Inquiry was to investigate the state of conditions regarding Aboriginal peoples in the Manitoba justice system. The inquiry was a result of two specific and separate incidents. The

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49 *Ibid.*

50 *Gladue*, *supra* note 6.

51 *Aboriginal Commission of Canada Report*, *supra* note 3 at 65.

52 *Ibid.*

53 *Manitoba Inquiry*, *supra* note 3 at ch 1.

first was the 16-year delayed trial for the murder of Helen Betty Osborne, and the second was the shooting death of J.J. Harper, executive director of the Island Lake Tribal Council, by a Winnipeg police officer.

1. Bail and Aboriginal Peoples: Some Statistics

Some statistics outline the problem as they saw it. Their analysis is based on Provincial Court cases that reveal Aboriginal persons were 1.34 times more likely to be held in pre-trial detention.[54] For Aboriginal women aged 18–34, the difference was 2.4 times.[55] For adult males between the ages of 18 and 34, Aboriginal persons spent 1.5 times longer in pre-trial detention.[56] Overall, they determined that Aboriginal detainees had a 21% chance of being granted bail, while non-Aboriginal detainees had a 56% chance.[57] The Report discovered that Aboriginal peoples spent considerably more time in pre-trial detention in Winnipeg and Thompson than non-Aboriginal people.[58] In Winnipeg, the average length of detention for an Aboriginal detainee was more than twice as long as it was for non-Aboriginal detainees.[59] In Thompson, the average length of detention was 6.5 times longer for Aboriginal detainees.[60] In Thompson, 28% of Aboriginal peoples who applied for bail had their applications denied, versus 10% of non-Aboriginal accused that were denied.[61] On average, Aboriginal youth in pre-trial detention were detained almost three times longer than non-Aboriginal youth.[62]

2. Consequences of Bail Denial

The consequences of bail denial were also explored. Considering that the statistics already show that Indigenous persons are being denied bail more often and are more likely to be detained in remand custody, the following consequences directly impact Indigenous persons as individuals and a community. Think of it in terms of all the ill effects of one type of bad outcome targeting an already vulnerable and marginalized population.

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54 *Manitoba Inquiry, supra* note 3 at ch 6.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 *Ibid.*

The separation from family and loved ones for over a year can seriously hurt family and employment.[63] Family dislocation and unemployment are already two major issues created by colonialism and its policies. Therefore, high levels of denied bail to Indigenous persons exacerbate the systemic issues recognized in *Gladue*. The irony is that bail was most likely denied due to the systemic issues of the *Gladue* factors being considered personal risk factors instead of government-created states of being. This creates the cycle of over-representation, as the factors that inform bail denial are being created by bail denial. In a situation where *Gladue* factors and systemic issues that flow from these factors are present, they should not be treated as risk factors and should not militate towards detention. This will be explored in the next section when modern approaches to ensuring Indigenous persons are not denied reasonable bail without just cause are discussed. The *Manitoba Inquiry* also stated that another consequence of bail denial is that sometimes-denied bail can create an "aura" of guilt or suspicion:

> In the eyes of an Aboriginal accused and the general public, the fact that a person has been charged with a serious offence and has been denied bail is highly suggestive both of guilt and of the ultimate need to incarcerate. Studies have shown that individuals who have been denied bail are far more likely to be incarcerated upon conviction. It is difficult to estimate the degree to which the trial or sentencing judge has been influenced in his or her decision, either to convict or to incarcerate, by the fact that the accused was denied bail. However, it is easy to imagine why the accused may feel he or she is at a disadvantage.[64]

Other consequences are that pleading out to charges sometimes seems easier to do when you know that you will be held until the time of trial. Crown attorneys sometimes use this to leverage a guilty plea by offering a reduced sentence. For someone who already has a criminal record, pleading guilty to an offence they did not commit, but would have to wait much longer in custody to prove they are not guilty, is not worth the loss of time from their life.

3. Bail and Systemic Discrimination

The report noted several ways the pre-trial detention system itself can discriminate against Indigenous peoples, with special note to those who live

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63 *Manitoba Inquiry, supra* note 3, Chapter 6 Manitoba Courts, Release from Custody, *The Consequences of Bail Denial.*

64 *Ibid.*

in remote communities.[65] When an Indigenous person is arrested in a remote community, they are removed from their community because there is no local person to hear a bail application.[66] This begins a process of shuffling the Indigenous person around the province.[67] This moving of the accused does not consider the accused's right not to be denied reasonable and timely bail without just cause. Many Indigenous peoples, because of *Gladue* factors and systemic issues of poverty, require a Legal Aid lawyer or rely on the Legal Aid duty council. Legal Aid is famously understaffed, especially in Northern Manitoba, and this directly affects Indigenous peoples seeking bail in Northern Manitoba. This Report did not elaborate on how the courts and their operation in the North are creating unreasonable delays and, therefore, routinely breaching Indigenous persons s. 11(e) *Charter* rights. However, this will be examined when we discussed the recent case of *Balfour & Young.*

The Report did make a serious attempt to address how the use of conditions of release on bail orders can discriminate against the Indigenous accused.[68] The surety system was described, and it was shown how Indigenous Manitobans were discriminated against because as a group Indigenous persons, wealth, income, and ability to access resources to post surety was drastically lower than any other group.[69] Not stated in the Report, but as an observation, ironically, this state of disparity has very much to do with *Gladue* factors and colonization policies. The result is one law for the rich and one for the poor.[70] Indigenous peoples moving often between cities and reserve communities are more likely to be considered transient, which is regarded as another "risk" factor when bail is considered.[71] The report stated that this was especially an issue as they noted a high mobility rate of Indigenous persons between these communities.

There was an attempt by the report to explain the phenomena of judges using factors such as employment, residence, family ties, substance abuse, and a previous criminal record to determine whether to detain a person or

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65 *Manitoba Inquiry, supra* note 3 at ch 6.
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*

not.[72] Here, they used an experiment with those factors and applied them to inmates at the Winnipeg Remand Centre.[73] They found that 39.1% non-Aboriginal people were considered good risks under that system compared to only 29.4% of the Aboriginal inmates being considered a good risk to release.[74] The conclusion was that the criteria the judges currently employ are likely to be biased against Indigenous peoples.[75]

4. Recommendation from Manitoba Final Report

Looking specifically at the Report for recommendations that affect the access to justice issue of the right not to be denied reasonable bail without just cause, the *Manitoba Inquiry* recommendations were as follows. They stated that bail hearings were to be conducted in the community where the offence was committed.[76] This does not occur as a matter of practice in the present day. If it is convenient, a bail hearing will occur in the community in which the offence was committed. However, the majority of the time, the accused are being transported at the cost of time to another community. The problem of shuffling an accused around the province and breaching *Charter* rights by not having the accused appear for a bail hearing is still very much a live issue. The province has not invested money or resources into the northern communities to make this happen. Legal Aid in the north is still underfunded and overworked, leading to delays for the most vulnerable. There is no political will in the province of Manitoba to invest money and resources into this issue.

The Manitoba Government recommended establishing a bail supervision program to provide pre-trial supervision to the accused as an alternative to detention.[77] There was a bail supervision program in Manitoba for a short time. However, there is now no official provincial government bail supervision program. The justice system relies heavily on private, non-profit charities such as the Behavioural Health Foundation and the Elizabeth Fry Society to supervise bail in the Winnipeg Community. These two organizations have the court's confidence in terms of supervising bails, but they are not strongly government-funded and rely

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72 *Ibid.*
73 *Ibid.*
74 *Ibid.*
75 *Ibid.*
76 *Manitoba Inquiry, supra* note 3, Appendix 1 – Recommendations, Court Reform, *Pre-Trail Detention.*
77 *Ibid.*

heavily on private donations. The Government has not made bail supervision programs a priority in Manitoba. This can also be seen by the funding reduction to the John Howard Society Bail Supervision Program in 2018 and effectively shutting down that bail supervision program. This is especially important in that, when looking at most Indigenous peoples who come before the court, the risks factor for release being used most often are those revolving around issues of stability – that being poverty, homelessness, unemployment, family dislocation, addiction, and mental health issues. These, as stated above, are also systemic factors resulting from the effects of colonization. These systemic issues resulting from *Gladue* factors are being used as grounds of high risk for denying bail to Indigenous peoples.

Ironically, the courts often state that this is a resource issue. If the courts start to address the systemic issues from the *Gladue* factors not as a traditional risk factors generated by the individuals personal choice but as factors that have been generated by external forces of colonial policy that the accused is not responsible for, then perhaps we would see fewer denied bails for Indigenous people based on high risk from poverty, homelessness, unemployment, etc. This, in turn, would put the stress back on the government to provide the resources needed to deal with the systemic issues. The Manitoba Provincial Government does not appear to be interested in investing money in a Government Bail Supervision Program, although the recommendation still stands. As with the first recommendation, there is no political will to invest resources in this area. This is not a popular issue, and it is much easier to appear "tough on crime" than it is to appear as a social justice advocate.

Inappropriate bail conditions were addressed – such as requiring cash deposits or financial guarantees from low-income people that militate against Aboriginal peoples obtaining bail – and are no longer applied.[78] The devasting effect of too many conditions and inappropriate conditions and how it relates to violating the right not to be denied bail without just cause was not mentioned. The *Manitoba Inquiry* focused on creating an Aboriginal Justice Institute and called on the federal and provincial governments to recognize the right of Aboriginal peoples to establish their own justice systems.[79]

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78 *Ibid.*
79 *Ibid.*

5. Summary of Manitoba Inquiry

The *Manitoba Inquiry* and *Manitoba Final Report* were the most comprehensive of the Reports and offer excellent recommendations. The main issue is that most of the recommendations regarding changes to the bail system were not followed, especially the critical ones such as more resources in remote communities and bail supervision programs in urban centres.

III. MODERN ATTEMPTS TO ADDRESS THE ISSUE

A. Bill C-75

Bill C-75 is now law.[80] It will be explained below that parts of this Bill attempt to address the issue of over-representation of Indigenous peoples in remand custody by creating a remedial provision that is intended to address the high number of Indigenous peoples being denied bail. Bill C-75's summary states that this enactment amends the *Criminal Code*[81] to, among other things:

> (a) modernize and clarify interim release provisions to simplify the forms of release that may be imposed on an accused, incorporate a principle of restraint and require that particular attention be given to the circumstances of Aboriginal accused and accused from vulnerable populations when making interim release decisions.[82]

These amendments are reflected at cl 210 where it states,

> *The Act* is amended by adding the following after section 493:
>
> Principle and Considerations
>
> Principle of restraint
>
> 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.[83]

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80 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,* 1st Sess, 42nd Parl, 2019, (assented to 21 June 2019), SC 2019, c 25 [Bill C-75].

81 *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*].

82 Bill C-75, *supra* note 81 [emphasis added].

83 Bill C-75, *supra* note 81 at cl 210.

> Aboriginal accused or vulnerable populations
>
> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give attention to the circumstances of
>
> (a) Aboriginal accused; and
>
> (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.[84]

S. 493.1 partially codifies the principles[85] set out in *Antic*.[86] The majority of the principles s. 493.1 hoped to codify include the ladder principle, the onus on the crown to show why more restrictive forms of release are required, the justification for moving up each "rung" of the ladder, the recognition that a release with sureties is one of most onerous forms of release, the lack of need to rely on cash bails, the statement against using cash bail amounts that effectively amount to a detention order ,and that terms of release may "only be imposed to the extent that they are necessary."[87] S. 493.2 is a remedial provision and a response to the sporadic case law that has been dealing with the application of *Gladue* factors at Interim Release Hearings (bail hearings). S. 493.2 should be seen as remedial in nature and similar to the enactment of s. 718.2(e) in that it creates a judicial duty to give its remedial purpose real force.[88]

Without addressing the lengthy discussion of the application of *Gladue* factors at bail hearings before the addition of s. 493.2, it is sufficient to surmise that it was generally accepted in the common law jurisprudence in Canada that *Gladue* factors were to be considered at bail hearings. The Supreme Court of Canada, on applying *Gladue* outside of sentencing in *Anderson*, endorsed the following finding of the Ontario Court of Appeal in *Leonard* that:

> [T]he *Gladue* factors are not limited to criminal sentencing but that they should be considered by all "decision-makers who have the power to influence the

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84 *Ibid*.

85 *Charter Statement - Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 29 March 2018, online: *Department of Justice* <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html > [perma.cc/JML9-WKWN].

86 *Antic, supra* note 44.

87 *Ibid* at para 67.

88 *Gladue, supra* note 6 at paras 37, 93.

> treatment of aboriginal offenders in the justice system" ... whenever an Aboriginal person's liberty is at stake in criminal; and related proceedings.[89]

The Ontario Court of Appeal in *Robinson* and the Alberta Court of Appeal in *Oakes* directly addressed the application of *Gladue* factors at bail. In *Robinson*, Chief Justice Winkler (as he then was) states, "[i]t is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue*... have application to the question of bail."[90]

Both rulings were helpful in that many jurisdictions adopted Ontario and Alberta's approach. Newfoundland and Labrador, Nova Scotia, Manitoba, Saskatchewan, British Columbia, the Yukon, and the Northwest Territories all followed Ontario and Alberta in that they stated *Gladue* factors had application at bail hearings.[91] New Brunswick was the only jurisdiction to have a clear decision at the superior court level that stated that *Gladue* factors did not apply to bail hearings.[92] It is interesting to note that the recognition of *Gladue* factors applying at bail for most of the provincial cases was in the early to mid 2000s. As originally stated in *Gladue* and reiterated in *Ipeelee*, "[t]he unbalanced ratio of imprisonment of Aboriginal offenders' flows from a number of sources... It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail...."[93] *Gladue* stated that there were many aspects of this "sad situation" which they could not address for these reasons.[94] *Gladue* was released in 1999, and *Ipeelee* was released in 2012. Therefore, it seems there was an intentional effort by the courts to start addressing this issue. It is commonly accepted that s. 493.2 is the codification of the principle stated in *Robinson*.[95]

Even though the courts' have attempted to address the issue of bail denial of Indigenous peoples by applying *Gladue* factors through the common law, remand custody rates of Indigenous peoples continued to rise

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89 *R v Anderson*, 2014 SCC 41 at para 26; *United States v Leonard*, 2012 ONCA 622 at para 85.

90 *R v Robinson*, 2009 ONCA 205 at para 13; *R v Oakes*, 2015 ABCA 178.

91 *R v Rich*, 2009 NLTD 69; *R v Paul-Marr*, 2007 NSPC 29; *R v Mason*, 2011 MBPC 48; *R v Daniels*, 2012 SKPC 189; *R v TJ(J)*, 2011 BCPC 155; *R v Magill*, 2013 YKTC 8, *R v Chocolate*, 2015 NWTSC 28.

92 *R v Sacobie*, (2001) 247 NBR (2d) 94, 52 WCB (2d) 453.

93 *R v Ipeelee*, 2012 SCC 13 at para 61 [*Ipeelee*]; *Gladue*, *supra* note 6 at para 65.

94 *Gladue*, *supra* note 6 at para 65.

95 *Supra* note 91 at para 13.

despite a decline in crime.[96] Professor Rogin states that the reason for this is that *Gladue* was not being applied in a meaningful way. Her main criticisms are the conflation of sentencing proceedings and bail proceedings, lack of reference to colonialism and systemic factors in bail proceedings, over-policing of Indigenous peoples, equal application of sureties creating inequities, and conditions of release.[97] Elaborating on each of these reasons cannot be covered in the breadth of this paper. Suffice it to say that Parliament felt it necessary to legislate perhaps to help address applying *Gladue* factors in a more meaningful way.

In *Zora*, the Court acknowledged that Parliament had recently attempted to address how numerous and onerous bail conditions interact with the offence of breaching conditions on bail order (s. 145(3)) to create a cycle of incarceration among the most vulnerable people.[98] This was a reference to Bill C-78 and, specifically, s. 493.2. The issue in *Zora* was the *mens rea* requirement for s. 145(3) and whether it should be assessed on a subjective or objective standard. Ultimately, they decided that the standard should be subjective. The reasoning by the Court in *Zora* is in alignment with arguments made by scholars, such as Rogin, who have observed that courts should need to prove that Indigenous persons intentionally breached their bail conditions.[99] *Zora* noted that the lack of proof of intentionality and subjective standard for such offences have led to larger amounts of convictions for these types of offences, which present further barriers for release in the future.[100] In this way, *Zora* can be seen as an aid in the application of s. 493.2 submissions.

The courts had been signalling in cases such as *Daniels* and *E(S)*[101] that the application of *Gladue* principles at bail:

> [M]ust be applied within the provisions of s. 515(10) of the Criminal Code. It is for Parliament to amend this section of the Criminal Code, not the Court and therefore I disagree with Justice Lee of the 19 Alberta Court of Queen's Bench in

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96 *Rogin*, *supra* note 7 at 326.

97 *Ibid* at 325.

98 *R v Zora*, 2020 SCC 14 at para 5 [*Zora*].

99 *Rogin*, *supra* note 7 at 355.

100 *Zora*, *supra* note 99 at paras 57–58.

101 *R v E(S)* (28 July 2017), Manitoba Y017-01-36139 (MBQB) (Transcript, Justice Kroft's reasons for denial of release at bail review).

> R. v. P. (D.D.), where he states that aboriginal circumstances can justify release,"... irrespective of the existence of the primary, secondary or tertiary ground.[102]

In short, a Crown argument that gained favour in Manitoba was that *Gladue* factors and systemic issues resulting from those factors could inform the court why the accused is before them and what types of release may be helpful. However, they cannot change the threshold of the test. Furthermore, if Parliament intended for the test threshold to be changed by these factors, they would legislate it. Essentially, what has occurred is that Parliament has now legislated this. The access to justice issue moving forward will be in making bail submissions for Indigenous persons with *Gladue* factors. Stating that the threshold for the test is changed when factors such as unemployment, homelessness, poverty, addiction, and/or mental health issues are attributed to *Gladue* factors is a remedial approach to addressing the discrepancy in the percentage of Indigenous persons being denied bail. The hope is that these issues, when attributed as *Gladue* factors, are not considered risk factors. The theory is that in considering these factors as risk factors leads not just to the cycle of over-incarceration in remand custody but, as stated above, feeds into the cycle of over-represented sentenced Indigenous persons.

This is asking a lot of the courts to do in Manitoba. Ontario, however, has already started moving in this direction, as can been seen in the case of *Sledz*, which was before the legislation.[103] Manitoba took the position from *Daniels* out of Saskatchewan; therefore, this signals that there will be much litigation around this issue. Perhaps the Supreme Court will take on the case at some point to address what s. 493.2 means and how it should be applied as they did with s. 718.2(e) of the *Criminal Code* and *Gladue*.[104]

In summary, the modern approach to addressing the issue of reasonable bail not being denied without just cause for Indigenous persons seems to be an attempt to legislate a remedial provision in the *Criminal Code*. This is new and developing law, and it will be interesting to watch as it progresses. Hopefully, Parliament will attempt to address the issue.

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102 *Ibid* at 9.

103 *R v Sledz*, 2017 ONCJ 151 [*Sledz*].

104 *Criminal Code*, *supra*, note 82, s 718.2(e).

IV. The Challenges Needed to be Addressed

Addressed systematically in the above analysis are many challenges that needed to be addressed to stop the systemic breaching of Indigenous person's *Charter* rights at bail hearings. This section will focus on the most recent case in Manitoba, which addressed the list of challenges that affect access to justice for Indigenous persons regarding bail hearings, specifically in Northern Manitoba. Keep in mind as we look at the issues brought by this case, similar issues were brought in the Inquiry's and Commissions from 20 and 30 years ago.

A. *Balfour* and *Young*

The recent case of *Balfour and Young* illustrated the systemic issues of the dysfunctional bail system in Northern Manitoba.[105] That court identified a serious charter breaching issue that is systemic in nature and disproportionately affects a vulnerable group. Furthermore, for the two cases at hand, it was found that their s. 11(e) *Charter* right for reasonable bail was breached.[106] The issue of a remedy of a stay of proceedings was moot for both Balfour and Young, and there was a remedy of modest court costs provided to the council involved. It was also acknowledged that the routine and systemic issues leading to consistent breaches of s. 11(e) *Charter* rights disproportionality affect the Indigenous population that resides in Northern Manitoba.[107]

In his conclusion, Justice Martin stated that it was beyond his scope of application and his role to make any specific declarations, orders, or even recommendations aimed at fixing the systemic shortfalls that continually infringe the *Charter* protected rights of Northern Manitobans.[108]

Justice Martin gave a list of two sets of recommendations, one for the short term and one for the long term. For the short term, it is stated that they must deal with the issues of first JJP appearances, timing out, the custody coordination policy, and Crown disclosure and appointment of counsel processes.[109]

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105 *Balfour & Young*, *supra* note 5 at para 1.
106 *Ibid* at para 101.
107 *Ibid* at para 97.
108 *Ibid* at para 102.
109 *Ibid* at paras 103–05.

The issue of the first appearance before JJP is that often the "appearance" is an audio-recorded telephone appearance. Most often, what occurs is that the JJP offers remand custody to the accused to have help from a lawyer with a bail application — once remanded in custody, an accused stays in the RCMP detachment cells until they can be taken to Thompson, Manitoba. When and how they are taken into Thompson depends on the location, weather, day of the week, holidays, resources, and manpower. Accused are either flown or driven to Thompson.

The Thompson RCMP cells are not designed for multi-day stays. Local judges have stated that it is inhumane to have an accused stay in these cells for multi-days. However, they routinely do this as a rule and not the exception. When they get to Thompson, they may go before a judge for a bail hearing, or they may be adjourned to the next court date, sometimes without ever getting to court to speak to duty counsel. These steps are all considered appearances, even if they do not appear. The next major issue is the Thompson Provincial Court policy of adjourning those who do not appear to a "custody coordination docket."[110]

Once they are on this docket, they can stay there up to four weeks – well past the three-day remand limit. Once on that docket, an accused can only apply to be brought forward to the next available custody court date if they give a clear two days' notice to the Crown. The idea is to cut down on the number of court appearances and relieve a strain on resources. However, nothing in the policy ensures an accused has a timely bail or that an accused must consent to an in-custody remand greater than three days. Also, there is no indication that the court is ensured an accused understands what is happening. Once put on this docket, an accused is moved, at closet, 400 kilometres to the Pas Correctional Centre or to Winnipeg Correctional Centres.[111] Northern Manitoba residents who are held waiting for bail are moved repeatedly, often driving great distances while locked in cramped vans and in foul weather.[112] Constant remands are the norm.

Also, by the policy of the Chief Provincial Judge, the court was required to close by 5:00 p.m. As such, accused were routinely "timed out" or adjourned, often with their appearance "waived" to another date without

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110 *Ibid* at para 17.
111 *Ibid* at para 19.
112 *Ibid* at para 23.

their matter being dealt with.[113] Lawyers stated that many clients have lost their employment, or have been attacked or threatened, while in remand waiting for bail hearings. Some accused consider pleading guilty just to get out of remand custody. The way these processes have been executed have all lead to the consistent breach of s. 11(e) of the *Charter*. Ms. Balfour spent 51 days in pre-trial detention without a chance at a bail hearing between her arrest date of November 1, 2018, and December 21, 2018.[114] Mr. Young spent 23 days in custody from arrest to his bail hearing and did not consent to many of the adjournments.[115] The reason for both of their delays in appearing for a bail hearing were all related to the above-mentioned issues. The short-term solution suggested is an immediate injection of court resources.[116] The long-term suggestions should be an independent, comprehensive review of the system, processes, technology, training, and facilities affecting in-custody accused on remand, from arrest onward, in northern Manitoba – particularly as it is connected to the Thompson judicial area and remote communities processes.[117] The court in *Myers* states that, "[d]elays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in Jordan and must be addressed."[118]

It was found that Balfour and Young's case are commonplace. In comparing the reports from 20 and 30 years ago, not much has changed regarding how bail practices are occurring in the north. The issues from the *Alberta Task force Report*, *Manitoba Inquiry*, *Aboriginal Commission of Canada Report* regarding the lack of resources and the delays regarding transporting Indigenous accused from smaller communities to larger communities are still prevalent. The recommendations that were intended to help address this issue in regard to more self-governing criminal justice systems in smaller communities and an increase in resources have not occurred. Therefore, the systemic breaching of Indigenous person rights to reasonable and timely bail continues to be breached routinely. I am going to suggest, as I did earlier, that the issue is not about identification; the issue is about having

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113 *Ibid* at para 21.
114 *Ibid* at para 48.
115 *Ibid* at para 62.
116 *Ibid* at para 104.
117 *Ibid* at para 106.
118 *Myers*, *supra* note 7 at para 38; *Balfour & Young*, *supra* note 4 at para 105.

the political will to put the resources towards addressing the problems in a meaningful manner. The Manitoba Government, by its own action, has determined that it is not a priority in the province to address the issue of Indigenous person's access to timely and reasonable bail, especially those in northern communities. There is hope as other, more progressive provinces – such as Ontario, Nova Scotia, New Brunswick, Saskatchewan, Alberta, and British Columbia – have established Indigenous courts, giving greater access to justice for Indigenous peoples, including access to reasonable and timely bail.

V. SUMMARY

Some issues regarding Indigenous peoples' access to reasonable and timely bail appear more straightforward, such as the commitment to resources and funding in specific program areas – i.e., northern legal circuits, bail supervision programs, and development of Indigenous courts. This, however, takes political will. As stated above, the problem, for the most part, was identified years ago and recommendations were just ignored (i.e., bail supervision programs and bails hearings taking place in the community where the offence occurred). Other issues are more evolving and not well defined, such as how reconciliation, *Gladue* factors, and the resulting systemic issues affect the test for the interim judicial release. I would suggest that as our understanding evolves regarding what reconciliation means and how *Gladue* factors inform the Indigenous experience, this will inform the political will, and the judiciary will need to acknowledge the will of the Parliament. My hope is based on the provisions in Bill C-75. However, it will be a challenge, and it will involve making arguments that are uncomfortable to say and uncomfortable to hear for a period of time, until it is not.

California Wrongful Incarceration Compensation Law: A History That is Still Being Written

KELLY SHEA DELVAC*

I. INTRODUCTION

From current popular media and social commentary, one might imagine that the issue of wrongful incarceration and compensating the victims of it is only a 21st Century issue. Quite the contrary is true; the issue is as old as the criminal justice system itself—and in California, the history of wrongful conviction parallels the state's history.

Judge Learned Hand remarked that our system of justice "has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."[1] California alone has had over 200 wrongfully convicted people exonerated since 1989.[2] Of these exonerees, less than 40% have received

* 2021 J.D. graduate of Pepperdine Law. This article is dedicated to my exonerated friends David, Derrick, Alex and the Los Angeles District Attorney Conviction Review team, who encourage me to do better every day. Special thanks to my husband, Bill, for his comments and edits to this article and Ben Fraser for his research assistance. I would also like to thank the members of the Manitoba Law Journal, especially Brooke Mowatt and Mikal Sokolowski for their careful editing and feedback. All errors are my own.

1 *United States v Garsson* (1923), 291 F 646 at 649, [1923] US Dist LEXIS 1442 (SDNY US).

2 "Exonerations by State/Year" (last visited 18 December 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [perma.cc/K7DY-LNVL] [The National Registry of Exonerations, "Exonerations by State/Year"]. "The National Registry of Exonerations provides detailed information about every known exoneration in the United States since 1989 — [exonerations are defined as] cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989."

any type of compensation for the time they spent wrongfully imprisoned.[3] That is because "exoneration guarantees only one thing—release from prison."[4] While the laws in California have been steadily changing to support the people the state has wrongly convicted monetarily, the law still leaves far too many exonerees with nothing.

This article will mark through the history of wrongful convictions in California, explain California's compensation laws and how they have been amended over time, and discuss possible remedies to strengthen the current iteration of the law. Part II of this article will give the history of wrongful convictions in California and the impact those wrongful convictions have on exonerees and society. Part III will look at California's compensation statute and how it has been applied throughout the State's history. Part IV will conclude with recommendations for the future.

II. HISTORY OF CALIFORNIA WRONGFUL CONVICTIONS

Wrongful convictions are not new to society. The history of wrongful convictions in California is as old as statehood itself. The first recorded wrongful conviction in California occurred in 1851.[5] Sheriff Charles Moore was murdered in Yuba County, and an arrest was made of a man known as "English Jim."[6] A few days after his arrest, however, English Jim escaped from jail.[7] Two months later, another man was attacked, but this man survived and described his attacker as looking like English Jim.[8] Within a day the police arrested Thomas Berdue, who bore an uncanny resemblance to English Jim.[9]

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3 Anthony Accurso, "California Exonerees Not Quite Innocent Under the Law" (1 April 2020), online: *Prison Legal News* <www.prisonlegalnews.org/news/2020/apr/1/california-exonerees-not-quite-innocent-under-law/> [perma.cc/VE9H-F6D3].

4 "Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation" (2016) at 9–10, online (pdf): *Innocence Project* <www.innocenceproject.org/wpcontent/uploads/2016/06/innocence_project_compensation_report-6.pdf> [perma.cc/PYP2-DRNQ] [Innocence Project, "Making Up for Lost Time"].

5 Anne Pachciarek, "Thomas Berdue" (last visited 18 December 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=15> [perma.cc/ASU6-UKGY].

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

Berdue was subsequently put on trial for the second assault and the murder of Sheriff Moore.[10] He was convicted of both crimes and sentenced to death by hanging.[11] A few days after Berdue's conviction, English Jim was caught committing a robbery.[12] English Jim was tried by a mob that named themselves the "Vigilance Committee," and before the Committee, he confessed to the murder of the Sheriff and the second assault.[13] The Committee put English Jim to death by hanging and informed the authorities of Berdue's innocence.[14] Berdue had become destitute trying to prove his innocence, and in response, the Committee proposed a fund to compensate him for his hardship.[15] However, the California Senate refused to give the fund to Berdue for his expenses because they feared it would "establish a precedent which, if carried out in all cases of the kind, would more than exhaust the entire revenue of the State."[16] They opined, "[i]n society it too often happens that the innocent are wrongfully accused of a crime. This is their misfortune, and the Government has no power to relieve them."[17]

Between 1852, when Berdue was exonerated, and 1989, there was no official counting of exonerations. Today, the National Registry of Exonerations keeps a current record of every modern exoneration.[18] As of this writing, there have been more than 2,600 exonerations nationally since 1989.[19] Information about exonerations before 1989 is sparse. However, the Registry keeps an anecdotal list of pre-1989 exonerations.[20] There are

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10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 "Our Mission" (last visited 18 December 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/mission.aspx#> [perma.cc/RA2P-PCUK].

19 The National Registry of Exonerations, "Exonerations by State / Year", *supra* note 2. 1989 was the first year the registry started an accurate compilation of exonerations.

20 "Exonerations Before 1989" (last visited 10 June 2021), online: *The National Registry of Exonerations* <www.law.umich.edu> [perma.cc/2N3J-S9M8] [The National Registry of Exonerations, "Exonerations Before 1989"]. The data underlying stats referred to throughout this section come from the Registry, however, the statistical extrapolations are the author's own work based on the raw data provided on these pages.

431 exonerations on that list, 43 of which happened in California. Of the California cases, all the exonerees were male but one.[21] They were of all different ages and races.[22] All of the crimes were either murder (or attempted murder), bribery, or robbery.[23] Their sentences ranged from one year to death.[24] Twenty-five were given life sentences; four received the death penalty.[25] While most served less than five years, three served over ten.[26]

There is not another recorded exoneration after Berdue's in California until 1924.[27] There were seven exonerations that decade, six for robbery and one for attempted murder.[28] The 1930s picked up with 11 exonerations.[29] The subsequent decades only have anecdotes of exonerations as follows: two in the 1940s, five in the 1950s, four in the 1960s, six in the 1970s, and seven in the 1980s.[30]

With the advent of official reporting, the number of exonerations went up exponentially in the subsequent decades. In the 1990s, California had 44 exonerations, followed by 98 from 2000 to 2009, and 81 from 2010 to 2019.[31] "It's impossible to fully grasp the magnitude of the injustice and suffering these [exoneration] numbers represent: careers and opportunities that were lost forever; children who grew up[32] and parents who died while the innocent defendants were in prison; marriages that fell apart—or never happened."[33]

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21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 The National Registry of Exonerations, "Exonerations by State / Year", *supra* note 2.

32 *See* Sion Jenkins, "Secondary Victims and the Trauma of Wrongful Convictions: Families and Children's Perspectives on Imprisonment, Release and Adjustment" (2013) 46:1 Austl & NZ J Crim 119 at 123–27 (reporting the effects of parental incarceration on the children of exonerees).

33 "Milestone: Exonerated Defendants Spent 20,000 Years in Prison" (2018) at 1, online (pdf): *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf> [perma.cc/PT3D-A8A7].

A. Impact on the Exoneree

Every exoneree is impacted by financial consequences caused by lost wages and legal bills, building up from accusation through appeal.[34] The financial blow is heightened because many exonerees were wrongfully convicted and imprisoned when they were young.[35] While their peers were finishing their education and building careers, the exoneree's imprisonment created an education and work history deficit that most exonerees can never surmount.[36]

Compounding the financial injury, services available to parolees — people who committed crimes, served their sentences, and are released — such as job placement, temporary housing, and medical care are generally not afforded to exonerees.[37] These services provide a safety net for released prisoners to get back on their feet and reintegrate into society. [38] The lack of these services to the exoneree is particularly problematic because exonerees are especially vulnerable since they face all the same struggles of reacclimating to life outside of prison that parolees do,[39] but with the added

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34 Innocence Project, "Making Up for Lost Time", *supra* note 4 at 9–10. "After serving nearly 10 years in prison for a crime he didn't commit, David Shephard's wages were garnished for failing to pay child support because his girlfriend and their son had been on welfare for a year while he was away. Larry Peterson was expected to retroactively pay for his own public defender. The New Jersey Public Defender's Office put a lien … on Peterson to pay for the cost of representing him. Peterson had to undergo litigation to have the lien removed."

35 *Ibid.*

36 *Ibid* at 9.

37 *Ibid* at 10.

38 *Ibid* at 9–10. David Shepherd was exonerated after spending ten years in prison for a crime he did not commit, and then was turned away from four different agencies that provide services for ex-offenders. The agencies told him that "he could not receive services since he had not committed a crime."

39 *See* Adrian Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Corr 165 at 171. The study found the exonerees "had marked and embarrassing difficulties in coping with ordinary practical tasks in the initial days and weeks - for example, crossing busy roads and going into shops. Some had more persistent difficulties (not knowing, for example, how to work central heating, TV remote controls, videos, credit cards, or cashpoints at banks) and experienced shame that prevented them from asking for help. One said, 'It's like when someone has a stroke; you have to be taught how to do things again.' He felt humiliated by his lack of ability and the fact that his wife had to teach him elementary skills. The men also typically had little sense of the value of money, had difficulty budgeting, spent recklessly, and got into debt."

psychological trauma of being wrongfully imprisoned.[40]

An exoneree also must deal with detrimental effects from prison life, which often provokes and normalizes criminal behaviour.[41] This exposure and acclimatization to prison life increases the risk that an exoneree will commit a crime after being released.[42]

B. Impact on Society

Blackstone said, "it is better that ten guilty persons escape, than that one innocent suffer."[43] All of society suffers when someone is wrongly

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40 *Ibid* at 168–70, finding evidence of long-term personality changes, PTSD, and other psychiatric disorders in exonerees specifically not found in parolees; the prison sentences for this study group ranged from nine months to nineteen years; all of the subjects had no psychological issues before incarceration. The long-term psychological effects found in this study were similar to the psychological effects found in war veterans. *Ibid* at 175, these psychological consequences were found to be specific to long-term imprisonment coupled with the miscarriage of justice. *Ibid* at 176, "[t]he miscarriage of justice typically entailed acute psychological trauma at the time of initial arrest and custody, involving experiences of overwhelming threat. In addition, there was chronic psychological trauma: years of notoriety, fear, and isolation in their claims of innocence. Most spent years preoccupied in pursuing their case, despite knowing or believing that they would never be released on parole as long as they refused to admit their guilt. Additional features specific to the wrongfully convicted were the absence of preparation for release and of post-release statutory support. The long-term imprisonment entailed psychological adaptation to prison, as well as losses - separations from loved ones, missed life opportunities, the loss of a generation of family life, for some, and of years of their expected personal life history."

41 See generally Francis T Cullen, Cheryl Lero Jonson & Daniel S Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science" (2011) 91 Prison J 48S; Paul Nieuwbeerta, Daniel S Nagin & Arjan A J Blokland, "Assessing the Impact of First Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison" (2009) 25 J Quantitative Crim 227; G. Matthew Snodgrass et al., "Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands" (2011) 49:4 Crim 1149.

42 See generally Evan J Mandery et al, "Compensation Statutes and Post-exoneration Offending" (2013) 103:2 J Crim L & Criminology 553.

43 William Blackstone, *Commentaries on the Laws of England*, vol 2, Book III and Book IV (Oxford: Clarendon Press 1765) at 358. This has come to be known as the Blackstone ratio. *See* "Blackstone Ratio" (last visited 14 June 2021), online: *Oxford Reference* <www.oxfordreference.com/view/10.1093/oi/authority.20110803095510389> [perma.cc/PXZ8-AWCA]. "The ratio of 10:1 expressed in the maxim 'Better that ten guilty persons escape than that one innocent suffer.'"

convicted.[44] The societal harms include a more dangerous society, re-victimization of victims, and financial costs to the justice system.[45]

Society is less safe because of wrongful convictions since they leave the real perpetrators free to commit more crimes.[46] Second, since the criminal justice system is set up to deter crime, a wrongful conviction sends a message to the criminal and society that criminals can get away with their crimes, thereby diminishing the deterrent effect of the entire system.[47] As a result, this decreases public confidence in the criminal justice system.[48] Lastly, recidivism in the exoneree population is high, and this shows that imprisonment of an innocent person possibly creates criminal conduct in

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44 See Danial Bier, "Quote Files: John Adams on Innocence, Guilt, and Punishment" (11 August 2014), online (blog): *The Skeptical Libertarian* < blog.skepticallibertarian.com/2014/08/11/quote-files-john-adams-on-innocence-guilt-and-punishment/> [perma.cc/9CQY-HZD4]. This blog quotes John Adams's opening statement for the Defense in the 1770 murder trial of eight British soldiers after the Boston Massacre, "We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security what so ever."

45 See generally Jennifer Thompson-Cannino, Ronald Cotton & Erin Torneo, *Picking Cotton: Our Memoir of Injustice and Redemption* (New York: St. Martin's Press, 2010) (explaining that when Ronald Cotton was imprisoned for a rape that Bobby Poole perpetrated, Poole was free to subsequently commit twenty more crimes including robberies, burglaries, and rape before he was finally caught and convicted of one of those subsequent crimes). See also Frank R Baumgartner et al, "The Mayhem of Wrongful Liberty Documenting the Crimes and True Perpetrators in Cases of Wrongful Incarceration" (2018) 81:4 Alta L Rev 1263 (documenting cases where subsequent crimes were committed by perpetrators who were free because others were falsely convicted of their previous crimes).

46 *Ibid.*

47 See generally Nuno Garoupa & Matteo Rizzoli, "Wrongful Convictions Do Lower Deterrence" (2012) 168:2 J Institutional & Theoretical Economics 224.

48 See generally Marvin Zalman, Matthew J Larson & Brad Smith, "Citizens' Attitudes Toward Wrongful Convictions" (2012) 37:1 Crim Justice Rev 51.

someone otherwise not predisposed to that behaviour.[49]

Society also pays a financial cost for wrongful convictions.[50] These include costs associated with trial and appeals, prison housing, compensation for wrongful convictions, and civil litigation costs from wrongful imprisonments.[51] Even the most aggressive, tough-on-crime advocates admit that the statistics prove wrongful convictions put an undue strain on state budgets.[52] California has paid out almost 26 million dollars over the last 23 years to indemnify exonerees.[53] That does not factor in the

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49 Recidivism is "[a] tendency to relapse into a habit of criminal activity or behavior." Bryan Garner, *Black's Law Dictionary* (Eagan: West Publishing, 2004) *sub verbo* "Recidivism". This term is problematic for exonerees, however, because they are not committing a crime again, but are merely committing a crime after imprisonment. See generally Evan J Mandery et al, *supra* note 42. That being said, for efficiency, the term will be used here to refer to an exoneree committing a crime after exoneration. This cycle illustrates the quintessential "but for" causation first-year law students are taught to seek out. See "But-For Test" (last visited 14 June 2021), online: *Legal Information Institute* <www.law.cornell.edu/wex/but-for_test> [perma.cc/2QW8-SDRX]. "But for" the wrongful conviction and imprisonment of this innocent person, this person would have never committed a crime now. For theories on why recidivism in the exoneree population happen, see "Post-exoneration Offending", Evan J Mandery et al, *supra* note 25 (showing lack of resources leads to recidivism); Bier, *supra* note 44 (stating when innocent men know they will be punished whether or not they commit a crime; they are more apt to commit a crime); Cullen, Jonson & Nagin, *supra* note 41 (analyzing how prisons normalize and create more criminal behavior).

50 See generally Erik Kain, "The High Cost of Wrongful Convictions" (29 June 2011), online: *Forbes*, <www.forbes.com/sites/erikkain/2011/06/29/the-high-cost-of-wrongful-convictions/#1876ee3c72ec> [perma.cc/LVL5-DDNA] (reporting on a study that found from 1989 to 2010 Illinois had 85 exonerations that cost Illinois $214 million); Rebecca Silbert, John Hollway & Darya Larizadch, "Criminal Injustice: A Cost Analysis of Wrongful Convictions, and Failed Prosecutions in California's Criminal Justice System" (2015), online (pdf): *Chief Just. Earl Warren Inst. L. & Pub. Pol'y* <ssrn.com/abstract=2741863> [perma.cc/W8EJ-2AY8] (finding that over 24 years, California spent $282 million on wrongful convictions and $120 million for incarceration alone).

51 See Jaclyn Gioiosa, "The Cost of Wrongful Convictions" (8 November 2016), online (blog): *Santa Clara University* <law.scu.edu/experiential/northern-california-innocence-project/the-cost-of-wrongful-conviction/> [perma.cc/Q8CG-GHA2].

52 See "The Cost of Wrongful Convictions" (9 December 2019), online: *Prison Legal News* <www.prisonlegalnews.org/news/2019/dec/9/cost-wrongful-convictions/> [perma.cc/DH9A-L3VZ].

53 "Claims for Erroneously Convicted Persons (PC4900)" (last visited 19 June 2020), online: *California Victims Compensation Board* <web.archive.org/web/20200627225053/victims.ca.gov/board/pc4900.aspx> [California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)"].

cost of civil suits against counties throughout California.[54] However, despite the cost to the state of compensating a person wrongfully convicted, it pales in comparison to the cost that the wrongfully convicted person has borne for the state because of their misplaced "justice."

III. EXONERATION COMPENSATION LAWS IN CALIFORNIA

Compensation statutes allow the state to indemnify exonerees for their time served in prison. These statutes, in theory, facilitate a streamlined process for an individual who has been wrongly incarcerated to pursue a claim against the state.[55] Today, 36 states, Washington, DC, and the federal government have compensation statutes.[56] State statutes are regarded as the

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54 See Melissa Etehad, "L.A. County to Pay $15 Million to Man Wrongly Convicted of Murder" (21 November 2017), online: *L.A. Times* <www.latimes.com/local/california/la-me-ln-frank-oconnell-settlement-20171121-story.html> [perma.cc/6AN5-3E95].

55 Lauren C Boucher, "Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated" (2007) 56:3 Catholic U L Rev 1069 at 1084. See also US, AB 316, *An Act to Amend Section 340.6 of the Code of Civil Procedure, and to Amend Sections 851.8, 4901, 4903, and 4904 of, and to add Section 851.86 to, the Penal Code, Relating to Wrongful Convictions*, Reg Sess, Cal, 2009, s 1 (explaining that the intent of the statute is to "remedy some of the harm caused to all factually innocent people ... and ... ease their transition back into society").

56 "Compensating the Wrongly Convicted" (last visited 20 December 2020) online: *Innocence Project* <www.innocenceproject.org/compensating-wrongly-convicted/> [perma.cc/HG2E-XYN6]. Of these 14, one state has pending legislation: US, HB 7086, *Enables Innocent Persons Who Have Been Wrongfully Convicted of a Crime to Petition the Presiding Justice of the Superior Court for an Award of Compensation and Damages*, Reg Sess, RI 2020. Of the remaining 13 states, seven have had bills in their legislatures that have failed, US, HB 118, *An Act Relating to Compensation for Wrongful Conviction and Imprisonment*, Reg Sess, Alaska 2017; US, SB 1359, *Amending Title 31, Arizona Revised Statutes, by Adding Chapter 6: Relating to Criminal Convictions*, Reg Sess, Ariz 2019; US, HB 196, *An Act to Amend Title 10 of the Delaware Code Relating to the Delaware Wrongful Imprisonment Compensation Act*, Reg Sess, Del 2019; US, HB 172, *Compensation of Persons Wrongfully Convicted and Imprisoned*, Reg Sess, Ga 2019; US, HB 267, *Relates to Wrongful Incarceration for Certain Wrongful Imprisonment*, Reg Sess, N Mex 1997; US, HB 1885, *Provides for the Payment of Damages to Innocent Persons who were wrongly Convicted*, Reg Sess, Pa 2013; US, HB 3303, *To Amend the Code of Laws Of South Carolina, 1976, by Adding Article 22 to Chapter 13, Title 24 so as to Provide that Certain Persons who Have Been Wrongfully Convicted of and Imprisoned for a Crime May Recover the Monetary Value of the Loss Sustained Through the Wrongful Conviction and Imprisonment*, Reg Sess, SC 2019. This leaves the last six states — Arkansas, Kentucky, North Dakota, Oregon, South Dakota, and Wyoming — showing no legislative movement on the topic.

most equitable avenue for compensation in comparison to lawsuits and private bills.[57] However, a state has the authority to write a statute in whatever way it wants, often excluding most people they purportedly sought to help.[58] This has been the case in California.

The first exoneration law in California was passed and enacted in 1913.[59] This legislation was proof that over the years, minds had changed from the time of Berdue's conviction on who should bear the burden of society's mistake in wrongfully convicting someone. The 1913 statute, later to become *Penal Code Section 4900*, provided that a person could make a claim for compensation as long as the person: (1) was wrongfully convicted of a felony; (2) was incarcerated in prison; (3) could show the conviction was overturned by a finding that the crime was not committed, or not committed by the one convicted, or by a pardon from the governor; and (4) could show a pecuniary injury.[60] The exoneree was required to submit a statement of facts to the California Victims Compensation Board (CalVCB) within six months of the judgement "and at least four months prior to the next meeting of the legislature of the state."[61] At that point, CalVCB would set a hearing date[62] where it would hear the exoneree's claim, as well as any opposition from the Attorney General.[63] This would essentially become a re-litigation of the underlying case. Except in this new compensation proceeding, CalVCB was not bound to the exonerating court's decision.[64] If CalVCB was satisfied that the crime was not done by the claimant and the claimant "did not by act or omission, intentionally or negligently, contribute to bringing about the conviction," then CalVCB could recommend that the legislature approve compensation for up to the sum of $5,000.[65] Exoneration alone is a massive feat of litigation, and, in

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57 See "Compensation for Exonerees" (11 September 2017) at 3, online (pdf): *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Documents/Compensation%20for%20Exonerees%20Primer.pdf> [perma.cc/XV8S-JAFD] [The National Registry of Exonerations, "Compensation for Exonerees"].

58 See e.g. Boucher, *supra* note 55.

59 *An Act to Provide Indemnity to Persons Erroneously Convicted of Felonies in the State of California*, Cal Stat. ch. 165 (1913).

60 *Ibid* at § 1.

61 *Ibid* at § 2.

62 *Ibid* at § 3.

63 *Ibid* at § 4.

64 *Ibid* at § 5.

65 *Ibid.* $5,000 in 1913 is equivalent to $135,957.07 in 2021. "Value of $5,000 from 1913 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator*, <www.in2013dolla

turn, this process for compensation should have been easy. In reality, however, that was not the case.

The first known compensation claim was filed for a crime committed in 1928.[66] Mike Garvey, Harvey Lesher, and Phil Rohan were convicted of murder and sentenced to life in prison.[67] They were convicted on the evidence of three witnesses.[68] One witness, who was not at the crime scene, claimed Lesher had confessed to him.[69] Lesher was the only reason his acquaintances Garvey and Rohan were linked to the crime.[70] After the conviction, that witness recanted, explaining he was too drunk to remember the night the confession was made, and that police had threatened to charge him with the murder if he did not testify.[71] The other witnesses were found to be uncredible by the exonerating court.[72] Alibis came forward for the convicted men for the night of the crime, and the fingerprints at the crime scene did not match any of the convicted.[73] The convictions of all three men were overturned in 1930 after they spent two years and eight months in prison.[74] All three men applied for compensation under the 1913 statute; they were the first — on record — to ever apply.[75] CalVCB denied their claims ruling on the basis that the evidence presented at the original trial was not "erroneous."[76] Unsatisfied with the ruling, the men applied for a rehearing.[77] At the rehearing, Lesher and Garvy's claims were denied.[78] CalVCB explained that Lesher and Garvy were "men of such unsavory character" and that CalVCB was not satisfied that the men did not contribute in some way to their conviction by past acts – yet CalVCB

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rs.com/us/inflation/1913?amount=5000> [perma.cc/T2SL-VYRZ].

66 Damon McLean, "Mike Garvey" (last visited 14 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=11> [perma.cc/J6JA-T8JP].

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

gave no other evidence for this finding.[79] Rohan, however, was awarded $1,692[80] – same crime, same evidence, same conviction, same time served, but totally different compensation rulings.[81]

California's compensation statute was amended in 1931.[82] The amendment to s. 1 simply provided that a pardon by the governor would be considered for indemnification only when a crime was not committed or not committed by the one convicted.[83] The amendment to s. 5 clarified that the board of control was to give recommendations and conclusions to the legislature, as well as a monetary amount under $5,000[84] if approved.[85]

Walter Evans and Miles Ledbetter were successful under this amended statute.[86] In 1928, Evans and Ledbetter were detectives with the Los Angeles Police Department (LAPD).[87] They were convicted of taking bribes from bootleggers and sentenced to one to 14 years in prison.[88] After the conviction, the LAPD continued to investigate and found new evidence to exonerate Evans and Ledbetter.[89] In light of the new evidence, the Governor gave them full and unconditional pardons.[90] They applied for compensation under the California Statute, and each of them received "several thousand dollars."[91]

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79 *Ibid.*

80 *Ibid.* $1692 in 1930 is equivalent to $26,365.72 in 2021. "Value of $1,692 from 1930 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1930?amount=1692> [perma.cc/37J6-SNX9].

81 McLean, *supra* note 66.

82 *An act to amend sections 1 and 5 of an act entitled '[a]n act to provide indemnity to persons erroneously convicted of felonies in the State of California.' [A]pproved May 24, 1913, relating to the indemnification of persons erroneously convicted*, Cal Stat. ch. 775 (1931) [*1931 Bill*].

83 *Ibid* at § 1.

84 In 1931, $5,000 was equivalent to $85,601.64 in 2021. "Value of $5,000 from 1931 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1931?amount=5000> [perma.cc/TG7K-R64G].

85 *1931 Bill*, *supra* note 82 at § 5. Reading the plain language of the amendment it is unclear what actually was changed other than the language of the statute now provided that CalVCB would give "recommendations and conclusions" to the Legislature.

86 Meghan Barrett Cousino, "Miles H. Ledbetter" (last visited 19 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=189> [perma.cc/N4S9-7ZSB].

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

The next known claims were not until the 1950s.[92] In 1953, Frank Hamlin was identified by a store clerk in San Francisco as a jewelry thief.[93] Hamlin insisted he was not in San Francisco the day of the robbery.[94] Based on the positive identifications by the store clerk and his assistant, Hamlin was convicted of the crime.[95] He was sentenced to five years to life in prison.[96] A year later, another man was arrested for a string of burglaries in northern California.[97] During his interrogation, the man confessed to the 1953 robbery in San Francisco.[98] In response to this new evidence, the Governor gave Hamlin a full and unconditional pardon.[99] Hamlin filed for compensation with the state and received $5,000.[100]

The last person to receive compensation under the amended 1931 statute was John Fry in 1959.[101] Fry's common-law wife, Elvira Hay, was found dead in a bathtub at the Venice Hotel.[102] Fry, who had been seen fighting with her the night before, was blamed for the crime.[103] Stating he was too drunk to remember what happened that night, he confessed to manslaughter out of fear of being charged with a more serious charge.[104] Fry was sentenced to one to ten years in prison.[105] The next year, a janitor at the Venice Hotel turned himself in after killing another person in the exact same way as Hay.[106] He then confessed to killing Hay a year earlier.[107]

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92 The National Registry of Exonerations, "Exonerations Before 1989", *supra* note 20.

93 Meghan Barrett Cousino, "Franklin Hamlin" (last visited 19 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=13> [perma.cc/G7P2-EYT5].

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 *Ibid.* In 1953, $5,000 was equivalent to $50,411.05 in 2021. "Value of $5,000 from 1953 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1953?amount=5000> [perma.cc/387C-UAHB].

101 The National Registry of Exonerations, "Exonerations Before 1989", *supra* note 20.

102 *Ibid.*

103 Meghan Barrett Cousino, "John Fry" (last visited 21 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=108> [perma.cc/49RV-3DW3].

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

In light of this new evidence, Fry was pardoned by the governor and released from prison.[108] He was able to receive compensation from the state in the amount of $3,000.[109]

The next amendment was effectuated in 1969.[110] This increased the amount an exoneree could collect from the 1913 maximum of $5,000 to $10,000.[111] There is no recording of a claim under this new statute on the Registry or the CalVCB website until 1997.[112] Although there were not many exonerees making claims for compensation under the statute, civil lawsuits in tort and for civil rights violations were pursued in more cases during this time period.[113] The exonerees sued municipalities, prosecutors, and defence attorneys.[114] They sued under false imprisonment, prosecutorial misconduct, and malpractice.[115] During this time, the California case of *Imbler v Patchmen* went all the way to the U.S. Supreme Court, cementing prosecutorial immunity into the foundation of the modern Court's immunity doctrines.[116] From 1969 to 1986, the amounts for which exonerees sued were anywhere from $17,000 to $1.4 million.[117]

The first and only person documented to claim the $10,000 offered by statute was Kevin Lee Green in 1997.[118] In 1979, Dianna Green, Kevin's

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108 *Ibid.*

109 *Ibid.* In 1959, $3,000 was equivalent to $30,246.05 in 2021. "Value of $3,000 from 1959 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1959?amount=3000> [perma.cc/8HW2-HL4L].

110 *An Act to Amend Section 4904 of the Penal Code, relating to Damages for Wrongful Imprisonment*, Cal Stat. ch. 704 (1969) (re wrongful imprisonment: damages. Increases from $5,000 to $10,000 the amount which may be recommended to Legislature by the Board of Control, to indemnify individual who was erroneously convicted of and imprisoned for a crime he did not commit.)

111 *Ibid.* In 1969, $10,000 was equivalent to $ 73,350.14 in 2021. "Value of $10,000 from 1969 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1969?amount=10000> [perma.cc/88WJ-TB8E].

112 California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.

113 The National Registry of Exonerations, "Exonerations Before 1989", *supra* note 20.

114 *Ibid.*

115 *Ibid.*

116 424 US 409 (1976).

117 The National Registry of Exonerations, "Exonerations Before 1989", *supra* note 20 (showing little is known of the actual amounts collected because many were confidential settlements and even those that were not confidential nothing is known about what was collected from the settlement).

118 "Kevin Green" (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* < web.archive.org/web/20200630055126/https://victims.ca.gov/docs/pc4900

pregnant wife, was struck in the head, losing the ability to communicate.[119] When she got to the hospital, the baby's fetal heart tones appeared to be fine, but later that day, they could not be detected.[120] The baby was declared stillborn.[121] A medical exam found spermatozoa in Dianna.[122] Kevin testified that when the attack occurred, he was at a hamburger stand to get food.[123] Dianna was the only witness to the crime and suffered amnesia.[124] Kevin was convicted on Diana's testimony and the testimony of mutual friends who said Kevin and Dianna had a volatile relationship.[125] He was sentenced in 1980 to 15 years to life in prison.[126] Sixteen years later, the spermatozoa found on Dianna was run through a DNA database and matched to a felon known as the "Bedroom Basher."[127] The police were able to secure a confession, and Kevin was exonerated and released.[128] In 1997, Kevin filed a claim with CalVCB and collected the maximum $10,000 allowed by statute.[129] The Governor awarded Green an additional $620,000 in 1999 for the time he spent wrongly incarcerated.[130]

The 2000 Legislative session saw another amendment to the compensation statute, *Penal Code Sections 4900*.[131] This amendment raised

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/PC-4900-Approved-Green.pdf?2019-06-27> (displaying documents of claims for compensation for Kevin Green) [California Victim Compensation Board "Kevin Green"].

119 "Kevin Green" (last visited 19 June 2020), online: *Innocence Project* <www.innocenceproject.org/cases/kevin-green/> [perma.cc/TKT6-ZHA7] [Innocence Project, "Kevin Green"].

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 California Victim Compensation Board "Kevin Green", *supra* note 118. In 1997, $10,000 was equivalent to $16,772.27 in 2021. See "Value of $10,000 from 1997 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/1997?amount=10000> [perma.cc/E2H8-SRR9].

130 Innocence project, "Kevin Green", *supra* note 119.

131 US, AB 1799, *An act to amend Section 4904 of the Penal Code, and to add Section 17157 to the Revenue and Taxation Code, relating to indemnification*, Reg Sess, Cal, 2000 (amending PC 4904 to remove the $10,000 limit and change the collection to $100 per day which will be classified as gross income to the exoneree) [*2000 amend.*].

the amount an exoneree could be granted from a maximum of $10,000 to a time-based approach, granting $100 per day for every day of wrongful incarceration.[132]

The first person to be granted a claim under this new amendment was Frederick Renee Daye.[133] In 1984, a woman was grabbed by two men while walking to her car.[134] She was pushed into the car, beaten, and raped.[135] She was then pushed out of the vehicle as the assailants drove off.[136] Daye was identified by the victim in a photo line-up and subsequently identified in an in-person lineup.[137] At trial, Daye was again identified, and a forensic analyst said the forensic evidence collected was "likely" Daye's.[138] Daye was convicted and sentenced to life in prison.[139] In 1990, his co-defendant made a statement that Daye was not involved.[140] Daye was able to secure DNA testing in 1994.[141] That testing affirmatively excluded Daye from the crime.[142] His conviction was thus overturned.[143] Daye's claim for compensation was approved in 2002 for $386,000:[144] $100 for each of the 3,860 days (over ten years) that he was incarcerated.[145]

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132 *Ibid.* In 2000, $100 was equivalent to $156.33 in 2021. See "Value of $100 from 2000 to 2021" (last visited 14 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/2000?amount=100> [perma.cc/C4C3-PHN5].

133 "Frederick R. Daye" (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630054943/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Daye.pdf?2019-06-27> (displaying documents of claims for compensation for Frederick Daye) [California Victim Compensation Board, "Frederick R. Daye"].

134 "Frederick Daye" (last visited 19 June 2020), online: *Innocence Project* <www.innocenceproject.org/cases/frederick-daye/> [perma.cc/6QVJ-HF8X].

135 *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 *Ibid.*

139 *Ibid.*

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 California Victim Compensation Board, "Frederick R. Daye", *supra* note 133. In 2002, $386,000 was equivalent to $582,083.69 in 2021. See "Value of $386,000 from 2002 to 2021" (last visited 15 June 2021), online: *CPI Inflation Calculator* <www.in2013dollars.com/us/inflation/2002?amount=389000> [perma.cc/EN2D-UHZH].

145 "Frederick R. Daye" (last visited 19 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3163> [perma.cc/66UF-FHZX].

The $100 per day amendment was not changed again until 2016 when it was changed to $140 per day of wrongful incarceration.[146] Between 2000 and 2015, 59 exonerees made a claim for compensation to CalVCB.[147] Of those claims, 38 were denied while 21 were recommended by CalVCB to the Legislature to pay.[148] The approved and recommended claims over this period of time totaled $8,673,800. This represents 86,738 days or 237 years of wrongful incarceration.[149]

Claims can be denied for a variety of reasons, but denials before 2015 generally fell into four categories laid out by the statutory language.[150] The statute dictated that an exoneree had to prove by a preponderance of the evidence that the claimant was innocent of the crime.[151] The exoneree had to also prove that the exoneree's own behaviour did not contribute to the conviction.[152] The claimant had a statute of limitations of six months from when the conviction was overturned to file a claim, and the claimant had to show a pecuniary loss to collect.[153]

The California Statute requires CalVCB to make a separate ruling on the facts of the case to decide if an exoneree qualifies for compensation.[154] The separate ruling puts the burden of proof on the exoneree to show that they are innocent of the crime by a preponderance of the evidence.[155] This showing is made before CalVCB – usually a panel of three – and requires

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146 US, SB 836 *Section 4904 of the Penal Code Amended*, Reg Sess, Cal, 2016.

147 *See CalVCB*, *supra* note 53. There were more the fifty-two claims during this time period however the claims that were not claims from an exoneration I did not include in this reporting. Those claims were generally improperly filed because they were either not a felony, did not result in imprisonment, or the conviction was not overturned.

148 *CalVCB*, *supra* note 53. While all the raw data was supplied by the CalVCB website all the statistical analysis is the authors own work.

149 *Ibid.*

150 *Ibid.*

151 US, AB 316 *Section 4903 of the Penal Code Amended*, Reg Sess, Cal, 2009.*Ibid.*

152 *Ibid.*

153 US, SB 1852 *Section 4900 of the Penal Code Amended*, Reg Sess, Cal, 2006.; *see also Tennison v. Victim Compensation and Government Claims Board*, 152 Cal. App. (4th) 1164 (2006).

154 Justin Brooks & Alexander Simpson, "Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins" (2012) 49:3 San Diego L Rev 627 at 640.

155 *Ibid.* "Preponderance of the evidence" means there is a greater than 50% chance the claim is true. "Preponderance of the Evidence" (last visited 5 February 2020), online: *Legal Information Institute* <www.law.cornell.edu/wex/preponderance_of_the_evidence > [perma.cc/3GUZ-JHMA].

new briefing and argument on the case with more relaxed evidentiary rules.[156] Thus, where evidence considered improper or prejudicial towards the defendant at trial is excluded, it is now allowed to be entered into evidence at these hearings.[157]

This separate agency ruling is problematic because it calls into question the extent of deference that the agency gives to the exonerating court's decision in the compensation ruling.[158] The deference question is an important one and one that has been troubling for California exonerees during this iteration of the statute. The original exonerating court pored through the record, often with an inmate who has been convicted of a heinous crime standing before it.[159] In the face of that prejudicial conviction, the exonerating court finds the evidence does not support the conviction, and with that new ruling, an inmate is released – an inmate who was once thought of as a dangerous risk to society.[160] Without deference, a new set of eyes can make a wholly inconsistent ruling on the same facts for the sole purpose of not compensating the exoneree for the conviction that the court has already ruled was wrong.[161] In the case of the 59 exonerees who made claims between 2000 and 2015, CalVCB's rulings were inconsistent with the exonerating court 64% of the time.[162]

A further problem is the three-person panel's makeup and the trends that emerge during a single panels tenure.[163] From 2000 through 2006, 21 claims were filed.[164] Of those 21 claims, eight were approved and 13 were denied.[165] Among those denied were Antoine Goff and John J. Tennison,

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156 California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.

157 *Ibid.*

158 Brooks & Simpson, *supra* note 154 at 645.

159 *Ibid* at 644.

160 *Ibid.* "Even though the original superior court judge made findings that Tim [Atkins] was innocent and that his habeas filings and evidence presented at the habeas hearing completely undermined the prosecution's case and pointed unerringly to innocence, the compensation board found that Tim had not met his burden of proof."

161 *Ibid.*

162 California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53. Those 64% are based on the cases where the compensation board made factual rulings on the merits of the case different from the factual rulings of the exonerating court. The other 36% primarily were exonerated on legal grounds without the exonerating court ruling on the merits.

163 *Ibid.*

164 *Ibid.*

165 *Ibid.*

who, while the exonerating court made a ruling that the men were factually innocent, CalVCB ruled "findings of 'factual innocence,' . . . are not binding and [are] inapplicable to the instant proceeding."[166] CalVCB then ruled that they did not find the men had proven their innocence by a preponderance of the evidence and denied their claims.[167] In 2009, the Legislature fixed this particular inconsistency, amending *Penal Code Section 4900* to expressly say that a finding of "factual innocence" by the exonerating court is binding on CalVCB.[168]

Looking at the time period from 2007 through 2012, 23 claims were filed, and only two were recommended for compensation while the other 21 were denied.[169] One of the two exonerees to get a recommendation for compensation during this six-year period was David Allen Jones.[170] In 1992, Jones was charged with four murders.[171] He had an IQ of 62, was classified as an intellectually disabled person, and confessed to the murders after detectives took him to the four crime scenes.[172] There were no witnesses to the crimes.[173] The perpetrator's blood, however, was found at the scene.[174] A serologist testified that the perpetrator had type A blood.[175] Jones had type O blood.[176] This was a discrepancy pointed out to the jury by the defence.[177] Regardless, Jones was convicted of three of the murders but

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166 "Antoine Goff" (last visited June 20, 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630080740/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Tennison-and-Goff.pdf?2019-06-27> (displaying documents of claims for compensation for Antoine Goff and John J. Tennison).

167 *Ibid.*

168 US, AB 316 *Section 4903 of the Penal Code Amended*, Reg Sess, Cal, 2009.

169 "David Jones" (last visited 19 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630055212/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Jones.pdf?2019-06-27> (displaying documents of claims for compensation for David Jones) [California Victim Compensation Board, "David Jones"].

170 See California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.

171 *Ibid.*

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

175 *Ibid.*

176 *Ibid.*

177 *Ibid.*

acquitted of the fourth.[178] He was sentenced to 36 years to life in prison.[179] In 2004, the Post-Conviction Assistance Center was appointed to help Jones pursue post-conviction DNA testing.[180] There was enough genetic material from two of the crime scenes for testing, but evidence from the other two had been destroyed.[181] The testing excluded Jones and hit on a serial killer who had been charged with ten other murders.[182] Because of the signature nature of the murders, all of Jones' convictions were overturned, and he was released from prison.[183] Jones was successful in his claim for compensation and received $74,600 – CalVCB reduced his statutory grant because he prevailed in a civil lawsuit against the police.[184] This reduction in the compensation was solely a decision of CalVCB; there was no statutory reasoning or precedent to decrease the compensation based on a successful civil suit.[185]

Of the 15 claims filed from 2013 through 2015, four were denied and 11 were approved.[186] Richard Hendrix was one of the exonerees denied compensation.[187] In 2009, Hendrix had an altercation with a security guard at his apartment complex.[188] The security guard used pepper spray on Hendrix and shot at him before calling the police.[189] When the police got there, they found Hendrix.[190] It was dark, and Hendrix was uncooperative.[191] He was eventually subdued and charged with "attempting by means of threats and violence to deter an officer from performing his

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178 *Ibid.*

179 *Ibid.*

180 *Ibid.*

181 *Ibid.*

182 *Ibid.*

183 California Victim Compensation Board, "David Jones", *supra* note 169.

184 *Ibid.*

185 *Ibid.* While some states have written into their compensation statute that if a claimant prevails in a civil suit based on the wrongful conviction their claim will be reduced, California has no such provision.

186 See California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.

187 *Ibid.*

188 "Richard Hendrix" (last visited 20 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630080828/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Hendrix.pdf?2019-06-27> (displaying documents of claims for compensation for David Jones).

189 *Ibid.*

190 *Ibid.*

191 *Ibid.*

duties."[192] The first jury deadlocked, and a mistrial was called.[193] At the second trial, the judge allowed evidence of two prior occasions where Hendrix resisted arrest.[194] After the second trial, Hendrix was convicted and sentenced to six years in prison.[195] Hendrix appealed.[196] The appellate court found an abuse of discretion by allowing evidence of the prior conduct into the trial and overturned the conviction.[197] The District Attorney's office decided to drop the case, and Hendrix was released.[198] Hendrix applied for compensation for his 1,136 days of wrongful incarceration equaling $113,600.[199] CalVCB ruled that Hendrix had not proven by a preponderance of the evidence that he did not unlawfully use force to resist Officer Mosely and denied the claim.[200] Essentially, in this case, CalVCB put themselves in the place of the jury and relied on the evidence the overturning court ruled prejudicial to come to their conclusion.[201] There is a fundamental problem with a ruling such as this in that it is not made to keep society safer, as is the purpose of our normal criminal justice process. This ruling is solely to keep the state from having to pay for what it already acknowledged as a miscarriage of justice. That is, in essence, the picture of injustice.

Another statutory bar to compensation involves the statute of limitations for filing claims, access to the compensation system, and other timing issues.[202] A statute of limitations balances the competing interest of giving enough time to the exoneree to file a claim and giving the state protection from an onslaught of delayed claims that undermine its ability to plan for budgetary liabilities.[203]

These time limits, which start to run at the moment the conviction is

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192 *Ibid.*
193 *Ibid.*
194 *Ibid.*
195 *Ibid.*
196 *Ibid.*
197 *Ibid.*
198 *Ibid.*
199 *Ibid.*
200 *Ibid.*
201 *Ibid.*
202 *See* Daniel S Kahn, "Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes" (2010) 44:1 U Michigan J L Reform 123 at 144.
203 *Ibid.*

overturned, can become a problem to access relief.[204] An exoneree struggling with re-entry into life after incarceration may be unable to navigate the legal system for the claim in an efficient and timely manner.[205] This difficulty is exacerbated by the fact that the legal team that has been involved up to this point in the criminal appellate work of exoneration generally does not specialize in the legal area of civil and administrative actions under which compensation claims fall.[206]

To add further complication, because CalVCB is outside the normal civil courts, the process is not governed by the California Rules of Civil Procedure.[207] Under the 2010 and earlier versions of *Penal Code Section 4900*, this meant that while the claim had to be filed within the statute of limitations (six months in California), the government was not under any such time constraint to file an answer.[208] This issue was particularly apparent in the case of Timothy Atkins.[209] Charged with murder in 1985, Atkins was exonerated in 2007 and filed a timely claim for compensation.[210] The Attorney General did not submit a written reply brief until two years later.[211] This lack of timely process undermined the whole aim for judicial efficiency and budgetary foresight while leaving the exoneree languishing in judicial limbo.[212]

In 2016, the Legislature amended *Penal Code Section 4900* once again.[213] One of the amendments was changing the six-month statute of limitations to two years.[214] The amendment also included that the Attorney General had 60 days from the time the claim was submitted to respond or apply for

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204 *See* Jessica R Lonergan, "Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated" (2008) 11:2 New York University J Legislation and Public Policy 405 at 419–20.

205 See generally Elina Tetelbaum, "Remedying a Lose-Lose Situation: How 'No Win, No Fee' Can Incentivize Post-Conviction Relief for the Wrongly Convicted" (2010) 9:2 Connecticut Public Interest L J 301.

206 *Ibid.*

207 See Brooks & Simpson, *supra* note 154 at 634.

208 *Ibid.*

209 Maurice Possley, "Timothy Atkins" (last visited 20 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3001> [perma.cc/VR7X-HW3B] [Possley, "Timothy Atkins"].

210 *Ibid.*

211 *See* Brooks & Simpson, *supra* note 154 at 634.

212 *Ibid.*

213 US, SB 836 *Penal Code Amended*, Reg Sess, Cal, 2016, § 251-53.

214 *Ibid* at § 251.

an extension for good cause.[215] This change provided a more compassionate timeframe for an exoneree re-entering society. Another change was that the compensation amount was raised to $140 per day for each day of wrongful incarceration.[216]

With all the positive changes in the 2016 amendments, *Penal Code Section 4900* still maintained some problematic disqualifiers. One such disqualifier is the statute precludes compensation for a claimant whose behaviour is deemed to have contributed to the wrongful conviction.[217] This contributing behaviour can happen before the crime, during the arrest, or prior to conviction.[218] These behaviours can include prior criminal acts,[219] false confessions,[220] fleeing from police,[221] or entering a guilty plea.[222]

Kelly Carrington was convicted of possession of a controlled substance.[223] He pled guilty and was sentenced to 16 months in prison.[224] Carrington's conviction was overturned on an unopposed writ of *habeas corpus* alleging police misconduct and the planting of evidence.[225] He filed a timely claim for compensation.[226] CalVCB ruled that a granted writ of

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215 *Ibid* at § 252.

216 *Ibid* at § 253.

217 See Robert J Norris, "Assessing Compensation Statutes for the Wrongly Convicted" (2012) 23:3 Crim Justice Policy Rev 352 at 359. *See also* Brooks & Simpson, *supra* note 138 at 649.

218 *Ibid.*

219 See "Kelly Carrington" (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630075930/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Carrington.pdf?2019-06-27> (displaying documents of claims for compensation for Kelly Carrington).

220 "Facts and Figures" (last visited 20 January 2020), online: *Falseconfessions.org* <falseconfessions.org/fact-sheet/> [perma.cc/S44U-PNNG] ("[a]ccording to the Innocence Project, 25% of wrongful convictions overturned by DNA evidence involve a false confession and many of those false confessions actually contained details that match the crime-details that were not made to the public").

221 See Brooks & Simpson, *supra* note 154 at 650.

222 See "Innocents Who Plead Guilty" (24 November 2015), online (pdf): *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [perma.cc/S7BH-PLV2] (explaining that 15% of known exonerees pled guilty).

223 California Victim Compensation Board, "Kelly Carrington", *supra* note 219.

224 *Ibid.*

225 *Ibid.*

226 *Ibid.*

habeas corpus is not a ruling on innocence and that "Mr. Carrington has a number of prior convictions involving moral turpitude.[227] These convictions cast doubt on Mr. Carrington's credibility."[228]

Back to the case of Timothy Atkins, CalVCB found he "contributed" to his conviction because he ran when the police first approached him.[229] CalVCB found this even though Atkins's testimony was ruled credible, and Atkins testified that he ran because he was a teenager on probation and was worried about interaction with the police.[230] This flight was not brought up at trial and had no bearing on his actual conviction, yet CalVCB felt it was enough of a contributing factor to deny Atkins compensation.[231]

In 2009, Connie R., who had a prior sex crime conviction in another state and was arrested for not registering as a sex offender in California, pled guilty to the offence.[232] She was sentenced to three years in prison.[233] A year later, the appellate court overturned the conviction because Connie was not required to register in California.[234] CalVCB denied her claim because she had pled guilty and, therefore, had contributed to her conviction.[235] It seems rather illogical to hold Connie responsible for not understanding she was pleading guilty to a crime that did not apply to her when the prosecutor, defence attorney, and judge were not able to ascertain this fact either.

A final bar to compensation is the lack of pecuniary evidence of damages.[236] This is particularly egregious in the age where most able-bodied prisoners hold prison jobs.[237] This means that the state can profit from the wrongly convicted inmate's labour and then rule that had the person been free, they would not have been gainfully employed and, therefore, will not

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227 *Ibid.*

228 *Ibid* at 5.

229 *See* Brooks & Simpson, *supra* note 154 at 650.

230 *Ibid.*

231 *Ibid.*

232 "Connie R." (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630083638/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Connie-R.pdf?2019-06-27> (displaying documents of claims for compensation for Connie R.).

233 *Ibid.*

234 *Ibid.*

235 *Ibid.*

236 US, SB 836 *Section 4900 of the Penal Code Amended*, Reg Sess, Cal, 2016, s 250.

237 See US, General Accounting Office, *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage* (GAO/GGD-93-98) (May 1993) at 19.

be compensated.

Charles Holmes III was denied compensation.[238] Holmes had a lengthy criminal history that required him to register as a sex offender.[239] In 2005, after being released from prison on a burglary charge, he registered as an offender at the police department.[240] A few days later, he moved, and a few days after that, he was stopped by the police and charged with not re-registering at the new address, as well as being under the influence of drugs and providing false information to the police.[241] He pled guilty to the charges and was sentenced to nine years in prison.[242] He served almost seven years of that sentence before being paroled.[243] Shortly after his release, he was charged and convicted for drug possession.[244] While in jail, Holmes discovered that as of 2005, he was no longer required to register as a sex offender.[245] He was thus able to get his prior conviction vacated.[246] He applied for compensation in the amount of $215,200 for the 2,152 days he had been imprisoned on that conviction.[247] CalVCB put out a tentative recommendation based on his application granting him compensation.[248] After the tentative came out, the Attorney General responded in opposition.[249] A hearing was held, and at the conclusion, CalVCB denied Holmes' compensation.[250] The reasoning they gave for the denial was "that given Holmes' extensive criminal history and unemployment status at the time of his arrest and currently, he has not demonstrated that he suffered

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238 See e.g. "Charles Holmes III" (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* < web.archive.org/web/20200630080845/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Holmes.pdf?2019-06-27> (displaying documents of claims for compensation for Charles Holmes III) [California Victim Compensation Board "Charles Holmes III",].

239 Maurice Possley, "Charles Holmes III" (last visited 20 June 2020), online: *The National Registry of Exonerations* <www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4747> [perma.cc/4JFN-ZNJZ] [Possley, "Charles Holmes III"].

240 *Ibid.*

241 *Ibid.*

242 *Ibid.*

243 *Ibid.*

244 *Ibid.*

245 *Ibid.*

246 *Ibid.*

247 *Ibid.*

248 California Victim Compensation Board, "Charles Holmes III", *supra* note 238.

249 *Ibid.*

250 *Ibid.*

any pecuniary loss as a result of his incarceration."[251] The ruling was appealed to the California Superior Court and then to the California Court of Appeal where the judgement was upheld and affirmed.[252]

The 2016 amendment did not clear up all the problems with *Penal Code Section 4900*, but the amendments did allow more exonerees to access justice. From 2016 to 2019, 27 exonerees filed claims for compensation. Of those 27 claims, nine were denied and 18 were granted.[253]

Notably, among the exonerees granted compensation during this period was the aforementioned Timothy Atkins.[254] Mr. Atkins had a long road to justice.[255] Many of *Penal Code Section 4900*'s problematic disqualifiers were the reason his compensation took so long to be granted. In 1985, Vicente Gonzalez and his wife were carjacked by two men on New Year's Eve.[256] Vincente was murdered.[257] A witness came forward alleging she heard a man bragging about the crime.[258] With Atkins as the accomplice and another man, Evans, alleged to be the gunman, they were arrested.[259] Both men were allegedly assaulted in their jail cells because gang members believed they would blame someone else for the crime.[260] Evans was beaten to death.[261] Atkins went to trial in 1987, was convicted, and sentenced to 32 years to life.[262] In 2007, Atkins' writ of *habeas corpus* was granted after the star witness recanted and admitted that the police had threatened her with a narcotics charge if she did not testify.[263] Atkins was released, and he filed a claim with CalVCB.[264]

When Atkins filed his claim in 2007, the attorney general, who was required to file a reply, did not respond until 2009.[265] Shortly after the

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251 *Ibid.*
252 Possley, "Charles Holmes III", *supra* note 239.
253 See California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.
254 *Ibid.*
255 Possley, "Timothy Atkins", *supra* note 209.
256 *Ibid.*
257 *Ibid.*
258 *Ibid.*
259 *Ibid.*
260 *Ibid.*
261 *Ibid.*
262 *Ibid.*
263 *Ibid.*
264 *Ibid.*
265 See Brooks & Simpson, *supra* note 154 at 634.

answer was filed, a hearing was held.[266] That claim was denied.[267] CalVCB ruled that Atkins had "not met the statutory requirements to receive compensation."[268] CalVCB held that he did not show by a preponderance of the evidence that he was innocent and that his flight from the police was a contributing factor to his conviction.[269]

Undeterred, Atkins went back into court on a writ of *habeas corpus* to be granted a finding of "factual innocence."[270] In 2014, he was granted the ruling of factual innocence, and he once again applied for compensation from CalVCB.[271] Astonishingly, CalVCB denied Atkins claim once again. It stated that since his exoneration occurred in 2007, before the 2010 amendment to *Penal Code Section 4900* making a factual innocence ruling binding on CalVCB, they were not bound to the factual innocence ruling as it applied to his 2007 case.[272]

Atkins appealed the decision in superior court and won in 2017.[273] The State appealed.[274] In October 2018, the judgement in favour of Atkins was upheld.[275] However, the courts did not specify whether the pre-2016 rate of $100 per day — which would have applied at the time of both previous compensation hearings and would equal $713,700 — or the current rate of $140 per day – equaling $1,129,660 – would be applied to Atkins' appeal.[276] In 2019, 34 years after the murder, 32 years after his wrongful

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266 "Timothy Atkins-denied petition" (last visited 30 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630065756/https://victims.ca.gov/docs/pc4900/PC-4900-Denied-Atkins.pdf?2019-06-27> (displaying documents of claims Denied for compensation for Timothy Atkins) [California Victim Compensation Board, "Timothy Atkins-denied petition"].

267 Possley, "Timothy Atkins", *supra* note 209.

268 California Victim Compensation Board, "Timothy Atkins-denied petition", *supra* note 266 at 1.

269 See Brooks & Simpson, *supra* note 154 at 650.

270 Possley, "Timothy Atkins", *supra* note 209.

271 *Ibid.*

272 California Victim Compensation Board, "Timothy Atkins-denied petition", *supra* note 266 at 19.

273 Possley, "Timothy Atkins", *supra* note 209.

274 *Ibid.*

275 *Ibid.*

276 "Timothy Atkins-granted petition" (last visited 20 June 2020), online (pdf): *California Victim Compensation Board* <web.archive.org/web/20200630054417/https://victims.ca.gov/docs/pc4900/PC-4900-Approved-Atkins.pdf> (displaying documents of claims granted for compensation for Timothy Atkins). There was a discrepancy about which

conviction, 12 years after being released from prison, and five years after being given a ruling of factual innocence, Timothy Atkins was finally given his compensation of $1,129,660 at the $140 per day amount for the 8,069 days he spent wrongfully imprisoned.[277]

The most current amendment to *Penal Code Section 4900* went into effect on January 1, 2020.[278] This amendment changed the statute of limitations to ten years from the time the conviction is overturned.[279] It further provides that "the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial... or... a certificate of factual innocence... shall be binding on the Attorney General, the factfinder, and the board."[280] Lastly, it adds a section stating that if an exoneree knowingly pleads "guilty with the specific intent to protect another from the underlying conviction" they will be denied compensation.[281] In the first quarter of 2020, five people – all with rulings of factual innocence –made claims for compensation, and all five claims were granted.[282]

IV. CONCLUSION

Wrongful convictions and what to do about them are legal issues that have been with us throughout all of statehood. The law has evolved, albeit slowly, in favour of exonerees but with some bumps along the way. It was over 60 years from the first wrongful conviction in California until the first statute allowed exonerees compensation. There is sparse reporting on exonerations until 1989. With the advent of reporting, the number of exonerations has increased dramatically. Yet, exonerees have had widely differing results with compensation, in part due to antiquated versions of the compensation statute and what appears to be result-oriented compensation grants by CalVCB to minimize costs to the State.

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days of incarceration would count that was also part of the claim. As that argument was not statutorily driven it will not be expounded upon here.

277 Possley, "Timothy Atkins", *supra* note 209.

278 US, SB 269 *An act to amend Sections 1485.55, 4901, and 4903 of the Penal Code, relating to criminal procedure.*, Reg Sess, Cal, 2020, § 2–3 [*2020 Amendments*].

279 *Ibid* at § 2.

280 *Ibid* at § 3(b).

281 *Ibid* at § 3(c).

282 California Victims Compensation Board, "Claims for Erroneously Convicted Persons (PC4900)", *supra* note 53.

All told, between 1997 and the first quarter of 2020, 93 exonerees have applied for compensation, 46 claims have been granted, and 47 claims have been denied.[283] Those 46 compensated exonerees were granted a combined total of $26,156,379 for their 208,410 days – or 571 years – they spent wrongfully incarcerated. That is only a small drop in the bucket for the more than 200 California exonerees since 1989, but it is a good start.[284]

California has come a long way from the 1851 Legislature declaring, "the innocent are wrongfully accused of a crime. This is their misfortune."[285] California has frequently led the way in compassionate compensation laws for the wrongly convicted, and each amendment has been an even greater improvement. However, there is still room for refinement.

One proposal for improvement would be that in cases where a crime cannot be proved to have occurred — often referred to as a no-crime case — a claimant should not have to prove "if the crime occurred then" by a preponderance of the evidence that they are innocent of the crime. Perhaps CalVCB will be bound to the lower court's factual finding as an outcome of the most recent amendment,[286] but only time will tell.

A second proposal would be to strike the showing of pecuniary injury. It does not make sense to have a compensation scheme based on a static amount per day if CalVCB gives the same amount to a millionaire that they would give to a minimum wage employee but would then deny compensation to a homeless person because they cannot show pecuniary loss. It is even more troubling if that person, denied compensation for lack of pecuniary loss, was employed in a prison job while they were incarcerated because that would show an appropriation of the exoneree's labour that CalVCB then rules would have had no value if the person had not been incarcerated.[287]

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283 *Ibid.* There are another 27 claims marked as denied on the CalVCB website. Those claims were not filed by exonerees. CalVCB' s earliest claim reported on the website is from 1997, and no information is currently available on claims before that time.

284 *Ibid.*

285 Anne Pachciarek, "Thomas Berdue", *supra* note 5.

286 *2020 Amendments*, *supra* note 278.

287 See "Section III: The Prison Economy" (last visited 25 January 2020), online: *Prison Policy Initiative* <www.prisonpolicy.org/prisonindex/prisonlabor.html> [perma.cc/42DB-Y26P] (citing US, United States General Accounting Office, *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage* (GAO/GGD-93-98) (May 1993) at 19). These jobs pay on average less than $2/hour. See Wendy Sawyer, "How Much do

"Compensation with money can never fully make up for these losses [exonerees endure] ... But if you don't have any money ... you can't afford medical care ... and you can't get a car, ... a job, ... [or an] education... [a]nd that's what happens to so many of these people."[288] Never was the maxim "the delay of justice, is great injustice" more poignant then in the case of those wrongly convicted.[289] California has done a great job of trying to right those wrongs, but the job is not done yet.

One can be sure that there will be wrongful convictions so long as there is a criminal justice system. Further, society's view of the need for justice and compensation will likely evolve, and with it, the law to compensate exonerees will follow. This is a topic whose history is not yet fully written.

Incarcerated People Earn in Each State" (10 April 2017), online: *Prison Policy Initiative* <www.prisonpolicy.org> [perma.cc/HS7L-MS2U] (reporting the average low wage as $0.14/hour, with the average high being $1.41/hour).

288 See The National Registry of Exonerations, "Compensation for Exonerees", *supra* note 57 at 1 (quoting Barry Scheck, Co-Director, The Innocence Project *in* Burden on Innocence, *Frontline*, PBS (2003)).

289 John Musgrave, *Another Word to the Wise, Shewing that the Delay of Justice, is great Injustice* (London: publisher not identified, 1646) at 1.

Predictive Policing and the *Charter*

KAITLYND HILLER*

ABSTRACT

Predictive policing technology uses algorithms trained on past crime data to predict where crime is likely to occur in the future. Given the historical over-policing of minority and low-income communities, there is a concern that this bias will be perpetuated and amplified in the future if the algorithms are not corrected to account for this. Furthermore, there is a concern that when police are deployed to areas flagged as "high-crime," they will rely on these predictions as justification for detaining individuals — leading to an erosion of s. 9 *Charter* protections. This paper draws on Canadian and American caselaw to argue that as long as courts uphold the individualized suspicion requirement for investigative detention, s. 9 rights will likely not be eroded. Given the widespread issues with validating the accuracy of predictive algorithms and the unwillingness of courts to allow generalized suspicion to justify detentions, these tools will likely be given limited weight in the reasonable suspicion analysis moving forward.

I. INTRODUCTION

Police increasingly rely on data that they and others collect to predict where crime is most likely to occur. This practice is not entirely new. Police have always relied on crime location data to make predictions in the service of effective and efficient law enforcement.[1] In the 1990s, under Commissioner William Bratton, the New York Police Department

* BSc (University of Alberta), MSc (Columbia University in the City of New York), JD (University of Alberta). The author would like to thank Professor Steven Penney for his support and feedback throughout the drafting process.

1 Elizabeth E. Joh, "Policing by Numbers: Big Data and the Fourth Amendment" (2014) 89:1 Wash L Rev 35 at 39 [Joh, "Policing by Numbers"]; Andrew Guthrie Ferguson, "Crime Mapping and the Fourth Amendment: Redrawing 'High-Crime Areas'" (2011) 63:1 Hastings LJ 179 at 207 [Ferguson, "Crime Mapping"].

introduced the CompStat system, in which deployments were guided by weekly crime data.[2] More recently, police have begun using crime prediction systems employing artificial intelligence-based algorithms to make predictions about where and when crime is likely to occur in the near future.[3]

Some commentators have argued that the use of these algorithms will lower *Charter*[4] protections for individuals who live in certain "high-crime" areas.[5] This proposition stems from the reality that predictive algorithms are trained on historical crime data,[6] and that this will perpetuate the over-policing of low-income and minority communities by consistently flagging them as "high-crime" areas that law enforcement is sent to.[7] And although police require reasonable suspicion to conduct investigative detentions, the concern is that the predetermination of an area being "high-crime" will put the thumb on the scale of that analysis, requiring less suspicious behaviour from the detainee to justify detention than if they had been in an area that wasn't flagged as "high-crime."[8]

I argue, in contrast, that provided the Supreme Court's requirement of individualized suspicion for investigative detention remains robust, area-based predictive police algorithms will likely not erode the protection in s. 9 of the *Charter* against "arbitrary detention."[9] Given the issues inherent in

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2 Joh, "Policing by Numbers", *supra* note 1 at 43–44.

3 Artificial intelligence is defined as the programming of machines to be capable of intelligent, predictive behaviour. Machine learning is one application of artificial intelligence, which allows computer programs to learn from their experience. See Elizabeth E. Joh, "Feeding the Machine: Policing, Crime Data, & Algorithms" (2017) 26:2 Wm & Mary Bill Rts J 287 at 287, note 2 [Joh, "Feeding the Machine"].

4 *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*].

5 Ferguson, "Crime Mapping", *supra* note 1 at 214; Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (1 September 2020), online (pdf): *Citizen Lab: Transparency and Accountability in Research* <citizenlab.ca/wp-content/uploads/2020/09/To-Surveil-and-Predict.pdf> [perma.cc/P5MN-FAJ5].

6 Danielle Ensign et al, "Runaway Feedback Loops in Predictive Policing" (Paper contributed to the Proceedings of Machine Learning Research Conference on Fairness, Accountability, and Transparency, New York City, 23 February 2018) (2018) 81 Proc Machine Learning Res 1.

7 Although there are algorithms that use data to target individual suspects or criminal networks, this paper deals exclusively with area-based predictions.

8 Ferguson, "Crime Mapping", *supra* note 1 at 211.

9 *Charter*, *supra* note 4, s 9.

predictive policing algorithms and the reluctance of courts to recognize generalized suspicion as justification for infringement of liberty, the designation of an area as "high-crime" will likely play a limited role — if any — in the reasonable suspicion analysis moving forward.

I elaborate this argument as follows. First, I canvass current predictive policing programs and the issues they face with regard to data collection and algorithm bias. Second, I discuss case law regarding the constitutional implications of predictive technologies. Finally, I suggest a variety of ways that the courts may incorporate these technologies into the s. 9 analysis. These include complete exclusion of the factor, an additional onus on the Crown to show that the predictive information relied upon was accurate and non-discriminatory, and a move towards quantifying reasonable suspicion.

II. Predictive Policing

A. Overview of Existing Programs

The most widely used predictive police algorithm in the United States is called PredPol.[10] It uses three historical variables in order to predict where and when future crime is likely to occur: crime type, date and time, and location.[11] The algorithm — originally developed on models of seismic activity[12] — uses these data points to try and predict where "aftershocks" of crime might occur in the future.[13] It provides officers with one day's worth of "hotspots" represented as 500 by 500 ft squares on a map.[14] Officers are then able to prioritize the flagged areas during their patrols. HunchLab is another machine learning algorithm that includes variables such as weather, major sporting events, moon phases, and the location of bars[15] to predict future crime hotspots. Even though the property crime algorithms are relatively new, area-based algorithms have now expanded to predicting violent crime.[16]

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10 Joh, "Feeding the Machine", *supra* note 3 at 291.

11 *Ibid.*

12 Kristian Lum & William Isaac, "To Predict and Serve?" (2016) 13:5 Significance 14 at 18.

13 Ensign, *supra* note 6 at 2.

14 Joh, "Policing by Numbers", *supra* note 1 at 44.

15 Robertson, Khoo & Song, *supra* note 5 at 41.

16 Andrew Guthrie Ferguson, "Policing Predictive Policing" (2017) 94:5 Wash UL Rev 1109 at 1137–138.

PredPol has published results indicating that the use of their technology leads to significant drops in crime rate,[17] however, their data has been met with skepticism.[18] A 2019 survey of 50 agencies that have used PredPol found that none of them had produced studies validating the effectiveness or accuracy of the tool.[19] Furthermore, hundreds of academics signed an open letter emphasizing that there is no academic consensus that the research behind PredPol is either ethical or valid, and should always be weighed against literature to the contrary.[20]

Studies on the efficacy of predictive policing programs lack internal consistency because of selection bias and their inability to isolate variables and reproduce results.[21] There is no known baseline of actual crime or control group to evaluate the efficacy of the tool against, and the only population that data is being collected on is the one selected by the algorithm itself. This provides a fundamental challenge to this technology—given the naturally occurring fluctuation of crime over time, separating correlation from causation in studies of predictive policing becomes exceedingly difficult.[22]

If the goal of predictive policing is to effect short-term crime prevention, then causal inference is not necessary: the technology still helps police to allocate their resources efficiently. However, without knowing what causes the observed crime patterns, there is no way to know which interventions

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17 Zach, "PredPol Partners LAPD-Foothill Records Day Without Crime!" (22 February 2014), online (blog): *PredPol* <www.predpol.com/predpol-partners-lapd-foothill-records-day-without-crime/> [perma.cc/8RRQ-XRZF].

18 Two randomized controlled trials of PredPol found an average crime reduction of 7.4%, see Litska Strikwerda, "Predictive Policing: The Risks Associated with Risk Assessment" (2020) Police J: Theory, Practice & Principles 1 at 4.

19 Beryl Lipton, "'It's PredPol, and it's going to reduce crime': Agencies take algorithmic effectiveness on faith, with few checks in place" (5 November 2019), online: *MuckRock* <www.muckrock.com/news/archives/2019/nov/05/predictive-policing-lacks-accuracy-tests/> [perma.cc/EJK8-EK8R].

20 "Over 450 academics reject Predpol" (8 October 2019), online (blog): *Medium* <medium.com/@stoplapdspying/over-450-academics-reject-predpol-790e1d1b0d50> [perma.cc/M6S2-U5UL].

21 Ferguson, "Policing Predictive Policing", *supra* note 16 at 1159–160.

22 Joh points out that this is the predictable outcome of mining big data to find correlations — it bypasses the need for a hypothesis and causality-testing in research. The insights "are useful in their predictive value even though they provide no causal explanation [as to why the correlation exists]." See Joh, "Policing by Numbers", *supra* note 1 at 41–42.

(police or otherwise) would most efficiently reduce crime in the long term.[23] There is also a risk that hostility towards police may increase (and crime rates with it) if police are repeatedly deployed to the same area without an understanding of the causal factors underlying crime patterns.[24] Predictive police algorithms have continued to proliferate despite these concerns.

The Vancouver, Toronto, and Edmonton police agencies have already formed relationships with companies that manufacture predictive policing software.[25] The Vancouver Police Department uses GeoDASH to predict break-and-enters. Similar to PredPol, it uses historical police data to generate location-based forecasts every two hours for 100 and 500-metre-squared areas. Its algorithm uses four data inputs — type of crime, location of crime, date, and time — and only relies on cases triggered by civilian complaints.[26] If an area is forecast as high-risk, officers will be sent to patrol the area to "deter criminal activity" and look for "suspicious activity."[27] However, in the case of already over-policed areas such as the Downtown Eastside, some zones are excluded from the forecast so that even if they are flagged as high-risk areas, officers won't be sent back there repeatedly.[28]

Although a representative from the Toronto Police Service stated in 2019 that they are not yet using algorithmic predictive policing technologies,[29] they have access to Environics Analytics and IBM's software, which have data mining, analytic, and predictive abilities geared towards crime prediction. They have indicated that they will not implement a predictive policing program until there is alignment with other governmental strategies for their use.[30]

Edmonton Police Service has also been developing a digital policing platform with IBM. On their website, IBM indicated that this work would form the "building blocks" for predictive analytics intelligence.[31]

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23 Strikwerda, *supra* note 18 at 11–12.

24 Janet Chan & Lyria Bennett Moses, "Is Big Data challenging criminology?" (2016) 20:1 Theoretical Criminology 21 at 33.

25 Robertson, Khoo & Song, *supra* note 5 at 42–45.

26 *Ibid* at 42.

27 *Ibid* at 43.

28 *Ibid*.

29 *Ibid* at 45.

30 *Ibid*.

31 "Edmonton Police Service" (October 2018), online: *IBM* <www.ibm.com/case-studies/edmonton-police-service-hybrid-cloud-integration-crime> [perma.cc/7Y88-QGDD].

B. Problems with Data Collection

Although algorithmic-based decision making offers greater accuracy and objectivity in theory, much scholarship has pushed back on reliance on algorithms as a panacea. Mathematicians and lawyers alike have studied how algorithmic outputs can vary based on the bias of the data inputs and even the factors considered in any given algorithm itself. In terms of reliability, crime data is particularly unrepresentative and incomplete.[32] Murder and auto theft are reported more consistently than sexual assault,[33] and reporting also varies by class, race, and ethnicity. Police officers also wield immense discretion in deciding where to patrol and whether to arrest or lay charges.[34]

These deficiencies may be amplified when crime data is fed into machine-learning algorithms. In one study, drug crime arrest data from the Oakland Police Department was used to simulate PredPol's accuracy in predicting drug crimes.[35] The PredPol algorithm (utilizing historical crime data) was applied every day for a year, and each grid was recorded with how many times it was flagged for targeted policing by the algorithm. Outcomes were compared to a map of the area created by a self-reported survey of drug use elicited from the 2011 National Survey of Drug Use and Health.[36] This data represented a more accurate base rate of illicit drug users in the city. The areas that PredPol flagged were predictably skewed towards non-white and low-income neighbourhoods, reinforcing the *ex-ante* pattern of policing rather than accurately representing the true geographic distribution of offending.

The researchers noted that this simulation relied on the assumption that increased policing in an area would not change the number of crimes discovered in that same area.[37] They conducted an additional simulation that increased the number of crimes discovered in areas targeted for policing, which then became part of the data set used to predict future crimes. The effect of additional crimes being observed at targeted locations

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32 Joh, "Feeding the Machine", *supra* note 3 at 295–96; P Jeffrey Brantingham, "The Logic of Data Bias and its Impact on Place-Based Predictive Policing" (2018) 15:2 Ohio St J Crim L 473 at 474–79.

33 Ferguson, "Policing Predictive Policing", *supra* note 16 at 1146.

34 Joh, "Feeding the Machine", *supra* note 3 at 299.

35 As noted above, PredPol's algorithm does not incorporate arrest data. This is one limitation of the simulation.

36 Lum, *supra* note 12.

37 *Ibid* at 18.

is that the algorithm becomes more confident that most crime is located in the areas that it has been targeting historically. However, the more positive feedback that occurs, the more divergent future predictions become from the baseline of actual crime. In this case where "selection bias meets confirmation bias,"[38] algorithms are vulnerable to runaway feedback loops.

C. Algorithmic Neutrality

Studies on algorithmic decision-making in other domains have shown that creating neutral algorithms, *i.e.*, algorithms that do not artificially favor or disfavour certain immutable individual characteristics, is very difficult. In a recent review of employee dismissal cases, reasonable notice periods for employee dismissal were reviewed to determine if there were statistically significant differences between awards given to female and male plaintiffs.[39] A data set of over 1,700 decisions was collected and coded for factors commonly used in decision-making (character and length of employment, age of the employee, availability of similar employment, compensation, etc.).[40] No direct evidence of gender differences in the outcome of reasonable notice period awards was found when adjusted for the other factors.[41]

The author notes that although there was no explicit gender bias in the data set, that does not mean that it is not present. Rather, the gender differences are manifested through the factors themselves, such as job type and compensation. For example, clerical workers—who received less than other workers on average—are disproportionately female.[42] Furthermore, the general wage gap between female and male workers[43] manifests as lower compensation for female plaintiffs. Thus, a decision-making algorithm

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38 *Ibid* at 16.

39 Anthony Niblett, "Algorithms as Legal Decisions: Gender Gaps and Canadian Employment Law in the 21st Century" (31 July 2020), online (pdf): *SSRN* <dx.doi.org/10.2139/ssrn.3702495> [perma.cc/6RBP-VGTT].

40 This includes the factors from *Bardal v Globe & Mail Ltd*, [1960] OJ No 149, 24 DLR (2d) 140, as well as others at the discretion of the author, see Niblett, *supra* note 40 at 8.

41 Niblett, *supra* note 40 at 4.

42 *Ibid* at 13.

43 Nicole M. Fortin, "Increasing Earnings Inequality and the Gender Pay Gap in Canada: Prospects for Convergence" (2019) 52:2 Can J Econ 407 at 415.

based on the law will continue to reproduce systemic biases even though on the face of the data it is 'gender-neutral.'[44]

The issue of correlative factors acting as a proxy for immutable characteristics has also been shown to persist in algorithms that predict risk scores for offenders. In a study of the COMPAS software for sentencing, black offenders were twice as likely to be misclassified at a higher risk of violent recidivism than white defendants.[45] This analysis controlled for prior crimes, future recidivism, age, and gender; the algorithm itself did not include race as a factor.

Courts have also recognized that algorithmic decision-making may be biased. In *Ewert v Canada*,[46] the applicant, Mr. Ewert, challenged Correctional Services Canada's use of algorithmic risk assessment in making decisions regarding prison conditions, access to services, and parole. Mr. Ewert claimed that since their validity had not been tested with regard to Indigenous offenders, that the Correctional Services of Canada had breached their statutory duty to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate… as possible."[47]

Expert evidence was presented at trial which showed that not only did the actuarial tests suffer from cultural bias (and were therefore not valid predictors when applied to Indigenous inmates),[48] but that Correctional Services of Canada had not taken steps to research and improve upon those tools despite being aware of their potential for bias.[49] The Supreme Court of Canada determined that although the use of the tools did not impact Ewert's *Charter* rights, it was a breach of the Correctional Services of Canada's statutory duty to ensure that the tools they rely on when making a decision about an offender are as accurate as possible.[50]

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44 Niblett, *supra* note 40 at 16.

45 Julia Angwin et al, "Machine Bias" (23 May 2016), online: *ProPublica* <www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [perma.cc/9YP3-5DMJ]. See also Joh, "Feeding the Machine", *supra* note 3 at 294–95.

46 2018 SCC 30 [*Ewert* SCC].

47 *Ewert v Canada*, 2015 FC 1093 at para 80 [*Ewert* FC], citing the *Corrections and Conditional Release Act*, SC 1992, c 20, s 24(1).

48 *Ewert* FC, *supra* note 48 at para 52.

49 *Ibid* at paras 71–73.

50 *Ewert* SCC, *supra* note 47 at para 80.

D. Addressing Algorithmic Bias

Given that the bias present in input data described above is largely a reflection of human decision-making, some academics have argued that instead of throwing out algorithmic tools altogether, they should be adjusted to correct for some of that bias in the hopes of making better decisions. Brantingham, for example, examined how place-based predictive policing algorithms responded to one type of crime rate bias: the upgrading and downgrading of crime. Building on social science research, Brantingham hypothesized that implicit bias leads police to minimize the interests of non-white crime victims (downgrade the crime) and maximize the liability of non-white suspects (upgrade the crime).[51] The impact is reversed in the case of white individuals. The downstream effect of this implicit bias leads to higher risk-profiles being generated for certain suspects/crimes, and in practice, to over-policing of minority communities and under-policing of white communities — the precise concern raised by many legal experts and advocacy groups.[52]

Brantingham ran two sets of experiments where he sequentially upgraded and then downgraded crimes from 2% to 20%, observing the effect on the predictive policing model.[53] He found that when data bias was introduced to downgrade crimes (ex from aggravated assault to assault simpliciter), the risk-estimation went down as well. When crimes were upgraded, the risk estimation went up. However, the change in risk did not change beyond natural variation unless the biases impacted over 20% of the dataset.[54]

Brantingham's study is helpful in showing how predictive algorithms may be adjusted to account for bias in officer's perception of crime. However, it also illustrates the difficulty with putting the cart before the horse in such adjustments. How can we determine the extent to adjust predictions if there is no initial quantification of the amount of bias that is existing in the system? There is inherent difficulty in altering inputs to produce less-biased outcomes if the amount of bias that you are adjusting for is quantitively unknown.

A study of bail decisions attempted to address this difficulty in pre-trial release predictions. It began with an analysis of bail decisions to determine

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51 Brantingham, *supra* note 32 at 476.
52 Robertson, Khoo & Song, *supra* note 5.
53 Brantingham, *supra* note 32 at 478–80.
54 *Ibid* at 481.

what factors judges were giving undue weight towards. The authors found that judges tended to over-weigh the current charge defendants are facing when making release decisions: they treated high-risk defendants as low-risk if the current charge they are facing is minor, but erred on the side of detaining low-risk defendants if the current charge they face is more serious.[55] The researchers accordingly trained an algorithm to make bail decisions adjusting for the perceived human error.[56] They found that when applied to new scenarios, the artificial judge reduced the subsequent crime rate as effectively as human decisions while imposing 28.8% less detention than human judges.[57]

Scrutiny of how human error influences and is dealt with by predictive algorithms should also extend to ensuring that the algorithms being relied upon are not perpetuating the problem of over-policing minority communities.[58] An officer's justification for detaining individuals must be *Charter* compliant, and therefore must not rely on immutable characteristics of a suspect.[59] Police services in Canada have had the benefit of observing some of the unfortunate outcomes of predictive policing in the United States and are approaching this technology with those concerns in mind.

The Vancouver Police Department, for example, has been monitoring their GeoDASH algorithmic prediction system for areas that become, or may become, over-represented in their forecasts.[60] Officer training also stresses that the forecasted crime models cannot form independent grounds for a street check.[61] The City of Edmonton has also shown that it is aware of the potential issues with predictive policing. It has requested meetings with the experts at the Alberta Machine Intelligence Institute (Amii) to discuss how to reduce bias when it comes to machine learning tools.[62] One

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55 Jon Kleinberg et al, "Human Decisions and Machine Predictions" (2018) 133:1 QJ Econ 237 at 284.

56 The study's obvious limitation is that while it can calculate the judge's "correctness" of deciding to grand bail based on whether conditions are breached, it cannot calculate the counterfactual — the effect that jailing defendants otherwise released would have been. See Kleinberg et al, *supra* note 56 at 256.

57 *Ibid* at 286.

58 See generally *R v Le*, 2019 SCC 34 at para 95 [*Le*].

59 *R v Chehil*, 2013 SCC 49 at para 43 [*Chehil*].

60 Robertson, Khoo & Song, *supra* note 5 at 43–44.

61 *Ibid* at 44.

62 Cory Schachtel, "More Data, More Problems: The Edmonton Police service reaches out to ensure it doesn't reach too far" (5 June 2019), online: *EDify* <edifyedmonton.com/urban/innovation-technology/more-data-more-problems> [perma.cc/W67H-A6XB].

of the directors of Amii noted that they were informed of the problem of feedback loops and open to modifying data in order to avoid the creation of positive feedback loops which send officers back to marginalized communities.[63]

Ultimately, algorithmic decision-making is only as good as the inputs it receives. Area-based predictive police technologies must take into account and adjust for bias in the data it uses in order to be *Charter* compliant and lead to better decision-making. Until then, their usefulness in crime prevention and as a factor in legal decision-making will be limited.

III. Constitutional Implications

A. Reasonable Suspicion and the *Charter*

S. 9 of the *Charter* protects an individual's right to be free from arbitrary detention.[64] The Supreme Court has recognized three categories of detention: physical restraint, psychological restraint with legal compulsion (where there are lawful consequences for not complying), and psychological restraint without legal compulsion.[65] Psychological restraint without legal compulsion arises where police conduct leads a reasonable person to believe that the choice to not comply does not exist.[66]

In *Grant*,[67] the Supreme Court identified a number of factors that may be taken into account in order to determine whether someone has been detained under this category. These include how focused or coercive the police inquiry was, the nature of the language used by the officer, and the characteristics of the accused (their age, relative stature, minority status, etc.).[68] If the totality of the circumstances would lead a reasonable person to believe that they had no choice but to cooperate, then detention will be made out and s. 9 protections will be triggered.

Police have a common law power to detain individuals for investigative purposes.[69] In deciding whether an investigative detention is lawful under s. 9, courts examine whether police had reasonable suspicion to detain. The

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63 *Ibid*.

64 *Charter*, *supra* note 4, s 9.

65 *R v Therens*, [1985] 1 SCR 613 at 641–44, [1985] SCJ No 30.

66 *R v Grant*, 2009 SCC 32 at paras 28–32 [*Grant*].

67 *Ibid*.

68 *Ibid* at para 44.

69 *R v Mann*, 2004 SCC 52 at para 45 [*Mann*].

reasonable suspicion standard requires articulable suspicion of why an individual is possibly engaging in some criminal activity.[70] The reasons for suspicion must be objectively discernable facts—something more than a mere hunch but less than reasonable and probable grounds.[71]

The Supreme Court has been clear that "generalized suspicion" alone does not provide reasonable suspicion for police to detain individuals. In *R v Mann* the Court stated: "The presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime."[72] Presence in a high-crime area without more will not be accepted as a lawful detention.[73] Furthermore, factors in combination with a high-crime area such as "refus[al] to make eye contact" and "repeated looks at the police car" while walking in a high-crime area are not enough to ground a lawful detention.[74]

The Supreme Court dealt with how predictive policing intersects with the reasonable suspicion analysis as it applies to an individual in *R v Chehil*. In *Chehil*, the RCMP targeted the defendant's airline luggage with a sniffer dog search because his flight manifest matched the RCMP's drug-courier profile.[75] At trial, it was found that the factors relied upon by the police did not meet the threshold of reasonable suspicion to justify a sniff search. This amounted to a s. 8 breach, and the evidence was excluded under s. 24(2). This finding was reversed upon appeal. The Supreme Court affirmed on appeal, finding that although a "constellation of factors" made up of characteristics that may generally apply to innocent people will not be enough to ground reasonable suspicion,[76] the factors which made up the drug-courier profile, when considered as a whole, went beyond generalized suspicion and to individual factors enough to constitute a basis for reasonable suspicion of Mr. Chehil.

In the entrapment context, a 5-4 majority of the Supreme Court recently affirmed in *R v Ahmad* that police must have reasonable suspicion over a sufficiently particularized place or individual before presenting an opportunity for a person to commit an offence.[77] The Court found that a

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70 *R v Kang-Brown*, 2008 SCC 18 at para 75.
71 *Chehil*, *supra* note 60 at paras 26–27.
72 *Mann*, *supra* note 70 at para 47.
73 *Le*, *supra* note 59 at para 132.
74 *R v Austin*, [2015] OJ No 5374 at para 37, 125 WCB (2d) 252.
75 *Chehil*, *supra* note 60 at paras 4, 8–9.
76 *Ibid* at para 30.
77 2020 SCC 11 at paras 4, 20–21 [*Ahmad*].

phone number used in a dial-a-dope investigation counts as a "place" for the purposes of the entrapment analysis.[78]

The majority explained that the "target" to which reasonable suspicion attaches is context-dependent.[79] In the case of sniffer dog searches of an individual (such as in *Chehil*), reasonable suspicion must attach to the individual person.[80] In the context of dial-a-dope investigations, reasonable suspicion can attach to a phone number (or narrowly defined virtual area).[81] Notably, the majority did not overrule *Barnes,* which allows officers to conduct *bona fide* investigations by randomly approaching individuals with an opportunity to commit an offence in a physical area where it is reasonably suspected that crime is occurring.[82]

In dissent, Justice Moldaver points out that *bona fide* investigations ultimately rest on the generalized, location-based reasonable suspicion that was carved out by *Chehil* in favor of an individualized approach.[83] The majority maintains that the individualization requirement of reasonable suspicion is consistent with *Barnes*, so long as places are targeted using a "sufficiently particularized constellation of factors."[84] Thus, in the entrapment context, police solicitation may be justified based on reasonable suspicion of a targeted area rather than an individual. However, given the majority's distinction that sniff-searches still require individualized suspicion of the person, it is unlikely that this approach will apply to the context of investigative detention and s. 9 cases.

Given that few police departments in Canada have adopted (or are thinking of adopting) area-based predictive policing, their precise impact on law enforcement decision-making and subsequent judicial treatment has yet to percolate through *Charter* jurisprudence. Looking to the jurisdiction of the United States, where predictive policing technologies have been in use for much longer, provides insight into how judges are responding to the technology and its constitutional implications.

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78 *Ibid* at para 42.
79 *Ibid* at para 49.
80 *Ibid*.
81 *Ibid* at 48.
82 *R v Barnes*, [1991] 1 SCR 449 at 463, [1991] SCJ No 17.
83 *Ahmad, supra* note 78 at para 129.
84 *Ibid* at para 48, citing *Chehil*, *supra* note 60 at para 30.

B. *United States v Curry*

In *United States v Curry*,[85] a full panel of the Fourth Circuit heard a Fourth Amendment case which reckoned (to some extent) with the applicability of predictive algorithms in determining the reasonableness of police action.

The Fourth Amendment protects individuals from unreasonable searches and seizures.[86] It has also been interpreted to provide constitutional protections to stops and arrests, with arrests requiring probable cause and investigative stops requiring reasonable suspicion.[87] Investigative stops captured under the Fourth Amendment are known as "*Terry* stops"[88] and are the functional equivalent to investigative detentions under s. 9 of the *Charter*. They require a "particularized and objective basis for suspecting the particular person stopped of criminal activity."[89]

The facts giving rise to *Curry* occurred one evening in 2017. Four officers were patrolling an area in Richmond, Virginia, when they heard five to six gunshots coming from nearby.[90] They quickly drove towards Walcott Place, arriving only 35 seconds later. Their presence in the area and corresponding quick response time were due in part to the Richmond Police Department's use of predictive policing algorithms.[91] Following six shootings and two homicides in the previous three months, the area was flagged as a "hot spot."[92] Upon arrival, the officers received dispatch calls that gunfire was reported at Walcott Place. They did not receive a suspect description. There was an open field flanking the building, with a handful of men walking away from the building and several people standing near the apartment building. The officers fanned out across the field, walking towards individuals and shining their flashlight on their waistbands and hands, looking for weapons.

One officer (Gaines) approached Curry and instructed him to put his hands up, to which he complied. Gaines then instructed Curry to pull up his shirt, which he did, but Gaines testified that he could not see the entire

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85 965 F (3d) 313 (4th Cir 2020) [*Curry*].

86 US Const amend IV (the United States does not have an equivalent of s. 9).

87 James Stribopoulos, "The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning" (2008) 40 SCLR (2d) 211 at 211, n 5.

88 *Terry v Ohio*, 392 US 1 (1968).

89 *United States v Griffin*, 589 F (3d) 148, 152 (4th Cir 2009).

90 *Curry*, *supra* note 86 at 5.

91 *Ibid* at 65, Wilkinson J. dissenting.

92 *Ibid*. See also *United States v Curry*, 937 F (3d) 363 at 367 (4th Cir 2019).

waistband and then Curry turned away. Gaines called for back-up to do a pat-down search of Curry. A revolver was found on his person, and Curry was arrested for possession of a firearm by a convicted felon.

The district court found that Curry's seizure was not a lawful *Terry* stop as Gaines lacked particularized reasonable suspicion. It also rejected the government's argument that Curry's seizure was justified under the exigent circumstances exception to the Fourth Amendment.[93] The government appealed, conceding that there was no reasonable suspicion for the seizure and instead justifying the seizure on exigent circumstances alone. A split panel of the Fourth Circuit reversed the district court's ruling. Curry then successfully petitioned for a full panel rehearing en banc.

The court upheld the district court's decision, affirming that exigent circumstances did not justify the suspicion-less seizure of Curry.[94] Officer Gaines testified that he told Curry to stop and show his hands because "the high crime area, the recent violent incidents, and the shots he had heard"[95] led him to conduct seizures of not only Curry but also the other men in the field. Although he cited generalized suspicion and safety concerns, the court determined that without more specific facts particularizing Curry as having engaged in criminal activity, this did not meet the threshold of reasonable suspicion for a *Terry* stop.[96]

Additionally, the majority found that the situation the officers faced did not rise to the level of exigent circumstances. The situations in the jurisprudence where suspicion-less, investigatory seizures were conducted pursuant to exigent circumstances all had clear, limiting principles[97] and at least some level of particularized suspicion relating to the safety threat.[98] Although the government emphasized the fact that the area had been plagued with shootings in the preceding weeks, the majority refused to give that fact "special weight"[99] in their analysis. They asserted that to do so would essentially relegate residents of high-crime areas to a lower level of

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93 *Curry*, *supra* note 86 at 8–9 (the district court granted Curry's motion to suppress the evidence of the revolver as well as statements he made while in custody).

94 *Ibid* at 4.

95 *United States v Curry*, No 3:17-cr-130, 2018 WL 1384298 at 20 (ED Va 2018).

96 *Ibid* at 27.

97 *Curry*, *supra* note 86 at 19.

98 *Ibid* at 23, n 8.

99 *Ibid* at 32.

Fourth Amendment protection, which risks treating them as "second-class citizens."[100]

This holding fits with the Supreme Court of Canada's reasonable suspicion jurisprudence: some level of individualization is required. The only suspicious act that officers testified Curry engaged in was walking away from officers after raising his hands for the first time. The Supreme Court has said that officers cannot rely upon behaviours that arise from the exercising of *Charter* rights (for example, walking away from questioning if they are not lawfully detained) to show suspicion.[101] Thus, Curry's walking away from the officer after complying with his initial request would likely fall into the category of normal behaviour if this case was before a Canadian court.

An examination of the dissent reveals a more complicated picture. Judge Wilkinson argued that the use of predictive policing technologies (which allowed officers to respond in 35 seconds) rests on a trade-off: police will get to the scene faster, but with less information. Thus, to expect them to wait around for more information to be discovered before taking action is to deliver "a gut-punch to predictive policing."[102] Wilkinson and the remaining dissenting judges took the position that not only did the unfolding active-shooter scenario qualify as an exigent circumstance, but that Gaines acted reasonably in response to it.[103] Therefore, since the Fourth Amendment rests on reasonableness, the analysis should not require particularized suspicion such as *Terry*, but merely that the State's response to the threat was reasonable in the context of the exigent circumstances.

Canadian law also recognizes that constitutional rights may be circumscribed where exigent circumstances exist. At common law, warrantless searches are permitted in some cases where exigency leads an officer to believe that either evidence is likely to be lost if there is a delay due to gaining a warrant, or where there is a safety threat that calls for immediate action.[104] The Supreme Court has also recognized a general safety search power under the ancillary powers doctrine which allows officers to conduct a frisk search for weapons where they have reasonable

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100 *Ibid*, citing *Utah v Strieff*, 136 S Ct 2056, 2069, 195 L Ed 2d 400 (2016), Sotomayor J. dissenting.

101 *Chehil*, *supra* note 60 at para 44.

102 *Curry*, *supra* note 86 at 71, Wilkinson J., dissenting.

103 *Ibid* at 73.

104 *Hunter et al v Southam Inc*, [1984] 2 SCR 145, [1984] SCJ No 36; *Grant*, *supra* note 67.

grounds to believe that a person is armed and dangerous.[105] Exigent circumstances related to search powers have also been codified. For example, s. 117.02(1) of the *Criminal Code* allows an officer to search a person where they have reasonable grounds to believe that a firearms-related offence has been committed and that evidence is likely to be found on the person.[106]

There is no police power to conduct a suspicion-less search (and, by extension, detention) of an individual. However, the Supreme Court has also used the ancillary powers doctrine to allow for investigative roadblock stops where there is generalized probable grounds. In *R v Clayton*,[107] officers responded to a call describing four individuals who were brandishing guns outside of a strip club.[108] Within minutes they blocked the parking lot exit and stopped a car attempting to leave, even though it was not one of the vehicles that was described to them. The Supreme Court upheld the detention given that the response was logistically tailored to a specific geography and within a short timeframe of a serious offence being reported.[109] Thus, although the officers lacked individualized suspicion as to the vehicle that they stopped, the generalized probable grounds combined with the tailored nature of the *Charter* infringement was justified.

The reasoning in *Clayton* is quite similar to Wilkinson's "trade-off." When officers are responding quickly to a serious offence (of which firearm-related incidents will almost certainly always fall under), there may be a lack of specific information for them to act on. Yet as long as their response is temporally and geographically tailored to the threat being faced, individualized suspicion may not be required depending on the context. In *Clayton*, the response targeted vehicles leaving the parking lot five minutes after an incident was reported. In *Curry*, the response targeted some of the men leaving the surrounding area of an apartment complex where shots were heard seconds earlier. *Curry* can be distinguished in that the officers had less information about the incident than those in *Clayton*, however, not by much.

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105 *R v MacDonald*, 2014 SCC 3 at para 44; *Mann*, *supra* note 70.

106 RSC 1985, c C-46.

107 2007 SCC 32 [*Clayton*].

108 Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2nd ed (Toronto: LexisNexis Canada, 2018) at 128.

109 *Clayton*, *supra* note 110 at para 41.

Given that Canadian law already recognizes "trade-offs" in the case of roadblock stops lacking individualized suspicion, *Curry* presents a scenario that will become more common if predictive policing is effective at getting officers to the scene faster. Whether the individualized suspicion requirement will fall by the wayside when officer response is quick and tailored remains to be seen, however, there are important policy reasons against this as stated strongly by the majority in *Curry*.

If officers no longer need to provide individualized suspicion for detentions, *Charter* rights will be diminished. The rights of those who happen to live in areas with a greater police presence—or "hot spot" areas—will be further diminished. Courts should vigorously guard against this so that certain individuals are not treated as "second-class citizens" based on where they live.

C. The Path Forward

The decision in *Curry* highlights the myriad ways that predictive police technologies might be treated by courts in Canada. For a seemingly commonplace interaction between an officer and individual, the decision spanned ninety-nine pages with four separate concurring decisions and two dissents.[110] Thus, it is clear that reasonable people can disagree about how

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[110] *Curry*, *supra* note 86. The majority opinion authored by Judge Floyd held that in order for a suspicionless seizure to be justified under exigent circumstances, it must be narrowly targeted based on a known crime and controlled geographic area. Chief Judge Gregory concurred, emphasizing that actions taken with the intent of preventing crime do not automatically make them constitutional. Judge Wynn concurred, warning against sociological studies and policy considerations becoming determinative of constitutional questions. Judge Diaz (joined by Judge Harris) concurred, dealing with the government's argument that Curry's seizure was lawful under the "special needs" doctrine, which eliminates the requirement for individualized suspicion altogether in certain circumstances (such as roadblock stops). He found that this argument was not supported on the facts of *Curry*, given that the officers were not discretionless and systematic in how they chose to search individuals after the gunfire was heard. Judge Thacker (joined by Judge Keenan) concurred with a strong critique of predictive policing, describing it as "little more than racial profiling writ large." Judge Richardson (joined by the five other dissenting judges) wrote a dissenting opinion that emphasized the contextual factor of recent gun violence in the community as weighing in favor of the reasonableness of Officer Gaines's actions. He argues that to limit suspicionless searches to situations where there is a known crime and controlled area is to straightjacket police from responding to crime. Judge Wilkinson wrote a separate dissent, advocating for police to be able to use whatever reasonable strategies work for their community—including predictive technologies.

to incorporate this new policing technology into reasonable suspicion determinations. A few of the potential directions are discussed below.

1. Limit the Weight of the Factor

The majority in *Curry* excluded the "high-crime" area determination from the reasonable suspicion analysis altogether. This is consistent with what academics suggest.[111] Although police may use predictive technologies to help decide where officers should be deployed, it should not be used as a factor to be relied upon in the reasonable suspicion analysis.

This approach would relieve decision makers from having to wrestle with the logic, assumptions, and theory of big data predictive analysis. As discussed in section 2A of this paper, predictive technologies are limited in their ability to separate causation from correlation. This limitation, combined with the fact that most of the software used is proprietary[112] and either unknowable or inscrutable to the public, makes these algorithms a 'black box.'[113] This lack of transparency makes it nearly impossible to justify legal decisions based on machine-learning where its assumptions, variables, and weighing of each are unable to be examined.[114]

Yet despite the benefits of this approach, courts might not adopt it given that the reasonable suspicion test considers the "totality of the circumstances." This includes information that police had at the time. Whether they knew crime was forecasted to occur at the place where they noticed an individual engaging in suspicious activity may be found to be relevant in the s. 9 analysis.

2. Additional Onus on the Crown

Another direction advocated by some scholars is to place a burden of proof on the Crown to show that stereotypes did not play a role in officer's exercise of discretion.[115] This resembles challenge-for-cause jury selection, where racism rebuts the presumption that all jurors are unbiased. This approach also recognizes there will always be an information asymmetry

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111 See e.g. Fabio Arcila Jr., "Nuance, Technology, and the Fourth Amendment: A Response to Predictive Policing and Reasonable Suspicion" (2014) 63 Emory LJ 87 at 88.

112 Robertson, Khoo & Song, *supra* note 5 at 130–31.

113 Chan & Moses, *supra* note 24 at 34.

114 Robertson, *supra* note 5 at 35.

115 David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 145.

where the state is in a better position to show the reasons for the stop,[116] and that individuals are generally hard-pressed to prove discrimination due to the privatized and generally opaque nature of the technology.[117]

Although this onus might result in algorithmic bias being brought to light and examined sooner, it may be prejudicial to require the Crown to adduce additional evidence and potentially experts for every s. 9 hearing. In terms of the individualization component, courts have made it clear that the Crown already bears an onus of showing how the objective facts must be "tied to the individual."[118]

A statutory duty similar to the one found in *Ewert*[119] could help to ensure that the algorithms relied upon by police are effective and non-discriminatory. However, this might result in a patchwork of standards across the country given that provinces, not Parliament, have jurisdiction over their provincial police forces.[120] Thus, a rigorous analysis of the factors relied upon by the officer may be a better option, as explained below.

3. Quantify the Weight of the Factor

Some level of quantification by courts as to what falls within the range of reasonable suspicion might aid in ensuring that predictive area-based algorithms used by police do not erode s. 9 protections. Steven Penney argues that certainty in decision-making could be increased if courts would define standards such as "reasonable suspicion" to fall within a range of accepted statistical possibilities.[121] For example, if the reasonable suspicion is defined to fall somewhere between 11 and 35% probability of criminality,[122] then *Chehil* might have had a different outcome had it been deduced that their drug-courier profile only had a 2% success rate in identifying drug traffickers.[123]

Although courts are generally deferential to officer testimony and experience when it comes to accepting "high-crime area" as a factor in the constellation, courts have applied evaluative approaches to bare assertions

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116 *Ibid* at 147.

117 Robertson, Khoo & Song, *supra* note 5 at 122.

118 *Chehil*, *supra* note 60 at para 46.

119 *Ewert* SCC, *supra* note 47.

120 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(14), reprinted in RSC 1985, Appendix II, No 5.

121 Steven Penney, "Standards of Suspicion" (2017) 65 Crim LQ 23 at 48.

122 *Ibid*.

123 *Ibid* (borrowing from the analysis on page 52).

before. When an officer cited being in a high-crime area as a reason for arrest in *R v Brown*, the Ontario Court of Appeal determined that "[t]he evidence supporting that contention was thin to say the least."[124]

Given the sophistication of the technology being utilized by police departments, embracing a level of "analytical rigor to the high-crime area question" may be the path forward.[125] Andrew Guthrie Ferguson argues for a "particularized approach" to replace "high-crime area" assertions and their analysis. This would require officers who are relying on predictive data to show a nexus between the particular crime being forecast and the observed individualized activity.[126] This approach could help guard against the issue of over-policing in two ways.

First, if an officer was deployed to patrol an area for a certain type of crime (break and enters) and instead comes across suspicious behaviour associated with another type of crime (drug dealing), they may not be able to use that forecast to bolster their reasonable suspicion justification as to why they detained an individual for a drug dealing investigation.[127] Second, if officers are able to reference that the possibility of a break and enter in that area was forecast at a 31% likelihood that day, that contextual factor can be given appropriate weight. A forecast of only 2% might fail to weigh in favor of a reasonable suspicion.[128]

Whether on its own or combined with a court's quantitative range of reasonable suspicion as described above, these specific factors can allow for the "independent and rigorous judicial scrutiny"[129] of reasonable suspicion called for in the caselaw. As Ferguson notes in his scholarship: "Hard data has a way of hardening previously fuzzy judgment calls."[130]

IV. Conclusion

Predictive policing technologies have arrived in Canada, as have the multiple concerns that come with relying on machine learning to inform human decision-makers. There has been considerable debate around area-

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124 *R v Brown*, 2012 ONCA 225 at para 18.

125 Ferguson, "Crime Mapping", *supra* note 1 at 221.

126 *Ibid*.

127 Andrew Guthrie Ferguson, "Predictive Policing and Reasonable Suspicion" (2012) 62:2 Emory LJ 259 at 321–22 [Ferguson, "Predictive Policing"].

128 *Ibid* at 322.

129 *Chehil*, *supra* note 60 at para 3.

130 Ferguson, "Predictive Policing", *supra* note 130 at 322.

based predictive policing forecasts, which have the potential to exacerbate over-policing and undermine *Charter* rights. However, given the Supreme Court's commitment to an individualized reasonable suspicion standard, it is unlikely that s. 9 rights will be eroded by the use of area-based predictive technologies. The use of algorithms may necessitate a move towards quantifying the reasonable suspicion standard as part of the court's rigorous scrutiny. Whether these emerging technologies find purchase in the law under this scrutiny remains to be seen.

Algorithmic Policing Technologies in Canada

SHAWN SINGH [*]

ABSTRACT

Canadian law enforcement agencies are applying algorithmic technologies to identify individuals at the regional, provincial, and federal levels. These technologies connect templated facial images to an array of informational fragments that are collected from databases scattered between the public and private sectors. While that is the case, these surveillance technologies continue to be authorized under SCC jurisprudence, as opposed to legislation enacted by Parliament. Algorithmic technologies collate and analyze disparate information from public and private databases to identify patterns, which are then used to generate formulas to 'predict' future trends. Kate Robertson and colleagues explain that implementation of APTs by Canadian police services holds serious deleterious potential for the *Charter* rights of Canadians, with consequences that disproportionately affect people of colour. Be that as it may, the most malevolent consequence of applying APTs may be their application of generalized formulas to generate recommendations used to intercept individuals based on biased and inaccurate information. Although not authorized by statute, surveillance technologies continue to be permissible under common law authorities. Richard Jochelson explains the inappropriate nature of this approach, arguing in the alternative that the court's traditional role calls for application of the *Oakes* test to determine if state surveillant practices fall within its constitutional limits. Considering APT's serious implications for *Charter* protected rights, this paper calls on legislators to implement dedicated legislation to govern the use of surveillant technologies in law enforcement, with a particular focus on regulating the use of APTs. Failure to do so risks an unprecedented expansion of prejudicial policing practices, which may act to crystallize the existing biases in law enforcement practices

[*] Third-year law student at Robson Hall, Faculty of Law, University of Manitoba.

into objective 'scientific' outputs that may hold serious deleterious potential for Canada's most vulnerable populations.

Keywords: Algorithm; Policing; Technology; Search; Detention; Ancillary; Equality

I. INTRODUCTION

Law enforcement agencies are currently applying algorithmic technologies to identify individuals in Canada. These technologies connect templated facial images to an array of informational fragments that are collected from databases scattered between the public and private sectors. These databases include state-held information like drivers' licencing information, as well as corporate records including social media information, facial recognition databases, CCTV recordings, and many others. Algorithmic technologies collate and analyze these disparate data fragments to identify patterns that are intended to generate formulas to 'predict' future trends. These formulae can also be applied to determine whether a particular target matches defined selection criteria. Results generated from these 'black-box' calculations may appear like an objective science, but closer analysis reveals this technology's foundational reliance on observational biases that are crystallized into the enforcement records used to train this technology.

Algorithmic Policing Technology (APT) is "trained" to identify patterns related to criminal behaviour using inputs of historical law enforcement data. This is troubling – a short review of Canada's criminal justice literature reveals a long history of racial prejudice in law enforcement practices. Police, prosecutions, and the courts have maintained a consistently disproportionate focus on people of colour, with particular attention on Indigenous individuals and communities. While this reality is resoundingly captured in the literature, it is unlikely that historical enforcement records maintain a critical perspective regarding the policing practices applied in the field. The combined effect of using biased enforcement records with the ongoing operation of prejudicial enforcement practices in the field holds serious deleterious potential towards the generation of APT formula and applying its outputs to identify prime intervention opportunities for patrolling officers. Police services in major metro centres like Vancouver, Calgary, and Saskatoon have trained and applied different forms of APT to

monitor citizen activity, respond to anti-social behaviour in 'real-time,' and, in some jurisdictions, predict optimal deployment of police resources.

Kate Robertson and her colleagues at Citizen Lab conducted a prospective analysis of APT use in Canada's police forces.[1] Although limited to obtainable information from these agencies, their research provides a comprehensive description of this new technology and projects its potential to alter the law enforcement landscape in Canada. They highlight the expansion of APTs in recent years, as well as several inherent flaws that are rooted in APT components, such as using biased information to "train" APTs, applying its vast data-processing capabilities and recommending arguably unreliable outputs to inform officer interventions. Police use APT outputs to make decisions about whether to interfere with an individual's liberty, whether that intervention is simple questioning, detention, or arrest. As agents of the state, execution of these powers against an individual activates *Charter* protected rights against unreasonable search and seizure, and arbitrary detention, as well as the residual guarantee of equality before the law at the social level.

While Canada's courts have yet to formally analyze the influences of algorithmic decision-making on broader policing practices, the Supreme Court of Canada continues to authorize the use of broader surveillance technologies under the common law ancillary powers doctrine. *Charter*-protected rights are engaged when agents of the state directly collect or access historical records.[2] This includes accessing fragmented bits of information, like photos or social media posts of disparate information contained in a variety of public records. Although engaged, our highest court finds that the 'examination' of abandoned informational material fails to constitute a search because the user cannot maintain a reasonable expectation of privacy.[3] Alternatively, access to corporate service records may be consented to under statute or implication, which allows the state to access these data fragments for enforcement purposes. This level of informational surveillance may be reasonable in the context of case-by-case access, but the invasive potential of algorithmic assembly and its application

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1 Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (1 September 2020), online (pdf): *Citizen Lab: Transparency and Accountability in Research* <citizenlab.ca/wpcontent/uploads/2020/09/To-Surveil-and-Predict.pdf> [perma.cc/FBA9-V344].

2 *R v Morelli*, 2010 SCC 8 [*Morelli*]; *R v Spencer*, 2014 SCC 43 [*Spencer*].

3 *R v Patrick*, 2009 SCC 17 [*Patrick*].

is exponential. Rapid collection and collation of fragmented datasets to present profiled information to officers in 'real time' certainly reveals more biographical information of a person of interest than using heat-sensing equipment or sniffer dogs.[4] Further to this, standards of reliability regarding APT recommendations have yet to be established. This shortfall is concerning. Robertson and colleagues explain that reported matches remain highly uncertain because of inherent flaws in APT equipment, as well as the influence of surrounding environmental conditions at the time and spaces where APT recommendations are produced. Considering the application of these technologies by Canadian police to interfere with the *Charter*-protected rights of Canadians, this paper asserts that the legal authority to do so ought to stem from legislation, rather than the common law.

Police surveillance powers have promulgated under the auspices of the SCC's ancillary powers doctrine. Richard Jochelson explains the role of the *Waterfield* test in expanding police powers in the absence of legislative authorization by examining SCC decisions that sanction the use of investigative tools like roadblocks, sniffer dogs, and investigative detention.[5] While outside the traditional role of an adjudicative court, surveillant technologies have become constitutionally authorized under the common law, rather than legislation. This approach may have been reasonable when surveillant traces did not reveal core biographical information about an individual's life, but the power to assemble this information into suspect profiles and apply them to prevent a predicted breach of the peace likely exceeds the current scope of existing authorities.

Considering these risks, along with the inherent flaws of APT, it is clear that legislation is required in this area. The validity of technologically enhanced state surveillance has persisted under the common law, but the addition of APT goes well beyond established precedents. Rather than allow *Charter*-protected rights to be infringed on an ongoing basis, legislation from Canadian governments should be implemented to contour the field's development while it is still maturing. The research of Robertson and colleagues provides a strong foundation for the development of a robust

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4 *R v Tessling*, 2004 SCC 67 [*Tessling*]; *R v Kang-Brown*, 2008 SCC 18 [*KB*]; *R v M(A)*, 2008 SCC 19 [MA].

5 Richard Jochelson, "Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory" (2017) 43:3 Ottawa L Rev 355; *Tessling*, *supra* note 4; *KB*, *supra* note 4; MA, *supra* note 4.

governing framework for APT surveillance by local law enforcement agencies.[6] This paper echoes the recommendations contained in *To Surveil and Predict* to urge Canadian governments to establish APT policies that can remain consistent with the *Charter*-protected rights of Canadians.

This paper offers a primer on the existence of algorithmic enforcement practices and their role in Canada. Using Robertson and colleague's research as a guideline, Part II reviews the fundamental concepts behind algorithmic policing, its preparation for field application, and the risks inherent to this process. We will review the historical, social environment that is captured in criminal justice records to highlight the systemic prejudice that risks becoming woven into APT outputs. In addition, we will also discuss data inaccuracies related to police interventions like detention and arrest. Part III describes the use of APTs in Canadian police services in Alberta and Saskatchewan to demonstrate different approaches to ATP development in this jurisdiction. Part IV provides a *Charter* analysis of the rights that can be engaged with APT deployment, with particular focus on rights against unreasonable search and seizure (s. 8) and arbitrary detention (s. 9). As part of this analysis, we will review the established bright-line standards, as well as the jurisprudence that authorizes modern surveillance practices as 'reasonable.' Part V reviews the work of Richard Jochelson, who describes the ancillary powers doctrine and its role in authorizing these investigative tools. His description of the *Waterfield* test will guide this discussion, as well as its contraposition to determining the constitutionality of state action under the *Oakes* test. Part VI reviews Robertson and colleague's recommendations to government regarding APT in order to contrast the benefits of implementing dedicated APT legislation against the risks that can arise under a more flexible regulatory regime. We build on these recommendations to assert that the only meaningful solution is firm legislation, at least in terms of criminal justice. Regulatory flexibility may be appropriate for the private sector but cannot address the prospective consequences for marginalized populations that can result from the implementation of APTs under the current framework. Concluding remarks are found in Part VII.

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6 Robertson, Khoo & Song, *supra* note 1.

II. ALGORITHMIC POLICING FUNDAMENTALS

In response to the exponential expansion of technological surveillance in Canadian policing practices, Kate Robertson and her colleagues at Citizen Lab conducted research that highlights the potential they hold to infringe the *Charter*-protected rights of Canadians. Their prospective research focuses on several flaws inherent to APTs, which are rooted in historical record-keeping methods of local state services, the use of these records to train new APT software, and the reliability of its data outputs. But what is algorithmic technology?

Simply put, these technologies generate mathematical formulas using historical information to achieve defined outputs.[7] A computer automatically generates formulae by analyzing input information against historical outcomes to identify patterns that can be represented mathematically.[8] In general, some algorithmic technologies apply generated formulas to assist or substitute human decision-making, like artificial intelligence applications. When applied to the law enforcement context, APT applies these automatically generated formulae to rapidly collect, analyze, and collate mass database information to make on-the-spot identifications of targets. Tools like automated licence plate readers or cameras with access to facial recognition software are used to identify individuals and match them with databased information. Alternatively, APT outputs may be applied to predict unlawful activity before it happens by extrapolating on a series of factors.

A key feature of APT is its ability to adjust formulas as new input data is received to achieve stronger matches to desired APT outcomes. An APTs original rules are generated using large training data sets, which are autonomously updated as more data is provided. The system is designed to optimize outputs to achieve the desired goals of program administrators. The formulas are continuously optimized through "data mining" or the "practice of searching through large amounts of computerized data to find useful patterns and trends."[9] Some household examples of machine

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7 *Ibid* at 29–31.

8 Royal United Services Institute, "Machine Learning Algorithms and Police Decision-Making: Legal, Ethical and Regulatory Challenges" (September 2018) at 2, online (pdf): *University of Winchester Centre for Information Rights* <rusi.org/sites/default/files/201809_whr_3-18_machine_learning_algorithms.pdf.pdf> [perma.cc/QJ6R-KKBJ].

9 Walter L. Perry et al, "Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations" (2013) at 34, online (pdf): <www.rand.org/content/dam/ra

learning include computer identification of images, as well as speech recognition that allows conversion-to-text that is a common feature of new cell phones.[10] Machine learning can be supervised, where input data sets are labelled with defined outcomes, or unsupervised, where the system determines which variables are relevant in unlabeled data sets. In both cases, APTs generate algorithmic formulas to represent the patterns identified by the software.[11]

While this can be beneficial, it also presents accountability and oversight concerns. Robertson and colleagues explain that machine learning is considered to be a "black-box" phenomenon, where people typically do not understand its inner workings because of its inherently amorphous nature.[12] This issue is compounded by proprietary concerns, like trade secrets, that work against revealing the processes that make algorithmic products unique in an increasingly competitive marketplace. This framework is especially concerning because it is difficult to assess the reliability of a given algorithm, including identification of flaws in its formula or inclusion of unintended factors in achieving defined outputs. For example, an algorithm may successfully identify images of wolves against dogs using snow in image backgrounds.[13]

In the context of law enforcement, the 'training' of algorithmic software using historical policing records presents a serious risk of recreating biases that influence the criminal justice system's disproportionate focus on marginalized populations. Robertson and colleagues assert that APTs must be trained on data that is accurate and representative of the subject matter being studied.[14] Failure to prevent inputs of inaccurate or biased information will result in tainted outputs that risk being hidden as a function of APTs "black-box" nature. They refer to this statistical concept as simply "garbage in, garbage out", where gaps or other problems in a data set cause an algorithm's outputs to be unrepresentative of reality.

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nd/pubs/research_reports/RR200/RR233/RAND_RR233.pdf> [perma.cc/M65M-DTZZ].

10 "Human Rights in the Age of Artificial Intelligence" (November 2018) at 10, online (pdf): *Access Now* <www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf> [perma.cc/7TSZ-NWGX].

11 Royal United Services Institute, *supra* note 2 at 18–19.

12 Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, Massachusetts: Harvard University Press, 2015) at 3.

13 Robertson, Khoo & Song, *supra* note 1 at 31.

14 *Ibid* at 31–32.

Algorithmic facial recognition software is subject to these concerns when trained on data sets that underrepresent or misrepresent certain populations, like groups categorized on the basis of gender, age, or race.[15] APT training presents a prime opportunity for systemic biases to taint output results because of the technology's primary reliance on historical policing information. The Government of Canada recognizes our history of systemic and institutional racism against people of colour, with a particular focus on Indigenous peoples.[16] These effects are exponentially pronounced in the criminal justice system, where police were historically deployed to control culturally heterogeneous groups to maintain the settler-colonial status quo. Training APTs with this type of data will generate inferential rules based on the patterns identified in law enforcement reports. "If systemic biases permeate data sets that are produced in Canada's criminal justice system, these biases may become embedded in and perpetuated by APT to the further detriment of individuals and communities that have been the subject of historic discrimination."[17]

The risk of amplifying historically systemic racism is serious. For those communities that have been disproportionately impacted by the criminal justice system in the past, the adverse effects of training APT on this data can be significant and long-lasting. Literature produced by researchers and government inquiries confirm that Canada has a long history of systemic and institutional racial bias in criminal justice. The Aboriginal Justice Inquiry explained that the over-representation of Indigenous peoples in the criminal justice system is directly rooted in this history.[18] Indigenous peoples in Canada are more likely to be arrested, charged, detained in custody without bail, convicted, and imprisoned.[19] Indigenous Canadians

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15 Joy Buolamwini & Timnit Gebru, "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification" (2018) 81:1 Proceedings of Machine Learning Research 1 at 1, online: <proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> [perma.cc/B5EN-2ZY2].

16 Canada, Canadian Heritage, *Building a Foundation for Change: Canada's Anti-Racism Strategy* (17 July 2019), online: <www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> [perma.cc/6THR-SDF2].

17 Robertson, Khoo & Song, *supra* note 1 at 15.

18 *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Manitoba: AJIC, 2001) at ch 4, online: <www.ajic.mb.ca/volumel/chapter4.html> [perma.cc/A9HQ-54EW].

19 *Ibid*; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1995) (René Dussault & Georges Erasmus) at 309–11;

also suffer from higher rates of victimization by crime and violent crime,[20] as well as other negative criminal justice outcomes like overrepresentation in correctional institutions.[21]

The issue of systemic racial discrimination has been acknowledged by Canadian legislatures in recent years. Most recently, the Ontario Human Rights Commission issued an Interim Report into practices of racial profiling and discrimination by members of the Toronto Police Service. The Tulloch Report concludes that sample regions consistently conducted disproportionate policing of racialized communities.[22] Canada's Heads of Prosecutions also recognized the effects of racial bias on law enforcement practices in 2018.[23] At a more local level, provincial inquiry reports recognized the issue of racial bias in law enforcement much earlier and at more regular intervals. For example, racial bias was found to be a prominent feature in the convictions of Donald Marshal Jr., Thomas Sophonow, and many others.[24]

Statistics Canada, *Victimization of Aboriginal People in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2016), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> [perma.cc/2FXS-AELA]; "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (July 2014) at 19, online (pdf): *CCLA* <ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> [perma.cc/T5UR-8YTJ]; Canada, *Office of the Correctional Investigator Annual Report 2019–2020*, by Ivan Zinger (Ottawa: CIC, 2020), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20192020-eng.aspx#s10> [perma.cc/2QY8-56B2].

20 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System," *Ontario Ministry of the Attorney General* (9 March 2017) at 1–8, 36–40, online (pdf): <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> [perma.cc/DLL5-6LQL].

21 Boyce, *supra* note 18; CIC, *supra* note 18; Canada, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta*, vol 1 (Edmonton: Task Force, 1991) (Hon Justice Robert Allan Cawsey) at 2-5, 2-46 to 2-51.

22 Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Ontario: OHRC, November 2018), online: <www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black> [perma.cc/HMH2-246A].

23 Public Prosecution Service of Canada, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: PPSC, 2019) at ch 10, online: <www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch10.html> [perma.cc/ZWP4-K6SW].

24 Nova Scotia, *Royal Commission On The Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations* (Halifax: Royal Commission, 1989) at 1–3, online: <www.novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf> [perma.cc/RK5W-

The pervasiveness of these issues has led the SCC to take judicial notice of its prevalence in Canadian law enforcement practices. The Court's majority recognized the systemic overrepresentation of Indigenous peoples in their landmark decision *R v Gladue*.[25] They found that Canada's criminal justice system has, in essence, assumed the role of residential schools in reclaiming Indigenous youth. Building on this finding, the Truth and Reconciliation Commission of Canada includes addressing this issue in their Calls to Action.[26] The SCC has also acknowledged the aggressive effects of racialized enforcement practices against other minority populations, like Black and Asian Canadians.[27]

Research shows that issues of racial bias continue to affect frontline policing practices. Police often intercept Indigenous and Black Canadians in circumstances where the individual in question is subjected to harsh treatment by law enforcement authorities, even when found to be doing nothing outside the liberty rights enshrined under s. 7 of the *Charter*. Robertson and colleagues reviewed recent studies in the Toronto area, which concluded that people of colour were more likely to be held in custody and brought to bail court, rather than released for simple marijuana possession.[28] Research conducted by Scot Wortley and Akwasi Owusu-Bempah into Toronto stop-and-search practices further confirm this reality.[29] Their study concluded that Black respondents were much more likely to report being stopped and searched by police, as opposed to

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E22G] [Royal Commission]; Manitoba Justice, *The Inquiry Regarding Thomas Sophonow* (Manitoba: Manitoba Justice, 2010) (Peter Cory), online: <digitalcollection.gov.mb.ca> [perma.cc/AG8P-DCJF]; Canada, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Manitoba: Lieutenant Governor-in-Council, 2007) (Hon Patrick J. LeSage), online: <www.driskellinquiry.ca >[perma.cc/DDN9-4RPY].

25 *R v Gladue*, [1999] 1 SCR 688 at paras 60–65, 171 DLR (4th) 385.

26 Robertson, Khoo & Song, *supra* note 1 at 16; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (December 2015), online: <publications.gc.ca/pub> [perma.cc/EX26-XX6W].

27 *R v Le*, 2019 SCC 34 at paras 93–95 [*Le*]; *R v Grant*, 2009 SCC 32 at paras 133, 154–55 [*Grant*].

28 Jim Rankin & Sandro Contenta, "Toronto marijuana arrests reveal 'startling' racial divide" (6 July 2017), online: *Toronto Star* <www.thestar.com> [perma.cc/676U-TSCC]; Alex Luscombe & Akwasi Owusu-Bempah, "Why legalization won't change racial disparities in cannabis arrests" (19 April 2018), online: *VICE* <www.vice.com> [perma.cc/QY9U-P9GL].

29 Scot Wortley & Akwasi Owusu-Bempah (2011) "The Usual Suspects: Police Stop and Search Practices in Canada" 21 Intl J Research & Society 395 at 395–407.

respondents from other racial backgrounds. Black respondents were also found to be more likely to report vicarious experiences of racial profiling from police as part of routine information gathering. They noted that patrolling officers were much more likely to stop Black Torontonians in circumstances where the investigator could see the complexion of the suspect.

These results highlight the tainted nature of information captured in historical police reports. Police have access to vastly disproportionate amounts of information about racialized individuals and about marginalized neighbourhoods, which may form the basis of training APT algorithms.[30] Police data includes subjective, statistical, and biographical information that is collected by frontline and internal workers. Examples of information currently processed by APTs in Canada include, but are not limited to, criminal survey statistics, social media posts, geolocation data, crisis centre call logs, hospital injury data, and criminal activity data collected by non-police security personnel such as transit, campus, or mall cops or private security.[31] By using this data to inform future police interactions, the feedback effect of their use to predict future police interventions will likely exacerbate existing biases that are continuously recreated as part of the daily operations of the police.

The above is not an exhaustive representation of the data that can be used to train APTs but provides a snapshot of the systemically biased considerations that risk becoming assumed as part of APT outputs. These data are used to train algorithms in massive quantities from wide-ranging sources. APTs use this information to generate forecasts about people or locations, which police use to inform 'reasonable suspicions' that allow them to interfere with an individual's liberty. Considering these risks, Robertson and colleagues note that:

> [I]t is imperative that these new methods do not contribute to the historic disadvantage experienced by communities targeted by systemic bias. Preventing the perpetuation of systemic bias and discrimination includes asking questions such as whose personal information is being collected or used by the technology, and which individuals or communities will be most affected, and why?[32]

It is clear from this discussion that the training and deployment of APTs present a serious risk of crystallizing enforcement biases that are

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30 Robertson, Khoo & Wong, *supra* note 1 at 19–20.
31 *Ibid* at 18–19, 47–58.
32 *Ibid* at 24–25.

continuously recreated as a function of the structure of law enforcement practices in Canada. While that is the case, Robertson and colleague's research highlights how Canadian police services are developing and implementing these technologies, regardless of their knowledge of their deleterious effects against marginalized Canadians, such as people of colour.

III. APT MODELS IN CANADIAN POLICE SERVICES

Canadian police services have already started to acquire, train, and employ APTs in their jurisdictions. Services utilize this software in different ways: some apply APTs strictly as real-time surveillance tools, whereas others apply APT formulas to predict necessary police interventions. Robertson and colleagues analyzed the strategic planning and budget documentation of police services across the country to reveal their intentions to deploy APTs in their jurisdictions. Their research identifies the use of terms like "predictive," "data-driven," or "intelligence-led" policing, which all emphasize the development and application of data-analytic software.[33] APTs currently deployed in Canadian jurisdictions can be separated into two categories: location-focused APTs, like those employed by the Toronto Police Service, and person-focused APTs, like those acquired and employed by the Calgary Police Service (CPS), or those being developed internally by the Saskatchewan Police Predictive Analytics Lab (SPPAL). Our discussion remains focused on person-focused APTs, but many of the concerns raised apply to location-focused APTs as well. This section reviews two models of person-focused APTs (PFAPTs) in Canada to caution against latent predictive functions that are available in 'off-the-shelf' programs from international software developers, as well as to recommend a more localized approach to develop APTs and their databases.

Andrew Ferguson explains that PFAPTs are designed to assist police on two fronts: PFAPTs are used to identify individuals who may become involved in future criminal activity or to assess the level of risk held by an identified individual to engage in criminal activity or become a victim themselves. Assessments are made using personal details, like information about family, friends, associates, social media activity, criminal records, or

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[33] *Ibid* at 36–37; "2011 Winnipeg Police Service Annual Report" (2011) at 9, online (pdf): *Winnipeg Police Service* <www.winnipeg.ca/police> [perma.cc/VB5D-DHP2]; "2018 Edmonton Police Service 2018 Annual Policing Plan" (2018) at 5–6, online: *Edmonton Police Commission* <edmontonpolicecommission.com> [perma.cc/P7GW-5YER].

appearances in auxiliary databases that are connected to the software.[34] This information is submitted to APT software, which generates risk score outputs that are used to inform police decisions to intervene.[35] The overarching result of APT application in these contexts is to bring suspected individuals into contact with the criminal justice system. All APT models implemented in Canada follow this structure, including the programs acquired by the CPS and under internal development by the Saskatchewan Police Service.

A. Calgary Police Service's Palantir Gotham

The CPS adopted an APT developed by Palantir Technologies, which operates in tandem with IBMs i2 Analyst Notebooks.[36] This APT program was developed by New Orleans-based Palantir, with an intended application of unifying a series of separate public record databases and conducting "Social Network Analyses" that could reveal hidden relationships in the massive, unified data set.[37] Palantir technology has been employed across the USA; their marketing team is intently focused on expanding into the Canadian marketplace.[38] Similar to its application in New Orleans, Calgary first implemented Palantir Technology products to unify disparate databases to reveal latent relationships disbursed within the separated information. Although inactivated by the CPS, operational Palantir documentation indicates that its APTs can expand data collection protocols to process open-source information like publicly available social media data,

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34 Andrew G. Ferguson, "Policing Predictive Policing" (2017) 94:5 Wash UL Rev 1109 at 1137–134.

35 Robertson, Khoo & Song, *supra* note 1 at 45–46; "Strategic Subject List" (25 September 2020), online: *Chicago Data Portal* <data.cityofchicago.org/Public-Safety/Strategic-Subject-List/4aki-r3np> [perma.cc/77AM-8EWP].

36 Robertson, Khoo & Song, *supra* note 1 at 47–48; "Latest News" (2021), online: *Palantir Technologies* <www.palantir.com/media/>.

37 Andrew Papachristos & Michael Sierra-Arévalo, "Policing the Connected World" (2018) at viii, online: *Office of Community Oriented Policing Services* <cops.usdoj.gov.pdf>.

38 Robertson, Khoo & Song, *supra* note 1 at 50–51; Justin Ling, "Palantir's big push into Canada" (25 October 2019), online: *OpenCanada.org, Centre for International Governance Innovation* <opencanada.org/palantirs-big-push-into-canada/> [perma.cc/GP8R-FQ9A]; Murad Hemmadi, "Palantir's MacNaughton says data-mining firm is working with Ottawa, three provinces on COVID-19", *The Logic* (30 April 2020), online: <thelogic.co/news/exclusive/palantirs-macnaughton-says-data-mining-firm-is-working-with-ottawa-three-provinces-on-covid-19/> [perma.cc/YNS2-CBRX]; *Wakeling v United States of America*, 2014 SCC 72.

email, and telecommunications records, as well as third-party information like financial records and credit history. The associations and connections generated by Palantir Technologies are used to inform officers of the relationships and behaviours that individuals exhibit in public and quasi-public spaces. Profiled information is stored for every individual who interacts with police, including witnesses and victims. Further, auxiliary information is often collected about an accused, like religious affiliation. Palantir uses this information to make immediate intervention recommendations to officers on duty and to map out locations where service calls are taking place."[39]

The CPS appropriately recognizes that police assessments informed by Palantir outputs may present false associations between innocent individuals and broader criminal suspects. While that is the case, they failed to disclose that CPS's Palantir system does not have a critical oversight mechanism activated while applying the software in the field. The "Governance Entity" is not currently in operation but is designed to provide oversight mechanisms for data quality, implementation of new features, acceptance of new data sources, and review of privacy implications related to Palantir outputs. Rather than engage the Governance Entity, the CPS prefers to depend on general oversight mechanisms that are already in place for broader CPS activities. As an internationally accredited software suite that continues to be endorsed in leading jurisdictions like the USA, Palantir offers software that can support law enforcement objectives, reduce government expenditures on internal software development costs, and provide access to databased information from Palantir's jurisdictional partners. While this approach has its merits, the following section highlights the alternative model being developed by the SPPAL.

B. Saskatchewan Police Predictive Analytics Lab

Rather than purchase an 'off-the-shelf' APT program, the Government of Saskatchewan, the Saskatoon Police Service (SPS), and the University of Saskatchewan partnered to establish the SPPAL.[40] This program was originally intended to be a project to locate missing persons but was expanded to address a series of community safety issues. The SPPAL examines risk factors and behaviour patterns detected among Saskatchewan youth who are later reported as missing. Social patterns in this behaviour

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39 Robertson, Khoo & Song, *supra* note 1 at 47–50.

40 *Ibid* at 51–52.

became identifiable and were used to develop an algorithmic model to identify children who may be at risk of going missing in the future. The program is being developed for integration with Saskatchewan's broader HUB risk assessment model, which connects marginalized individuals with social service interventions, where appropriate. The HUB model systemically shares information between social service and law enforcement agencies to provide a whole-of-government approach to encourage proactive intervention before a report is made to a HUB service provider like police or mental health services.[41] This software is still in testing phases, but Robertson and colleague's research notes that output information will be shared with the government beyond law enforcement.

Distinct from the broad "unifying" approach that is applied by Palantir software, SPPAL only works with municipal policing data from the SPS. SPPAL has expressed intent to expand data access to include data sets from the RCMP "F" Division but has yet to take place. As a government enterprise, SPPAL has openly expressed their intention to include social media data in APT training and development in the future. While that is the case, measures are simultaneously being taken to ensure that strong privacy safeguards related to data encryption, confidentiality, and storage are put in place.[42]

In its current form, the SPPAL is uniquely focused on the preemptive identification of victims and those who may cause harm to themselves. The purpose of this software is to execute needs-based analyses to connect vulnerable individuals with prevention strategies, as opposed to predicting potential perpetrators in jurisdictions that apply APTs like those developed by Palantir. Robertson and colleague's qualitative research found that SPPAL team members maintain priority on complex issues that can meaningfully be addressed by supporting vulnerable people, helping them be safe and, by extension, improving community safety overall.[43]

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41 Abeba Taddese, "Saskatchewan, Canada: The Hub Model for Community Safety" (2017), online: *Results for America* <results4america.org> [perma.cc/UR3P-RGA6]; Nathan Munn, "Police in Canada Are Tracking people's 'Negative' Behavior In a 'Risk' Database", *Vice* (27 February 2019), online: <www.vice.com > [perma.cc/SE7C-DDSX].

42 Robertson, Khoo & Song, *supra* note 1 at 51–52.

43 "Saskatoon police analytics lab will try to predict crime before it happens", *CBC News* (14 January 2016), online: <www.cbc.ca/news> [perma.cc/E6JV-7MCK]; Meaghan Craig, "Saskatoon police lead the country with Predictive Analytics Lab", *Global News* (15 January 2016), online: <globalnews.ca/news/2455063/saskatoon-police-lead-the-country-with-predictive-analytics-lab/> [perma.cc/2HX2-D8HA]

This review demonstrates that Canadian police services are adopting different approaches to the implementation of APT in their jurisdictions. With consideration of Robertson and colleague's concerns, the SPPAL approach appears to be the more appropriate model. Data collection and analysis procedures used by global entities like Palantir Technology risk the application of formulae informed by enforcement data from far-away jurisdictions, rather than regional enforcement concerns of local police. The SPPAL model addresses these concerns by restricting APT access to data sets that reflect the behaviour of residents and their responses from local enforcement officials. In a broader sense, internal development of this software can also ensure that backdoor actions, like Palantir's Governance Entity, are not permitted to change output expectations or database access. On this basis, I recommend that Canadian police forces adopt the SPPAL approach, rather than outsourcing APT development to international providers that may latently influence the rights of individuals from the outside.

The concerns raised here are heightened with consideration of their potential to validate police infringements on the *Charter* rights of Canadians. Importantly, the concerns identified in Robertson and colleague's report only relate to the information known about the use of these technologies in Canada. The full extent may never be known, but based on those raised here, action must be taken to address these encroachments. The following section reviews the SCC's authorization of surveillance technologies under common law jurisprudence, which continues to empower investigative encroachment of spaces protected by s. 8 and s. 9 of the *Charter*. It is from this foundation that we consider the true implication of regional APT deployment and its consequences for human rights in Canada.

IV. *CHARTER* PROTECTED RIGHTS AND ANCILLARY EXPANSION OF SURVEILLANCE POWERS

A. Section 8 Protections

To Surveil and Predict provides a comprehensive review of the *Charter* rights that are engaged by APTs. The report considers the deployment of APTs using a human rights perspective to review the consequences of its implementation in different jurisdictions. In the context of privacy rights, Robertson and colleague's analysis concludes that APTs threaten commonly

held notions of privacy in very meaningful ways. APT processes were found to engage s. 8 considerations in several processes, including training protocols, generation of formulae, as well as their application in the field. On this basis, their report recommends establishing strong oversight mechanisms to protect against unreasonable extensions of APT capacities, as well as instituting firm limits on how law enforcement agencies can apply APTs in the field to maintain liberties that fall within a "reasonable expectation of privacy."

In Canada, the right to privacy is captured in s. 8 of the *Charter*, which protects individuals against unreasonable search and seizure by actors of the state.[44] The SCC issued a bright-line interpretation of s. 8 protections in *Hunter v Southam*.[45] In that case, Chief Justice Dickson explained s. 8 as protecting an individual's right to privacy from unjustified state intrusions. Its protection applies to people, not places, and establishes a rebuttable presumption that police must secure prior judicial authorization in order to validly conduct a search or seizure. The evidentiary burden is placed on the state to demonstrate the superiority of its interest to those of the individual on the standard of "reasonable and probable" grounds.[46] Failure to meet this expectation means that an impugned search is *prima facie* unreasonable and amounts to a breach of s. 8.

While the bright-line decision of *Hunter v Southam* is strong, the SCC proceeded to delineate a series of legal tests to refine judicial considerations of whether an accused could validly maintain a reasonable expectation of privacy in the circumstances of a search or seizure. In *R v Patrick*, police collected garbage from within the accused's residential property line via aerial trespass. In considering the validity of this act, the SCC provided the governing test used to determine whether Patrick held a reasonable expectation of privacy in his garbage.[47] In conducting this analysis, a court considers the nature of the evidentiary subject matter, as well as whether the accused had a direct interest in its contents, whether the accused held a subjective expectation of privacy in the search's subject matter, whether this subjectively held expectation is reasonable, as well as several contextual factors that compose the "totality of the circumstances." These factors can include whether the subject of the search was in plain view, was abandoned,

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44 *Constitution Act, 1982*, s 8, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

45 *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Hunter*].

46 *Ibid* at 159–62.

47 *Patrick*, *supra* note 3.

or was already in the hands of third parties; consideration of whether the investigative techniques in question were intrusive and objectively reasonable; and whether the subject matter of the search exposed any intimate details of the accused's lifestyle or biographical nature. On the facts of Patrick's case, the majority determined that his privacy interest in the garbage was abandoned, meaning that he could not maintain a validly reasonable expectation of privacy (REP). In essence, they concluded that officer recovery of the garbage did not amount to a search.[48] Reviewing previous jurisprudence to justify their conclusion, the majority delineated several stratified REP considerations that are now distinguished between the levels of bodily integrity, the residential territory, and personal information about an individual's behaviour. The bag of garbage was found to fall in the "informational" category, meaning that diminished REP considerations were applied. By abandoning his interest in the information contained in his waste, the police were permitted to reclaim it without activating s. 8 protections.

The SCC's model of informational privacy rights was further refined in *R v TELUS* to diminish REP considerations for investigative requests involving retained user information from corporate service providers, like telecommunications companies.[49] In that case, police requested access to tracked SMS information from two suspects who were TELUS customers. They requested text message history for the previous two weeks, as well as message information for two weeks following their request to monitor the activities of the accused. Justice Abella likened this request to a wiretap, finding that prospective authorization to seize communications before they took place amounted to an interception of communications while they were happening. On this basis, she concluded that stronger prior authorization is required before police can validly request prospective information about an individual's actions, even if this information will likely be retained by private companies.[50]

Although *TELUS* signified strong *dicta* regarding the preservation of s. 8 protections, the majority proceeded to distinguish investigative requests for information retained for historical tracking purposes in *R v Jones*.[51] Rather than request historical and prospective message information under

48 *Ibid* at paras 27–28.

49 *R v TELUS Communications Co*, 2013 SCC 16 [*TELUS*].

50 *Ibid* at paras 25–29.

51 *R v Jones*, 2017 SCC 60 [*Jones*].

a production order, the police only requested historical information from the service provider. In the previous case, the majority focused on the issue of collecting prospective messages from the service provider about customers. The majority distinguished Jones' case from *TELUS*, finding that the production order in question failed to activate s. 8 protections because retrieval of historically tracked information did not amount to an intercept, as previously described by Justice Abella. Writing in dissent, Justice Abella blasted the majority's distinction as artificial, highlighting her statements in *TELUS*: the court's focus should be on the "acquisition of informational content and the individual's expectation of privacy at the time the communication was made."[52] Regardless, the majority proceeded to authorize the collection of historically tracked message information from the service provider without amounting to a breach of s. 8.[53]

Like in *TELUS*, the SCC proceeded to establish bright-line s. 8 considerations related to computers and internet access in *R v Spencer*.[54] In that case, the SPS identified the accused as a provider of child pornography on a file-sharing platform in Saskatchewan. Police accessed his share using publicly available software, which allowed police to view the contents of the accused's folders and to confirm his IP address. Police secured the customer's information from Shaw Communications on request, which was used to obtain a warrant that permitted police to search Spencer's computer. In considering whether the search was reasonable, the SCC considered the purpose of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) related to disclosures of personal information. They found *PIPEDA* to imply that internet users can maintain a REP as it relates to the disclosure of personal information. Under this arrangement, the Court found that police did not have the power to request such intimate details from an Internet Service Provider (ISP). The majority rejected Crown arguments that s. 487.014(1) of the *PIPEDA* permits police to secure consent from ISPs, which allows them to collect this information as a form of consent search, rather than securing the appropriate warrant authorizations. The majority concluded that police are only be permitted to secure such digital information based on exigent circumstances, which were

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52 *TELUS*, *supra* note 49 at paras 25–29.

53 *Jones*, *supra* note 51 at paras 60–65.

54 *Spencer*, *supra* note 2.

not present in the case-at-bar.[55] On this basis, the Court excluded the evidence under s. 24(2) of the *Charter* and exonerated the accused.

In addition to the jurisprudential protections established in bright-line decisions like *Spencer*, the *Privacy Act* also restricts the investigative collection of personal information from corporate and public entities. This *Act* regulates how public and private sector agencies can share semi-public information about individuals between 'trusted' organizations. The Office of the Privacy Commissioner of Canada (OPCC) is empowered to investigate privacy concerns under this *Act* and adjudicate charges levied against breaching organizations. A recent example of this adjudication is a recent consideration of corporate sharing of customer information by Toronto Dominion Bank with third-party service providers in India. OPCC ultimately permitted the exchange but noted that privacy legislation in Canada must be strengthened.[56] Donalee Moulton explains that OPCC's decision is an about-turn from previous decisions to strengthen corporate customer consent requirements. He explains that corporate consultations with the government steered away from positively requiring consumer consent before internal information could be shared with international third parties.[57] The departed-from decision may have resulted from OPCBC's conclusion that the use of facial recognition technology and driver's licence photographs by law enforcement amounted to a breach of provincial privacy legislation. In that case, the OPCBC ruled that BC's public automotive insurer was not permitted to use its databases for purposes not disclosed to its customers.[58] Be that as it may, Moulton confirms that OPCC has restored the status quo. In writing, he notes that positivistic consumer consent requirements are antithetical to international business practices and hold negative potential for competitiveness for Canadian financial organizations, among others. While his comments are focused on financial markets, the jurisprudence of partner nations

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55 *Ibid* at paras 38–40, 54–58.

56 Office of the Privacy Commissioner of Canada, *Bank Ensures Openness and Comparable Protection for Personal Information Transferred to Third Party* (Report), No 2020-001 (Ottawa: PCC, 4 August 2020), online: <www.priv.gc.ca> [perma.cc/6Q2C-3NCN].

57 Donalee Mouton, "Privacy commissioner reaffirms original position on transborder transfer of data", *Lawyer's Daily* (2 September 2020), online: <www.thelawyersdaily.ca>.

58 Office of the Information & Privacy Commissioner of British Columbia, *Investigation into the Use of Facial Recognition Technology by the Insurance Corporation of British Columbia* (Report), No F12-01 (BC: IPCBC, 16 February 2012) at para 96, online: <www.oipc.bc.ca/investigation-reports/1245> [perma.cc/4EN8-LQKZ].

highlights an international trend towards expanding access to ISP records and personal account information.

Although outside of Canada, recent American jurisprudence may influence future consideration of the limits defined in *Spencer*. US District Courts are hearing cases against Facebook and Google for violations of consumer privacy related to user profiles.[59] These organizations were previously permitted to share user information with law enforcement agencies around the world, so long as they complied with local law enforcement laws and regulations. In the Canadian jurisdiction, the *PIPEDA* is the governing legislation that requires consumer consent to share corporate user information with others, particularly state agents. Under this legislation and its provincial counterparts, private corporations are only permitted to share information with law enforcement without consumer consent when they have "lawful authority" to do so. "Lawful authority" is determined using the REP analysis described here.[60] Like other comparable jurisdictions, American privacy advocates are mobilizing against these quasi-monopolistic data giants. While inconclusive at the time of writing, these cases are worthy of attention in the future.

Based on this jurisprudence, it is clear that privacy is a fundamental right in Canada. While that is the case, SCC jurisprudence delineates instances where police conduct does not amount to a search. S. 8 protects people, not places, meaning that an individual may fail to maintain a valid REP in the relevant context. By failing to activate s. 8 protections, an individual cannot reasonably expect privacy from state actors. Alternatively, this means that an individual must come to expect state examination in circumstances where a REP cannot be maintained. In addition to this, a REP may be abandoned or diminished in relation to the stratified REP level that applies in the investigative context. Privacy expectations are often diminished in relation to computer use and information accessed via the internet but continue to provide meaningful protection against digital state surveillance. While it is clear that a REP can maintain valid protection for individuals who make use of ISP offerings, the law also allows police to access private information normally protected by s. 8 by securing prior judicial authorization in the form of a warrant. From this foundation, the

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59 *In re Facebook, Inc, Consumer Privacy User Profile Litig*, 402 F Supp 3d 767; *Brown et al v Google LLC et al*, U.S. District Court No 20-03664.

60 *Spencer*, *supra* note 2 at paras 60–66; *Personal Information Protection and Electronic Documents Act*, RSC 2000, c 5, s 7(3)(c.1).

following section considers whether APT use can fall within the scope of currently authorized police powers or if they alternatively constitute a breach of s. 8 *Charter* protections.

B. APT's Relationship to Section 8 Rights

APTs engage the private information of individuals in several stages to generate sufficient output information. First, APTs collect private information from databases to generate pattern formulae. This information is consolidated and processed to generate inferential outputs. Results may be shared between law enforcement agencies, other governmental bodies, or with private sector actors under contract. These outputs are applied to real-time police decision-making to optimize resource allocation and the overall performance of duties. In addition to using APT outputs in frontline enforcement decisions, government reports indicate an interest in applying algorithmic technologies to augment decision-making in broader criminal justice processes, such as granting bail, generating sentence recommendations, establishing an accused's risk to re-offend, and determining parole eligibility.[61] The following outlines the various stages where APT is applied in Canadian justice and its potential to infringe on the privacy rights enshrined in s. 8 of the *Charter*.

1. Data Collection, Accuracy Concerns and Data Processing

A key question raised in *Jones* is whether the pre-emptive collection of data to forecast potential crime or gather disparate personal information generally is either necessary or proportionate to its infringement on s. 8 privacy rights.[62] *Hunter v Southam* generally requires that, whenever state agents intrude on protected spheres of privacy, they must have reasonable grounds to believe the collected information will reveal evidence of a crime. Related to internet use, the *Spencer* jurisprudence explains that some degree of anonymity is a known feature of internet activity, which forms a key priority that grounds the requirement for police to secure a warrant before obtaining access to IP subscriber information from ISPs.[63] Individuals often

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61 "The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada" (October 2020) at 3–9, online (pdf): *Law Commission of Ontario* <www.lco-cdo.org/wp-content/uploads/2020/10/Criminal-AI-Paper-Executive-Summary-Final-Oct-28-2020.pdf> [perma.cc/9FVQ-MJWD].

62 *Jones*, *supra* note 51 at para 74.

63 *Spencer*, *supra* note 2 at para 48.

have limited knowledge about the scope of their electronic footprint and may be even less aware of the ways their anonymity can be defeated through technological means.[64] APTs often rely on the collection, collation, and analysis of massive data sets that include personal information, communications, biometrics, geolocations and, social media information. Enforcement agencies also routinely collect information from online and 'real' environments that are considered public, or not protected by privacy law. While these claims are technically valid in Canada, Robertson and colleagues note that these assertions are somewhat baseless because there is no technology-specific law that either permits or prevents this type of data collection by police.[65]

In opposition to the claims of Canadian police regarding APT, Robertson and colleagues highlight a series of SCC statements regarding informational privacy. In the context of investigative requests for access to historical information retained by corporate third parties, the SCC explained that:

> The right to retain protection for information that has already been shared with third parties for limited purposes flows from the fact that "all information about a person is in a fundamental way [their] own, for [them] to communicate or retain for [themselves] as [they see] fit.[66]

The majority later confirmed this perspective, concluding that:

> While individuals do inevitably lose some degree of control over their personal information when it is shared with others, they may reasonably expect that the information will not be divulged further to (or collected by) law enforcement."[67]

The SCC also specifically raised concerns about using surveillance technologies to fish for prospective criminals: "[l]aw enforcement usage of sophisticated surveillance technologies "for forward-looking 'fishing expedition[s],' in the hope of uncovering evidence of crime… is untenable."[68] These statements underscore the SCC's understanding of the threats present by digital surveillance technologies in relation to s. 8 privacy rights and the principles the section is intended to protect. Unfortunately, the SCC has yet to formally consider the use of APT as part of the digital surveillance array and its potential to refine the "forward-looking fishing

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64 Robertson, Khoo & Song, *supra* note 1 at 77.
65 *Ibid* at 75–77.
66 *Spencer*, *supra* note 2 at para 40.
67 *R v Cole*, 2012 SCC 3; *R v Marakah*, 2017 SCC 59; *Jones*, *supra* note 51.
68 *Jones*, *supra* note 51 at para 74.

expeditions" that will undoubtedly form an expanding basis of future investigations.

The concerns highlighted here do not include criticisms of mass data collection, collation, and analysis by APTs. While currently unconsidered in the Canadian common law, Robertson and colleagues raise particular concern about expressed intentions from APT proponents to expand database access to include social media information sourced from corporate leaders like Facebook and Google. While a nominal impact at the individual level, systematic collection of personal information at a macro-scale paired with algorithmic analysis to detect behavioural patterns holds significant privacy implications.[69] Robertson and colleagues articulated this concern aptly:

> The aggregation and algorithmic analysis of data can potentially reveal a detailed picture about individuals that they may not expect to exist, let alone expect to be in the possession of the government. Indeed, it is the creation of this more detailed portrait of an individual's private life that provides the reason for algorithmic surveillance-based tools – they collect and reveal information that is otherwise unavailable to law enforcement.[70]

Canadian users of PFAPTs have expressed interest in expanding their access to private social media data to support Social Network Analysis functions. APT software can systemically mine social media accounts for personal information and apply it to inform future police interventions or deployments of police resources. The RCMP has indicated an interest in using online social media surveillance because this information, in their view, is sourced from an open or public source.[71] SPPAL also expressed interest in expanding APT access to local social media accounts.[72] Opposed to this perspective, Robertson and colleagues cite *Spencer* to highlight that

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69 *R v Rogers Communications*, 2016 ONSC 70 at para 19 [*Rogers*].

70 UN Human Rights Council, *The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights*, UNHRC, UN Doc A/HRC/27/37 (2014) at para 19, online: <undocs.org/A/HRC/27/37>; Robertson, Khoo & Song, *supra* note 1 at 76.

71 Nathan Munn, "Canadian Cops Will Scan Social Media to Predict Who Could Go Missing", *VICE* (17 April 2019), online: <www.vice.com> [perma.cc/9G45-WR8V]; Bryan Carney, "'Project Wide Awake': How the RCMP Watches You on Social Media", *The Tyee* (25 March 2019), online: <thetyee.ca/News/2019/03/25/Project-Wide-Awake/> [perma.cc/42QN-N2JK]; Catherine Tunny, "RCMP launches review of its social media monitoring operation", *CBC News* (5 November 2019), online: <www.cbc.ca> [perma.cc/HQ5U-9EC7].

72 Robertson, Khoo & Wong, *supra* note 1 at 51.

individuals do not expect that their personal information will be systemically collected by law enforcement when consenting to use social media platforms.[73] In addition, the collected information reveals detailed information about a user's personal life, relationships, and daily activities, which surely do not qualify as a reasonable search under the *Patrick* criteria. Individuals may be aware that social media profiles are public, but it would not be reasonable to expect individuals to know that police are systematically watching every online act.

The use of APT in this fashion is already concerning but presents a heightened risk when considering data accuracy concerns. As described above, historical enforcement information is likely ripe with enforcement biases inherent to police reporting. While inaccurate in its own right, the expansion of APT access to social media accounts is especially concerning because of the nature of information users post and share. As the home of "fake news," the information sourced on social media platforms is well known for its inaccuracy, as well as user misrepresentations to 'present well' to a quasi-public audience.[74] To this end, the Saskatchewan Information and Privacy Commissioner (SIPC) concluded that social media information should not be applied by APTs, or by public bodies generally, because they are notorious sources of inaccurate information.

Algorithms cannot distinguish the contextual considerations involved with social media information, which may inadvertently trigger police intervention.[75] Private vendors are generally obliged to take reasonable steps to ensure the accuracy of personal information that is provided to the police.[76] While that is the case, some Canadian provinces exempt data accuracy obligations for the collection of personal data for law enforcement

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73 *Spencer*, *supra* note 2 at paras 38–50; *R v Wise*, [1992] 1 SCR 527, 11 CR (4th) 253; Robertson, Khoo & Wong, *supra* note 1 at 77.

74 Kai Shu et al, "Fake News Detection on Social Media: A Data Mining Perspective" (September 2017), online: *Association of Computing Machinery Digital Library* <dl.acm.org/doi/10.1145/3137597.3137600> [perma.cc/LHE6-Q3H2]; Harry T. Dyer, *Designing the Social: Unpacking Social Media Design and Identity*, 1st ed (Norwich, UK: Springer Nature, 2020).

75 *Community Mobilization Prince Albert (Re)*, 2014 CanLII 81867 at para 32–38 (SK IPC); Jordan Pearson, "Researchers Claim AI Can Identify Gang Members on Twitter", *VICE* (1 November 2016), online: <www.vice.com/en_us/article/mg7kgx/researchers-claim-ai-can-identify-gang-members-on-twitter> [perma.cc/8VJ7-XXCH].

76 *Privacy Act*, RSC 1985, c P-21, s 6(1); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 35.

purposes.[77] Data accuracy concerns related to surveillance technologies have yet to be formally considered by the SCC, but the Ontario Court of Justice explained that reliance on inaccurate information risks constitutional inconsistency: an "arrest based on a source, the reliability of which in the end is unknown, cannot be said to be objectively reasonable."[78] Robertson and colleagues share the concerns of the SIPC: "Law enforcement agencies' reliance on error-tainted algorithmic forecasts would risk unjustifiable interferences with *Charter*-protected interests such as privacy or liberty, if law enforcement authorities act on those algorithmic predictions."[79] The SCC confirms these statements, concluding that state actors are expected to take all reasonable steps to ensure that data retained about offenders is up to date, accurate, and as complete as possible.[80] Be that as it may, government databases regularly fall short of this standard, meaning that further action is required.

Concerns related to APT data collection are alarming, but the most serious threat to *Charter* rights held in the generation of output data that is used to supplement investigative decision-making regarding officer interference with individual liberties. The fragmented information collected about individuals, as well as general trends about their identities, movements, and beliefs, are all examined as part of APT data analytics. Outputs generated from these data are used to draw inferences about a target's private life. APT data analysis takes this a step further by including metadata as part of its examination. Metadata consists of information about the information captured in the data log, like time, location, date, as well as the identity of the sender or the recipient.[81] In essence, it appears that algorithmic collection of information sourced from third parties can extend investigative powers beyond the limits that prevent police from collecting such data directly.[82]

In cautioning readers against APT's prospectively serious breaches of privacy rights, Robertson and colleagues take this a step further to argue that APT data processing and its application in the field amounts to a breach of the right to equality before the law, as captured in s. 15 of the

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77 *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31, s 40(3); *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M 56, s 30(3).

78 *R v White*, 2006 ONCJ 147 at para 27–28.

79 Robertson, Khoo & Song, *supra* note 1 at 87.

80 *Ewert v Canada*, 2018 SCC 30 at 3.

81 *Spencer*, *supra* note 2.

82 *R v Reeves*, 2018 SCC 56 [*Reeves*].

Charter.[83] While outside the scope of our discussion here, Robertson and colleagues argue that the use of macro-scale data collection, aggregation, and analysis to detect patterns based on protected characteristics like race, religious belief, age, gender, and sexual orientation hold serious deleterious potential for the equality rights of Canadians. Generating recommendation outputs based on granular information about individuals suggests that a system of constitutionally questionable generalizations is being employed to police these populations, even if target recommendations are issued on a case-by-case basis. While these considerations are outside the scope of this discussion, it is important to note the broader risks that may be associated with APTs.

The risks of applying this potentially tainted data in the field are compounded by flaws that are inherent to the equipment used to collect environmental information in real time. Technologies like facial recognition software (FRT) can rapidly compare templated snapshots of individuals in public against databased information to determine if intervention is required. New inputs may become tainted by the flaws inherent to the template formation process.[84] Recent FRT research explains that these technologies are unreliable, particularly in the case of racialized individuals and women.[85] FRTs are more likely to misidentify these groups, with highly varied rates in poor environmental conditions. The misidentification rates can be shocking: a 2018 report notes that FRT products from NEC Corporation produced inaccurate matches in 91–98% of cases studied by the UK Metropolitan Police and South Wales Police.[86]

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83 *Constitution Act*, *supra* note 44, s 15.

84 Iliana V. Voynichka & Dalila B. Megherbi, "Analysis of the Effects of Image Transformation, Template Selection, and Partial Information on Face Recognition with Time-Varying Expressions for Homeland Security Applications" (April 2014), online: *Homeland Security Affairs* <www.hsaj.org/articles/256> [perma.cc/H7GQ-MK4F].

85 Danielle Groen, "How We Made AI as Racist and Sexist as Humans" (12 November 2019), online: *The Walrus* <thewalrus.ca> [perma.cc/S8X2-QAVC]; Steve Lohr, "Facial Recognition Is Accurate, if You're a White Guy", *The New York Times* (9 February 2018), online: <www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html> [perma.cc/ANS2-LFVR].

86 "Face Off: The lawless growth of facial recognition in UK policing" (May 2018) at 3–4, 6, online (pdf): *Big Brother Watch* <bigbrotherwatch.org>.

Notably, NEC Corporation is the choice APT hardware provider for police services in Calgary and Toronto.[87]

Considering the serious implications of APT at the data collection and analysis phases, along with the constitutional risks of applying its outputs in the field, the following section analyzes APT's relationship to the right against arbitrary detention, as stipulated in s. 9 of the *Charter*.

C. Section 9 Protections

S. 9 of the *Charter* protects Canadians from arbitrary detention by police.[88] Be that as it may, police have become empowered to engage in investigative detentions under SCC jurisprudence. The SCC established a jurisprudential test to craft investigative powers under the framework described in the UK.[89] In *R v Dedman*, the accused refused to participate in a breathalyzer test at a sobriety check stop. In considering whether the police were acting within their powers in detaining Dedman, the majority failed to find legislative authorization for the conduct of the police. Regardless, they proceeded to authorize investigative detentions related to an officer's execution of their duty to control traffic. This decision received the ancillary powers doctrine into the Canadian common law and has since been applied to authorize several investigative powers that remain without governing legislation. Notable examples include powers to use sniffer dogs in certain contexts,[90] as well as to enter a private residence when an officer perceives a safety risk to investigators or the public.[91]

Formal common law powers of investigative detention were established using the imported ancillary powers doctrine from the *Dedman* decision. Using this doctrine, the SCC first defined powers of investigative detention in *R v Simpson*.[92] In that case, the arresting officer directed the accused to pull over after leaving a known drug den on suspicion of criminal activity. The officer conducted a safety search of the accused during what is now

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87 Robertson, Khoo & Song, *supra* note 1 at 62; Kate Allen & Wendy Gillis, "Toronto police have been using facial recognition technology for more than a year", *Toronto Star* (28 May 2019), online: <www.thestar.com/news/gta/2019/05/28/toronto-police-chief-releases-report-on-use-of-facial-recognition-technology.html?rf> [perma.cc/5UGP-6MT2].

88 *Constitution Act*, *supra* note 44, s 9.

89 *Dedman v the Queen*, [1985] 2 SCR 2 at paras 35–36, 20 DLR (4th) 321 [*Dedman*].

90 *KB*, *supra* note 4 at paras 80–97.

91 *R v MacDonald*, 2014 SCC 3 at paras 37–41 [*MacDonald*].

92 *R v Simpson*, [1993] OJ No 308, 12 OR (3d) 182 [*Simpson*].

known as investigative detention and proceeded to recover drug evidence. While finding the detention unlawful, the SCC applied the *Waterfield* test to consider whether the detention was authorized by law, as an extension of 'unknown' police powers that exist while officers execute their duties. Thus, the framework of investigative detention was established in Canadian common law. Shortly thereafter, this framework was successfully applied in *R v Mann*.[93]

The SCC later noted that investigative detention requires an officer to hold a 'reasonable suspicion' that criminal activity may take place in order to engage an investigative detention in *R v Chehil*.[94] The majority defined the standard to engage an investigative detention as an officer's subjectively held belief that detecting criminal activity is possible, not the probability of actually uncovering it. In Chehil's case, the accused exhibited common behaviours associated with drug traffickers at the Vancouver International Airport, which piqued the arresting investigator's suspicion of criminal activity. Sniffer dogs confirmed that narcotics were in his bags before he received them. The accused was arrested once he collected his bags. The SCC rejected the accused's challenge to the constitutionality of the search and alternatively confirmed that a latent investigative power existed for police to use sniffer dogs to supplement their search capabilities. This conclusion was reached with consideration of the current jurisprudence, the constellation of facts in Chehil's case, and totality of the circumstances.[95]

Although continuing to authorize investigative detentions under the ancillary powers doctrine, the SCC has taken judicial notice of how this investigative tool is routinely abused by police, with particular focus on people of colour. In *R v Grant*, the SCC considered the role of racial bias in forming the 'reasonable suspicion' used by officers to justify intervention with a young black man walking down the sidewalk. Two plain-clothes officers identified the youth as 'suspicious' and worthy of intervention. They directed a nearby uniformed officer to intercept the young man. While doing so, the plain-clothes officers enclosed Grant on the sidewalk. On identification as officers, the youth disclosed that he had a small sample of weed and a firearm. In considering Grant's case, the SCC reframed the jurisprudential test for determining if an investigative detention occurred, whether physical or psychological.

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93 *R v Mann*, 2004 SCC 52 at para 28–40 [*Mann*].

94 *R v Chehil*, 2013 SCC 49 [*Chehil*].

95 *Ibid* at paras 28–41.

Psychological detention is established either where (1) the individual has a legal obligation to comply with a restrictive request or demand from an authority or (2) a reasonable person would conclude, on the basis of presented state conduct, that they were obliged to comply. Three factors are considered when determining whether a reasonable person would conclude they were detained: the circumstances of the encounter, the nature of police conduct, and the particular characteristics or circumstances of the individual where relevant, including age, physical stature, minority status, or level of sophistication.[96] While using the language of minority status, this test focused on the role of race in law enforcement practices. The Court affirmed that Grant was detained and attending officers failed to provide him with his entitlement to retain legal counsel, as defined in s. 10(b) of the *Charter*. While finding numerous breaches in Grant's case, the SCC proceeded to define a new test for admission of evidence under s. 24(2) of the *Charter*, which was applied to maintain partial conviction for the accused.

While the amendments stipulated in *Grant* were intended to address the prevalent influence of racial bias towards engaging investigative detentions, the SCC was forced to further refine its *dicta* on this issue in *R v Le*. In that case, officers aggressively approached five suspects while they conversed in a member's townhouse yard.[97] On their aggressive entry to the property, officers immediately started questioning the group while another officer stepped over the fence to inform the primary accused to keep his hands in plain view. Le attempted to inform the officers that he did not have identification on his person, but an officer interrupted with demands to see the contents of a bag in the yard. The accused fled after this request. Once arrested, he was found to have drugs, cash, and a firearm in the bag. Of note, the group in the yard included the Asian accused and four other Black males. The SCC confirmed the unconstitutionality of the search and the detention. In doing so, the majority explained the circumstances of the encounter must be considered from the subjective perspective of the accused, who does not possess the knowledge of officers at the time of detention. Importantly, they explained that characteristics of the accused are considered at the standard of a reasonable person of similar racial background, with particular consideration of the social and historical context of that community's relationship with the police. The Court

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96 *Grant*, *supra* note 27 at para 44.

97 *Le*, *supra* note 27.

confirmed that more frequent interactions with police do not amount to sophistication but should rather be a consideration of an accused's understanding overall.[98] Once detention has been established under these criteria, a trier of fact will then consider if the detention was reasonable under the remaining *Collins* criteria: Was the authorizing law reasonable? Was the manner of the detention reasonable?

Since the recognition of investigative detention powers under the common law, the SCC continues to revisit its boundaries because of ongoing enforcement practices that are rooted in racial prejudice. James Stribopoulos explains that, from the beginning, intuitive assessments based on age, sex, socio-economic status, or race act as a foundation for investigative detentions. Courts are not exposed to the realities of its use on the frontline, where detentions may be applied to justify interference with vulnerable individuals in marginalized social spaces.[99] Although the court has a limited understanding of the frequency and realities involved with frontline investigative detention, a broader recording of its use is likely a part of internal reporting protocols for police. The aforementioned indicates that race continues to permeate the investigative processes of police. The SCC continues to reshape the scope of these powers to minimize its use against marginalized populations, but the trend of the jurisprudence reviewed here demonstrates the operation of racial bias at a systemic level.

Canadian governments recognized the serious implications of cognitive bias and "tunnel vision" in law enforcement as part of several inquiry reports into wrongful convictions. Bruce MacFarlane is a leader in these areas, whose work continues to ground contemporary government research into the prevalence of cognitive bias in the decision-making of law enforcement officials.[100] He defines cognitive bias as a psychological process

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98 *Ibid* at paras 37, 63–78, 90, 96–97, 106–10.

99 James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41:2 Atla L Rev at 341–44; James Stribopoulos, "The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning" (2008) 40 SCLR (2d) at 211.

100 Bruce A. MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* (Ontario: Ministry of the Attorney General: 2008), online: <www.attorneygeneral.jus.gov> [perma.cc/WF8V-ASR5] [MacFarlane, *Tunnel Vision*]; Bruce A. Macfarlane, "Wrongful Convictions: Determining Culpability When the Sand Keeps Shifting" (2014) 47:2 UBC L Rev 597 at 597 [MacFarlane, "Shifting Sands"]; Bruce A. MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31:3 Man LJ 403 at 403.

that causes an individual to unconsciously select the information that supports already-formed conclusions and to methodologically disregard alternatives.[101] Biases can become layered between investigators or transferred to prosecutors through information sharing.[102] Inquiry reports found that cognitive biases can often crystallize into "tunnel vision," which can drive entire investigative teams to focus on a particular theory of a case and dismisses contrary evidence. MacFarlane also explains that representatives of the Crown may fall subject to "noble cause corruption," where moral intentions to uphold the principle of law can lead criminal justice actors to engage in unethical activities to achieve their objectives.[103] Virtually every inquiry into wrongful convictions in Canada cites MacFarlane's work, with the most recent recognition from the Public Prosecution Service of Canada.[104] Considering the SCC's decisions in *Grant* and *Le*, it is clear that the concerns highlighted in federal and provincial reports related to cognitive bias and tunnel vision continue to influence the on-the-spot decision-making of police officers.

This type of historical information is used to train APT. Once trained, the software generates formulas that are applied to new inputs to match targets against its database. Robertson and colleagues explain that the application of APT formula in the field is really an application of generalized inferences to determine whether police should intervene with an individual. The SCC previously explained that a reasonable suspicion could not rely on generalized suspicions in *R v Kang-Brown*.[105] Building on MacFarlane's description of cognitive bias, the use of APT to support the reasonable suspicion necessary to justify investigative detentions risks the amplification of already-existing biases and applying them at an exponential level in the field. Robertson and colleagues state:

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101 MacFarlane, *Tunnel Vision*, *supra* note 99; MacFarlane, "Shifting Sands", *supra* note 99; Keith A. Findley, "Tunnel Vision" in Bryan Cutler, ed, *Conviction of the Innocent: Lessons from Psychological Research*, 2nd ed (Washington, DC: APA Press, 2010).

102 Keith A. Findley & Michael S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) Wis Law Rev 291 at 309.

103 MacFarlane, *Tunnel Vision*, *supra* note 99 at 20–26; "Lawyer defends use of informant in Sophonow inquiry", *CBC News* (8 May 2001), online: <www.cbc.ca> [perma.cc/TJD 5-7FPM].

104 *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: Public Prosecution Service of Canada, 2019) at ch 2, online: <www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch2.html> [perma.cc/D7BZ-V9PV].

105 *KB*, *supra* note 4 at paras 68–79.

> Relying on algorithmic policing technologies as grounds for suspicion may violate section 9 where the algorithmic prediction(s) are based on statistical trends, as opposed to being particularized to a specific individual. Officers may subconsciously rely on a risk prediction generated by an algorithm to form grounds for suspicion that they consider to be "reasonable", even if the suspect's actions have not changed. Rather than identifying meaningful interventions, APT outputs could instead be used to justify officer interventions that support already formed suspicions that may be unconstitutional. Algorithmic predictions may thus result in detentions that are rooted in generalized suspicions that are based on tools with questionable reliability in its output information.[106]

In a broader sense, APTs are highly susceptible to building unconscious biases into their outputs as a function of their training data, as well as the humans that develop the technology and the individuals that apply its recommendations in the field. By providing 'black-box' outputs that can be used to reinforce and justify pre-conceived decisions about an individual's 'suspicious' behaviour, APTs risk perpetuating these biases at an exponential level. Robertson and colleagues note that current research into the use of algorithmic technologies recognizes the tendency of humans to rely on the judgements of automated decisions as superior to their own, even when they have reason to believe the technology is flawed.[107] "Automation bias" may be an appropriate addition to Macfarlane's characterization of cognitive bias in Canadian law enforcement. Robertson and colleagues confirm that reliance on algorithmic tools that generate predictions on the basis of immutable individual characteristics will result in biased decisions against particular groups.[108] The *Le* jurisprudence confirms that violations of the right against arbitrary detention are often significant and humiliating experiences that strike at the core of individual dignity.[109] In terms of race, being subjected to increased police scrutiny, higher-stop rates, and use of detention can compound the already-negative experiences of some racialized community members.

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106 Robertson, Khoo & Song, *supra* note 1 at 111–13; Andrew Guthrie Ferguson, "Predictive Policing and Reasonable Suspicion" (2013) 62:2 Emory LJ 259 at 259.

107 Robertson, Khoo & Song, *supra* note 1 at 124–25; Lindsey Barrett, "Reasonably Suspicious Algorithms: Predictive Policing at the United States Border" (2017) 41:3 NYU Rev L & Soc Change 327 at 342–43, online: *NYU Social Change* <https://socialchangenyu.com/wp-content/uploads/2017/09/barrett_digital_9-6-17.pdf> [perma.cc/H9EQ-7V4L].

108 *Chehil*, *supra* note 94 at para 43.

109 *Le*, *supra* note 27 at para 95

Considering the serious risks to *Charter* rights against arbitrary detention, Robertson and colleagues caution that stronger public education in digital literacy and targeted training for officers is essential to prevent cognitive biases from becoming justified detentions under the authorization of APT outputs:

> Without establishing effective training, technological literacy, cultural competence, and related best practices throughout all law enforcement agencies across the country, individuals remain at an elevated risk of having their section 9 rights violated by way of automation bias and other biases in algorithmic policing. Clear written policies, directives, and meaningful accountability mechanisms are recommended.[110]

V. ISSUES WITH ANCILLARY EXPANSION OF INVESTIGATIVE POWERS

It is clear from this discussion that police investigative powers hold serious potential to infringe *Charter* protected rights. Considering this, it is surprising that investigative powers continue to fall outside the scope of statutorily defined powers. Rather than legislating police powers to conduct investigations in line with the constitutional roles of the legislatures and the courts, investigative powers continue to proliferate under the SCC's ancillary powers doctrine. Richard Jochelson explains that, although the Court has engaged in this practice with increasing frequency since terror attacks against the United States on 9/11, expanding police powers continues to fall outside of the courts' traditional role as guardians of the constitution.[111] Our Parliamentary democracy designates legislators with the responsibility to craft laws that limit the liberty of Canadians. Alternatively, it is the role of courts to determine whether government legislation is constitutionally consistent to ensure that enacted laws respect their natural boundaries.

Opposed to the *Waterfield* test described above, Jochelson explains that it is more appropriate for the court to apply the common law *Oakes* test to determine whether the government can justify breaches or encroachments of individual rights, rather than authorizing state infringements on the bench. The Crown bears the burden of

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110 Robertson, Khoo & Song, *supra* note 1 at 125–26.

111 Jochelson, *supra* note 5 at 355–76.

demonstrating that a proposed law addresses social harms in a proportion greater than the content of the rights being infringed. If there is a failure to do so, the court is empowered to strike legislation down or permit the government to reshape the law, within a reasonable time, to conform with its constitutional limits. When considering the use of police investigative powers, the court continues to be faced with an absence of governing legislation for surveillance tools. Rather than demanding a legislative framework for constitutional validation, SCC jurisprudence continues to unilaterally authorize the use of surveillant technologies under the ancillary powers doctrine. Jochelson describes this test as an inversion of the logic defined in *Oakes*, where the court can instead authorize constitutionally questionable police conduct when finding a sufficient nexus with existing common law duties for police. He argues that the ancillary powers doctrine forms the basis of a security calculus that is intended to enforce national security objectives, which is being applied beyond the interpretive purpose of the court and into the role of the legislature.[112]

Jochelson compares the structure of the *Waterfield* test to the *Oakes* test to illustrate this inversion. In highlighting the resemblance of these tests, he explains that *Oakes* is a two-prong approach, where the second prong includes three supplementary considerations. The Crown must first demonstrate the impugned legislation's sufficiently pressing and substantial purpose to justify a restriction of liberty. The second stage considers whether the law's effect is rationally connected to its objective, whether its impairment of rights is minimal, and whether the law's effect is proportional in relation to its objective. This final stage accounts for the importance of the legislative objective, which is balanced against the impugned law's salutary benefits and deleterious effects.[113]

The *Waterfield* test follows a similar track, where the court identifies whether the impugned police conduct is reasonably related to a valid common law power, like controlling traffic or maintaining public safety. Based on the court's analysis, the trier of fact will determine whether the importance of the police conduct, in line with their common-law duties, can reasonably justify their execution of that power to meet the duties that arose in the case-at-bar. Jochelson finds the second prong of the *Waterfield* analysis to be consistent with the second stage of *Oakes*, where a trier of fact

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112 *Ibid* at 357–58.

113 *R v Oakes*, [1986] 1 SCR 103 at paras 40–49, 62–71, 53 OR (2d) 719 [*Oakes*]; Jochelson, *supra* note 5 at 365–67.

considers whether the impugned power is a sufficiently tailored response to the suspected activity in question. He notes that rational connection considerations are often met with descriptions of police responsiveness on a standard of reasonability. In addition, the court often considers the nature of the accused's conduct in determining whether investigative methods, including applications of force, are minimally intrusive to the rights of the accused. Finally, the court considers the totality of the circumstances, which Jochelson likens to the cost-benefit analysis of the *Oakes* test. The court applies a contextual consideration of the circumstances at the time of detaining the accused to determine whether the cost of rights infringement outweighs the benefits provided by upholding the law.[114] Jochelson notes the adamant opposition of dissenting SCC justices to expand investigative powers under the *Waterfield* test to demonstrate the inappropriate nature of this test. Dissenting judges went so far as to argue that the ancillary powers doctrine risks replacing *Oakes* for a watered-down test for *Charter* scrutiny that can allow expansive growth of police investigative powers.[115]

Considering the constitutional role of the judicature, I agree with Jochelson's assertion that the *Oakes* test is a more appropriate jurisprudential tool than the *Waterfield* criteria. *Oakes* is applied in response to the legislative acts of Parliament: when a right is infringed, the court determines whether the law's encroachment is justified under s. 1 of the *Charter*. Where *Waterfield* is applied, there is no legislative authority for the state to act. This is particularly troubling because the ancillary powers doctrine is not authorized by law but is instead a judicial usurpation of the legislative role of Parliament. Jochelson notes that using this test is a betrayal of the common law's traditional role of protecting liberties from the tyranny of majorities. Rather, the removal of liberties is the constitutional responsibility of Parliament.[116]

The SCC proceeded to expand investigative powers using the ancillary powers doctrine under the auspices of dialogue theory. They claim that law-making is a discursive process, where legislators and judges exchange perspectives on the status of the law through the passage of legislation and its constitutional verification in court.

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114 *Dedman*, *supra* note 89 at paras 22–23, 68–69; Jochelson, *supra* note 5 at 367–69.

115 *R v Orbanski*, 2005 SCC 37 at para 81; *KB*, *supra* note 4 at paras 50–57.

116 Jochelson, *supra* note 5 at 370–74.

Jochelson acknowledges the role of dialogue theory but draws attention to its illogical application in the context of ancillary expansions of police powers. He explains that, rather than dialogue, the use of powers in this way amounts to a judicial monologue where the court can unilaterally invent common law powers and simultaneously declare them constitutional. In addition to undermining the structure of our democracy, the expansion of ancillary powers is exceptionally concerning when considering its implications for an unsuspecting accused. Unilateral expansion of police powers without governing legislation implies that an accused, due to issues with intelligibility and unpredictable discretionary choices of police, may never know the full extent of the investigative search and detention powers available to police until appearing in court.

Our discussion reviewed the use of the ancillary powers doctrine to authorize the use of surveillance technologies like heat scans and sniffer dogs. Considering the trend of this jurisprudence, Jochelson's concerns regarding the *Waterfield* test, and the extreme risk to individual liberties presented by the macro-scale implementation of APTs, the author demands strong legislative action to delineate the boundaries of police investigative powers. In particular, I recommend the enactment of a dedicated statutory framework that defines the use of surveillant technologies by police, with a particular focus on delineating the permissible scope of APT use. Robertson and colleague's research highlights the imperative nature of enacting APT-related legislation and provides a policy framework that can jump-start a governmental response to better protect the rights of individuals. In addition to upholding the constitutional limits of law-making in Canada, the implementation of governing legislation can also allow the court to resume its traditional role of validating the constitutionality of Parliament's laws. The following section reviews government's current knowledge of APT use in Canada, their expressed intention to expand data access, and Robertson and colleague's recommendations to implement a Canadian governance regime for APTs.

VI. APT Legislation is Required

The above sections of this essay described the implementation of APT in Canada and its potential to infringe *Charter* protected rights. The roll-out of these programs has been facilitated by regional police forces, provincial police services, as well as Canada's federal law enforcement agencies. All

agencies operate as a function of government and some serve as a direct extension of provincial or federal Ministries of Justice. For example, SPPAL is a joint partnership between the Government of Saskatchewan, the Saskatoon Police Service, and the University of Saskatchewan. While connected to the development and application of APTs, Canadian governments have been reluctant to legislate, or even acknowledge, the implications of algorithmic decision-assistance on the *Charter* rights of Canadians. It is clear that government officials are comfortable with the expansion of these technologies in law enforcement, but action must be taken to balance the encroachments that are taking place with companion legislation to demarcate the acceptable boundaries of its use.

Although reluctant to legislate, the Government of Canada has recently expressed intention to expand public access to more detailed data that is already captured in historical law enforcement records. In 2020, the Justin Trudeau minority government declared, as part of their Speech from the Throne, an intention to 'redouble' their efforts to address systemic racism by "building a whole-of-federal-government approach around better collection of disaggregated data."[117] The federal government expressed this intention as part of its broader strategy to address systemic racism. While noble, consideration of APTs potential to infringe *Charter* protections against racial discrimination, unreasonable search and seizure, and arbitrary detention by state actors rights and their progressive authorization under SCC jurisprudence indicates that expanded access to disaggregated data may alternatively act to exacerbate the effects of systemic racism, rather than mitigating its effects in law enforcement. This information may be used to better connect Canadians with social services, but research into the capabilities of APTs indicates that systems are already in place to algorithmically apply this information in law enforcement operations. It is worth noting that the Throne Speech includes other positive intentions to address systemic racism in Canada. Be that as it may, the constitutional risks inherent to the application of digital information as part of APT processes are much greater than the prospective benefits this information can provide.

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117 Canada, Privy Council, *A Stronger and More Resilient Canada: Speech from the Throne to Open the Second Session of the Forty-Third Parliament of Canada*, 43–2 (23 September 2020), online: <www.canada.ca> [perma.cc/P36W-HFF7].

These changes have yet to become authorized by Parliament but hold serious deleterious potential for the *Charter* rights of Canadians, particularly those who are Indigenous or Black. Our discussion reviewed the fallacious nature of historical enforcement information, as well as the risks of allowing disaggregated data collection related to specific character features like race. Canadian governments know about the use of APT in their jurisdictions, as well as the current flaws inherent to these technologies. It is also clear from the Government of Canada's Throne Speech that Parliamentary intention exists to expand access to granular data that can be input into APT systems and used by officers as part of APT outputs. Considering the serious implications this trajectory holds for Canadians, I assert that it is incumbent on Parliament and local legislators to comprehensively define the scope of APT use in law enforcement. This is more critical than ever because APTs are already in use and hold potential to affect s. 15 equality rights, as they relate to marginalized populations.

Further to this recommendation, I assert that it is most appropriate for Parliament to establish these rules in legislation, as opposed to regulations, in the criminal justice context. Some business-minded proponents argue that the Government of Canada should introduce regulations to govern the growth of algorithmic decision-making software in this jurisdiction.[118] While their arguments may have merit in the context of business enterprise, I disagree. A review of recent decisions by the OPCC shows that regulatory powers may not be enough to prevent majoritarian groups from influencing the legislative will to strengthen privacy protections.[119] This is already the case: Moulton noted that consultative pressure was applied by industry leaders to restore the status quo after the OPCC attempted to take positive action in this regard. Instead, the Parliamentary executive confirmed their preference for allowing business as usual when it comes to sharing customer information with international third parties. [120] On this basis, I believe that regulatory flexibility is not appropriate in the context of criminal justice. The prospective risks of institutionalizing APT surveillance with too much flexibility may allow governments to quietly activate features like Palantir's Governance Entity to lower match thresholds or to grant even greater access to prejudicial data sets. Should this take place, majoritarian pressures may

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118 Aviv Gaon & Ian Stedman, "A Call to Action: Moving Forward with The Governance of Artificial Intelligence in Canada" (2019) 56:4 Alta L Rev at 1137–165.

119 PPC, *supra* note 56; Mouton, *supra* note 57.

120 Moulton, *supra* note 57.

be strong enough to maintain course, even with minority opposition to such actions. Rather than regulations, we believe that legislation is the best avenue for authorizing the use of APTs. Further to this, legislation would allow the court to establish clear guidelines regarding the constitutionality of APT use and would require a majority will in Parliament to grant expanded access to data sets or their application in the field.

Most importantly, legislation must be introduced to govern the use of algorithmic decision-making in law enforcement because the Court has yet to validly test the constitutionality of its use in Canada. Surveillance technologies have thus far been authorized under common law police powers as a function of the ancillary powers doctrine. The SCC was reasonably able to apply the *Waterfield* test to expand powers in this way because legislation was absent. Should legislators implement a governing framework for APT use in Canada, or the broader use of surveillance technologies by law enforcement generally, the SCC will finally have an opportunity to apply the *Oakes* test to verify APT's constitutionality in relation to *Charter*-protected rights. As discussed in sections IV and V of this essay, the ancillary expansions may have been appropriate in the past to permit an investigative collection of fragmented pieces of personal data, but this method is not appropriate when its application may systemically breach the *Charter*-protected right of equality before the law.

To jump-start the legislative process, Robertson and colleagues provide a comprehensive suite of recommendations that includes overall government priorities, as well as discreet points that can help to resolve APT's prospective risk to *Charter*-protected rights.[121] I agree with several of these recommendations, including commissioning a judicial inquiry into the repurposing of historical police data sets for use in APTs; establishing standards of equipment reliability, necessity, and proportionality in criminal justice; implementing a dedicated oversight organization for APT use at the regional and national levels; mandating algorithmic impact assessments[122] before any APT can be used within

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121 Robertson, Khoo & Song, *supra* note 1 at 150–69.

122 Dillon Reisman et al, "Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability" (April 2018) at 5, online (pdf): *AI Now* <ainowinstitute.org> [perma.cc/D8SK-EQYD]; Algorithmic Impact Assessment" (29 March 2019), online: *Government of Canada* <open.canada.ca/aia-eia-js/?lang=en> [perma.cc/AMZ9-

the relevant jurisdiction; restricting APT data collection in public spaces; and establishing mechanisms for ongoing expert consultation to retool APT limits as the technology grows and improves. I hope that elected officials are cognizant of the risks that APT poses to the rights of Canadians and that action will be taken before marginalized Canadians start slipping through these cracks at an exponential level.

While the development and implementation of APTs continue to be ignored by legislators and other government actors outright, recent legislative action from the Government of Canada indicates an understanding of the risks inherent to the information available through internet services and the historical information retained by ISPs. The Trudeau minority government recently proposed *Canada's Digital Charter* under Bill C-11, which intends to demarcate digital 'safe spaces' in order to protect personal information currently retained by private sector proponents.[123] This legislation focuses on increasing an individual's control over information handled by private companies, institutionalizing the right for individuals to move their information from one organization to another, and ensuring that individuals can meaningfully demand the deletion of their information or for its automatic expiry when records become unnecessary. The Minister of Innovation, Science and Economic Development contends that Bill C-11 will drastically improve digital enforcement measures and will impose the strongest fines amongst Canada's partner nations for breaching privacy laws. Fines may approach the greater of 5% of a company's revenue or $25 million. This bill is

2E8V]; Privacy Commissioner of Canada, *Guide to the Privacy Impact Assessment Process* (Ottawa: PPC, 2020), online: <www.priv.gc.ca/en/privacy-topics/privacy-impact-assessments/gd_exp_202003/#toc4-1> [perma.cc/245F-JLLH].

123 Bill C-11, *Digital Charter Implementation Act*, 2nd Sess, 43rd Parliament, 2020 (second reading 24 November 2020), online: <parl.ca/DocumentViewer/en/43-2/bill/C-11/first-reading> [perma.cc/5HGD-92Y3]; "Canada's Digital Charter: Trust in a Digital World" (12 January 2021), online: *Innovation, Science and Economic Development Canada* <www.ic.gc.ca> [perma.cc/56GZ-AZUF]; "Canada's Digital Charter in Action: A Plan by Canadians, For Canadians" (23 October 2019), online: *Innovation, Science and Economic Development Canada* <www.ic.gc.ca> [perma.cc/58WR-TENG]; Gillian Stacey et al, "New Privacy Law For Canada: Government Tables the *Digital Charter Implementation Act, 2020*" (20 November 2020), online: *Davies Ward Phillips and Vineberg LLP* <www.dwpv.com> [perma.cc/4MZM-GG56].

encouraging but has yet to receive royal assent and entry into force.[124] At the time of writing, it is too early to evaluate the motivations of such legislation or to understand the scope of its impact related to the development and implementation of APTs in Canada.

VII. CONCLUSION

Our discussion reviewed the reality of APTs in Canada and the risks these technologies present to the *Charter*-protected rights of Canadians. Research indicates that Canadian governments and law enforcement agencies have already started to acquire, train, and apply APTs at the regional, provincial, and federal levels. Algorithmic technologies collate and analyze disparate information from public and private databases to identify patterns, which form the basis of formulae used to 'predict' future trends of criminal and anti-social behaviour. The results generated from these 'black-box' calculations may appear like an objective science, but, like all recorded information, they remain subject to the observational biases and operational flaws that ground the enforcement practices that influence APT outputs. Robertson and colleague's prospective research into APT implementation and development resoundingly concludes that APT deployment holds serious deleterious potential for the *Charter* rights of Canadians, with particularly malicious consequences for people of colour.

In line with Robertson and colleague's observations, this discussion highlighted how the development and implementation of APT in Canada risk macro- and micro-level encroachments of rights enshrined in ss. 8 and 9 of the *Charter*. Every stage of APT processes holds the potential to systemically infringe, if not breach outright, constitutional protections against unreasonable search and seizure, as well as arbitrary detention. While already concerning, the most pernicious consequence of applying

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[124] Canada, Department of Justice, *Bill C-11; An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make related and consequential amendments to other Acts*, (4 December 2020), online: <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c11.html> [perma.cc/72BR-4FSM]; Miles Kenyon, "Bill C-11 Explained" (23 April 2021), online: *Citizen Lab* <citizenlab.ca/2021/04/bill-c-11-explained/> [perma.cc/3EDS-TYRZ]; Caroline Deschênes et al, "Canada: Digital Charter Implementation Act, 2020 (Bill C-11) – Overview of Changes to the Applicable Regime" (9 December 2020), online: *Mondaq* <www.mondaq.com/canada/privacy-protection/1014324/digital-charter-implementation-act-2020-bill-c-11-overview-of-changes-to-the-applicable-regime> [perma.cc/68BF-SM37].

APT in the field can be found in the use of general formulae to issue on-the-spot intervention reports to officers. These recommendations are intended to encourage officers to intervene with identified targets, often on the basis of systematically biased and inaccurate information. SCC jurisprudence indicates that police interference with individual liberties cannot be based on generalized suspicions but must instead amount to a reasonable suspicion that criminal activity may be taking place.

Legislators and governmental decision-makers understand the invasive scope of APTs and the risks inherent to their application on a macro-scale. While that is the case, lawmakers maintain their statutory ignorance of investigative digital surveillance and the proliferation of new internet-based tools like APT. Rather than demarcating their permissible uses for law enforcement purposes, these surveillance technologies continue to be authorized under the ancillary powers jurisprudence of the SCC. Jochelson explained the inappropriate nature of this approach to argue that the traditional role of courts calls for application of the *Oakes* test to determine if state action falls within its constitutional limits. Considering APTs serious implications for the rights of Canadians, Robertson and colleague's comprehensive research and recommendations, as well as the legislative intentions expressed by Parliamentarians, this paper calls on legislators to implement dedicated legislation to govern the use of surveillant technologies by law enforcement agencies, with a particular focus on regulating their use of APTs. Considering Parliament's intent to expand public access to disaggregated police data, this paper asserts that the time to implement legislation in this area is now. Failure to do so risks the exponential application of APTs against Canada's most vulnerable populations, including Black and Indigenous communities.