

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

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## ABSTRACT

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

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

## I. INTRODUCTION

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

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<sup>1</sup> Amanda Carling, "Pleading Guilty When Innocent: A Truth for Too Many Indigenous People", *The Globe and Mail* (23 May 2018), online: <[www.theglobeandmail.com/opini](http://www.theglobeandmail.com/opini)

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

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

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

This literature will be examined in light of two cases involving Indigenous men: Richard Joseph Catcheway and Phillip James Tallio.

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on/article-pleading-guilty-when-innocent-a-truth-for-too-many-indigenous-people/> [perma.cc/265M-DLTF].

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

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

## **II. CULTURAL COMPETENCE AND WRONGFUL CONVICTIONS OF INDIGENOUS PEOPLES**

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

### **A. Competence in the Model Rules of Professional Conduct**

The Federation of Law Societies of Canada provides a Model Code of Professional Conduct for law societies to use in creating their own rules of professional conduct. Rule 3.1-1 defines what it means to be a competent lawyer as "a lawyer who has and applies relevant knowledge, skills and

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

attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement.”<sup>4</sup> The Model Code goes on to list several competencies, none of which mention cultural competence.

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

## B. What is Cultural Competence?

Cultural competence refers to a “set of skills, behaviours, attitudes and knowledge that enable a professional to provide services that are appropriate to a diverse range of clients.”<sup>10</sup> According to Pooja Parmar, cultural competence for lawyers must go beyond merely serving a diverse range of clients and instead must include training in both anti-racism and colonialism.<sup>11</sup> In addition, Parmar explains that cultural competence

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

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

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Marsden & Buhler, *supra* note 5 at 188.

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

<sup>10</sup> Pooja Parmar, “Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence” (2019) 97 Can Bar Rev 526 at 534.

<sup>11</sup> *Ibid* at 540, 545.

requires lawyers to understand how the legal culture is not neutral and, consequently, to think critically about the legal culture and the power dynamics produced and upheld by it.<sup>12</sup> With respect to reconciliation with Indigenous peoples, Parmar holds that a commitment to ensuring lawyers are culturally competent “demands acknowledgement of the foundational violence of colonialism that has shaped Canada, Canadian laws, and Canadians.”<sup>13</sup>

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

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

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

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

A false guilty plea occurs where an accused pleads guilty – often for a lighter sentence than what would be pursued at trial – when they did not commit the crime or lacked the requisite mental intent. Similarly, a false confession occurs when an accused confesses to committing a crime that they did not commit, and most often results in guilty pleas.<sup>15</sup> Malini Vijaykumar explains that plea bargains are “strong temptations” when an

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<sup>12</sup> *Ibid* at 539.

<sup>13</sup> *Ibid* at 535.

<sup>14</sup> *Ibid* at 556.

<sup>15</sup> Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada” (2018) 51:1 UBCL Rev 161.

accused is unsure about the strength of their case, especially if they are being detained pre-trial.<sup>16</sup>

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

In addition, the bail system is permeated with stereotypes of Indigenous peoples as “dangerous” which influences assessments of reliability that can result in unjustified pre-trial detention.<sup>22</sup> When faced with a choice between pre-trial detention with poor bail prospects and release upon a guilty plea, the CCLA reports that many Indigenous clients will plead guilty in order to return home.<sup>23</sup> Therefore, systemic discrimination in the bail system makes it more strategic for Indigenous peoples to plead guilty to avoid pre-trial detention than to wait for their day in court.

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

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

<sup>18</sup> *Ibid* at 435.

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

<sup>20</sup> *Ibid* at 75-76.

<sup>21</sup> *Ibid* at 76.

<sup>22</sup> Carling, *supra* note 17 at 427.

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

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

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

Second, colonial legacies and intergenerational traumas have resulted in high rates of Fetal Alcohol Spectrum Disorder (“FASD”) in Indigenous communities, which also plays a role in false confessions.<sup>33</sup> Individuals with FASD are able to perform basic functions but struggle with memory loss

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<sup>24</sup> Jeremy Greenberg, “When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth” (2020) 67 CLQ 407 at 12.

<sup>25</sup> *Ibid* at 7.

<sup>26</sup> Carling, *supra* note 17 at 428.

<sup>27</sup> Vijaykumar, *supra* note 15 at 11.

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

<sup>29</sup> Carling, *supra* note 17 at 443.

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

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

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at 445.

and controlling impulsive behaviour, while also being suggestible and, therefore, easily influenced by leading questions.<sup>34</sup> This is particularly problematic in the context of a police interrogation, as individuals with FASD are likely to be heavily influenced in their confessions by tactics used by police officers.<sup>35</sup>

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

## **B. Communicating with Indigenous Clients**

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

Aboriginal Legal Services’ (“ALS”) guide, *Communicating Effectively with Indigenous Clients*, illustrates how miscommunications between Indigenous accused and non-Indigenous lawyers can occur.<sup>38</sup> The guide also explains how such miscommunications stem from the differences between Standard English (“SE”) and Aboriginal English (“AE”) – representing numerous dialects spoken by Indigenous communities.<sup>39</sup>

Some of the consulted Indigenous peoples felt that their stories went unheard due to their distrust of the legal system and/or belief that they would not be deemed credible because they were Indigenous. Others felt

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

<sup>35</sup> Carling, *supra* note 17 at 445-46.

<sup>36</sup> *Ibid* at 448-49.

<sup>37</sup> *Ibid* at 449.

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

<sup>39</sup> *Ibid.*



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

### C. Richard Joseph Catcheway

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

On May 10, 2018, the Manitoba Court of Appeal overturned Catcheway’s wrongful conviction.<sup>48</sup> Although it is unclear why Catcheway pled guilty, his comments to the writer of the pre-sentence report – which are quoted in the joint factum filed at the Manitoba Court of Appeal –

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<sup>40</sup> *Ibid* at 2.

<sup>41</sup> *Ibid* at 25.

<sup>42</sup> *Ibid* at 21.

<sup>43</sup> *Ibid* at 24–25.

<sup>44</sup> *Ibid* at 26.

<sup>45</sup> *Ibid* at 23, 25.

<sup>46</sup> Carling, *supra* note 1.

<sup>47</sup> Cameron MacLean, “‘Miscarriage of Justice’ After Man Serves 6 Months for Crime he Couldn’t Have Committed”, *CBC News* (28 May 2018), online: <[www.cbc.ca/news/canada/manitoba/richard-catcheway-wrongful-conviction-1.4681737](http://www.cbc.ca/news/canada/manitoba/richard-catcheway-wrongful-conviction-1.4681737)> [perma.cc/J3RG-A8JN].

<sup>48</sup> Carling, *supra* note 1.

reveal that he pled guilty to avoid going to trial because there was a video statement saying he was present at the time of the offence.<sup>49</sup> During the interview, Catcheway alternated between saying he did not remember and he was not there. While it is unclear why Catcheway's lawyer allowed the plea to be entered without further investigation into Catcheway's whereabouts, Catcheway is an individual with FASD, and he was denied bail in this case – both of which are factors that make Indigenous peoples particularly vulnerable to false guilty pleas and false confessions.<sup>50</sup>

#### D. Phillip James Tallio

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

Jeremy Greenberg explains that when he was arrested, Tallio was in police custody for ten hours.<sup>55</sup> Tape recordings and interview transcripts confirm that during the first nine and a half hours of interrogations, Tallio maintained his innocence.<sup>56</sup> However, once a new constable came into the room at the nine and a half hour mark unaccompanied, he claimed that Tallio had confessed but the "tape recorder had mysteriously broken." While the alleged confession was ruled inadmissible at *voir dire*, Tallio pled

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

<sup>50</sup> Carling, *supra* note 1; MacLean, *supra* note 45.

<sup>51</sup> Greenberg, *supra* note 24 at 1.

<sup>52</sup> *Ibid* at 3.

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

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

<sup>55</sup> *Ibid* at 9.

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

guilty.<sup>57</sup> The guilty plea was entered into based on a letter from a psychiatrist who claimed that Tallio gave inculpatory statements after an unrecorded interview.<sup>58</sup> Although Tallio maintained that he did not meet with the psychiatrist, Tallio's defence counsel did not challenge the letter due to a concern that the jury would likely find Tallio guilty if the psychiatrist was called as a fact witness, and the lawyer entered the guilty plea on Tallio's behalf instead.<sup>59</sup>

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

## E. Where does Cultural Competence Fit In?

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

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<sup>57</sup> *Ibid* at 11, 13.

<sup>58</sup> *Ibid* at 13.

<sup>59</sup> *Ibid*.

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

<sup>61</sup> *R v Tallio*, 2021 BCCA 314.

<sup>62</sup> *Ibid*.

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

<sup>64</sup> Vijaykumar, *supra* note 15 at 198.

<sup>65</sup> *Ibid* at 197.

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

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

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

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

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

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

## IV. LAW SOCIETIES AND DISCIPLINARY PRACTICES

### A. Complaint Processes Across Canada

Across Canada, most law society investigations into the conduct of lawyers result from complaints launched by current or former clients and other legal professionals.<sup>67</sup> Investigations may also be the product of random audits, the media, or reports from government agencies, such as law enforcement.<sup>68</sup> The Federation of Law Societies of Canada published Discipline Standards for all law societies in Canada.<sup>69</sup> More specifically, discipline standards for transparency include hearings that are open to the public, providing reasons for any decision to close a hearing, and publishing notices of charges and/or citations. I will now discuss the complaint processes for 4 provinces: Ontario, Manitoba, Alberta, and British Columbia. Manitoba, Alberta, and British Columbia were chosen because of their relationship to the cases mentioned in this paper. Ontario was chosen because, with 57,000 lawyer licensees, it is the largest law society in Canada.

#### 1. Ontario

The Law Society of Ontario (“LSO”) is tasked with receiving and assessing complaints against members of the Ontario Bar. Complaints will

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

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

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

only be investigated by the LSO if they occurred within three years from the date of the issue or the date the complainant learned of the issue, with very few exceptions.<sup>70</sup> The first point of contact for a complainant is the Complaints and Compliance Department which decides whether to forward the case to investigation or to close it. If the complaint is within the LSO's jurisdiction and raises a professional conduct issue, the complaint is directed to the Intake and Resolution Department.

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

Subsection 49.3(1) of the *Law Society Act* gives the LSO the power to investigate a licensee's conduct if the LSO received "information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming of a licensee."<sup>71</sup> It is unclear whether this only relates to complaints made to the LSO or if it also includes information that comes to the LSO through news media. Complainants have a limited ability to have their cases reviewed, as the LSO will not review a complaint closed by the Complaints and Compliance Department. A complainant, however, may request an independent review by the Complaints Resolution Commissioner if the complaint is closed by the Intake and Resolution Department. In its 2020 Annual Report, the LSO disclosed that 3987 complaints were filed.<sup>72</sup> Of these complaints, 165 notices were filed in the

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

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

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

Hearing Division, and there were 123 hearings where a final order was rendered.

## ***2. Manitoba***

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

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

## ***3. Alberta***

In Alberta, there are various streams that a law society complaint may enter. A complaint can either go to the Resolution and Early Intervention Process, summary dismissal, or the Conduct Process. At Early Intervention, a complaint either goes to resolution or dismissal but can also go to the Conduct Process.<sup>77</sup> Once a complaint enters the Conduct process, a staff

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

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

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

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

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

lawyer (Conduct Counsel) is assigned to review the case and thoroughly analyze the information relating to the complaint.<sup>78</sup>

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

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

#### ***4. British Columbia***

In British Columbia, when a complaint is first received, intake staff determine whether there is a basis for investigating the complaint.<sup>82</sup> At this stage, complaints may be closed by intake staff if the complaint is unsubstantiated, outside the Law Society’s jurisdiction, frivolous or vexatious, or not a disciplinary violation if proven. If the complaint is sent to the investigation stage, information and documents will be gathered, and

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

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

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

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

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



interviews may be conducted. The complaint may be dismissed after the investigation is concluded. If there are ethical concerns or rule breaches, the lawyer may be referred to the Discipline Committee for further action. The Disciplinary Committee may recommend any of the following consequences: taking no further action, sending a conduct letter, ordering a conduct meeting, ordering a conduct review, or issuing a citation.<sup>83</sup>

## **B. Provincial Disciplinary Statistics**

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

## **C. A Note on Prosecutorial Complaints**

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

Nonetheless, an investigation by the *Toronto Star* found that the Ministry of the Attorney General's office in Ontario failed to monitor the nearly 1000 prosecutorial complaints lodged against prosecutors across the province. Moreover, the Ministry did not have a centralized system for tracking complaints or which prosecutors have been disciplined for

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

<sup>84</sup> *Krieger v Law Society of Alberta*, 2002 SCC 65.

misconduct.<sup>85</sup> While the LSO can technically investigate and discipline prosecutors since they are members of the Ontario Bar, prosecutorial complaints are usually investigated internally by the Ministry of the Attorney General's Office and are subsequently kept secret. In addition, it is usually direct superiors who deal with complaints and decide whether disciplinary actions will be taken.

## **D. Lack of Transparency and Accountability**

This paper maintain that the disciplinary processes described are inadequate because the overly discretionary nature of deciding which complaints are pursued results in a lack of transparency in how complaints are handled and why complaints are dismissed. The presence of discretion in the disciplinary process is not problematic on its own. However, too much discretion coupled with a decision-making system that is not transparent in how certain conclusions are reached can result in an inadequate disciplinary system overall.

The law societies discussed in this paper each publish statistics on the number of complaints received and how many complaints ended in a hearing in any given year. However, the lack of transparency in the disciplinary processes results from there being no publicly available documentation for any of the four law societies discussed stating the reasons why certain complaints were investigated but did not result in any further action. Such a process may offer some impunity for lawyers who may have played a role in wrongful convictions, as the lack of transparency in the system could create a culture of secrecy, and possibly even corruption, within law societies when it comes to disciplining lawyers. The inadequacies of the disciplinary processes will in part be illustrated through a closer examination of the wrongful convictions resulting from a disclosure scandal in Alberta and Clayton Boucher's wrongful conviction and subsequent complaint to the LSA.

### ***1. Alberta Disclosure Wrongful Convictions***

Before looking at the Alberta disclosure cases, this paper will first explain the disclosure obligations of prosecutors in Canada. *R v Stinchcombe* set guidelines for prosecutorial disclosure in Canada. In *Stinchcombe*, the

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<sup>85</sup> Jennifer Pagliaro & Jayme Poisson, "Ontario Fails to Track Complaints Against Crown Attorneys", *The Toronto Star* (16 December 2014), online: <[www.thestar.com/](http://www.thestar.com/)> [perma.cc/4KHL-AUPK].

SCC found that “the Crown must disclose to the defence all relevant information under its control, whether inculpatory or exculpatory, regardless of whether the information pertains to evidence that the Crown intends to adduce at trial.”<sup>86</sup> *Stinchcombe* also highlighted that this obligation is a continuing one – disclosure must be given before and during trial, and even after conviction.<sup>87</sup> This also means that disclosure must be given prior to and during plea negotiations with defence counsel.<sup>88</sup> In *R v Chaplin*, the SCC found that disclosure must include elements that are both favourable and unfavourable to the Crown.<sup>89</sup> However, per *Stinchcombe*, prosecutors still have discretion as to what information is “relevant.”

A six-month investigation by CBC’s *The Fifth Estate* found that senior officials at Alberta Justice were aware of a report undermining the findings of medical examiner Dr. Evan Matshes, which called into question several murder charges in which Dr. Matshes was involved.<sup>90</sup> Alberta Justice launched an inquiry into Dr. Matshes’ autopsies and found unreasonable findings in 13 of 14 cases reviewed – five of which were criminal cases. However, interviews with two defence lawyers and their clients suggest that this report was never disclosed to them after guilty pleas were entered, despite the prosecutorial disclosure obligations outlined in *Stinchcombe*. The cases of Butch Chiniquay and Shelby Herchak are two instances in which this occurred.

In January 2012, Chiniquay – an Indigenous man – pled guilty to manslaughter to avoid going to trial for second-degree murder of his girlfriend and was given a five year prison sentence.<sup>91</sup> The initial autopsy report in 2011 had ruled the death a homicide. However, while Chiniquay was serving his prison sentence, a medical report in November 2012 was

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<sup>86</sup> Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2015) at 654.

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

<sup>88</sup> *Ibid* at 662.

<sup>89</sup> *Ibid* at 655.

<sup>90</sup> Harvey Cashore, Rachel Ward & Carolyn Dunn, “Alberta Judge Denies Evidence was Buried in Autopsy Scandal”, *CBC News* (26 February 2020), online: <[www.cbc.ca/news/canada/calgary/judge-alberta-autopsy-scandal-1.5469933](http://www.cbc.ca/news/canada/calgary/judge-alberta-autopsy-scandal-1.5469933)> [perma.cc/V9X-4PQD].

<sup>91</sup> Harvey Cashore, Rachel Ward & Mark Kelly, “‘I did not kill her’: Justice Officials Withheld Report Signalling No Homicide While Alberta Man Sat in Prison”, *CBC News* (13 January 2020), online: <[www.cbc.ca/news/canada/fifth-estate-the-autopsy-1.5421945](http://www.cbc.ca/news/canada/fifth-estate-the-autopsy-1.5421945)> [perma.cc/Q9WC-26KQ].

completed – as part of the investigation into Dr. Matshes – which concluded that there was not adequate evidence of a homicide. While internal correspondence shows that there was an acknowledgement by Alberta Justice to disclose what they knew, Chiniquay’s lawyer maintains that he was never told there was a peer review done to indicate there was no homicide. In November 2013, the expert panel report was set aside because Dr. Matshes was never consulted. However, a second review has yet to be completed nearly six years later.<sup>92</sup>

Similarly, Shelby Herchak was charged with second-degree murder in the death of her 26-day old son in 2010, and she entered a plea bargain of manslaughter in October 2013 to avoid the possibility of a life sentence.<sup>93</sup> However, in 2012, the Chief Medical Examiner’s Office changed the autopsy report’s cause of death from “homicide” to “undetermined.” While correspondence demonstrates that the change in report was provided to prosecutors, the second-degree murder charge remained in place, and Herchak only learned of the change recently from journalists. Herchak’s lawyer did not respond to the CBC investigation, but it remains unknown why the review panel’s findings were not discussed prior to the plea bargain being entered. The bargain was struck on the basis of the Crown’s continued pursuit of a second-degree murder charge despite the report’s findings.<sup>94</sup>

## ***2. Clayton Boucher***

Clayton Boucher is an Indigenous man from Alberta. Boucher was arrested for an armed robbery that occurred on October 30, 2015 – an arrest that was likely the result of false eyewitness identification.<sup>95</sup> Boucher was released under strict bail conditions after the robbery and explained to Kenneth Jackson for APTN News that he was always being checked on by the RCMP.<sup>96</sup>

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<sup>92</sup> *Ibid.*

<sup>93</sup> Harvey Cashore & Rachel Ward, “Alberta Prosecutors Had Mounting Evidence Disputing Murder Charge Against Calgary ‘Baby Killer’”, *CBC News* (6 March 2020), online: <[www.cbc.ca/news/canada/alberta-prosecutors-shelby-herchak-autopsy-fifth-es-tate-1.5483752](http://www.cbc.ca/news/canada/alberta-prosecutors-shelby-herchak-autopsy-fifth-es-tate-1.5483752)> [perma.cc/H5TH-EAZF].

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

<sup>95</sup> Kenneth Jackson, “Tunnel Vision: The Sad, Wrongful Conviction of Clayton Boucher”, *APTN News* (last visited 31 March 2022), online: <[www.aptnnews.ca/tunnel-vision-the-sad-wrongful-conviction-of-clayton-boucher/](http://www.aptnnews.ca/tunnel-vision-the-sad-wrongful-conviction-of-clayton-boucher/)> [perma.cc/8KW7-HDM5].

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

On January 22, 2017, Boucher was arrested by RCMP officers for breaching his bail conditions, due to having changed his address without notifying his probation officer. The RCMP obtained a warrant to search the apartment where Boucher was residing after alleging that he was selling drugs. The officer found 130 grams of powder – some of which was in an Arm & Hammer baking soda box – and other items like a small scale and sandwich bags.<sup>97</sup>

The RCMP charged Boucher with trafficking and possession of meth and cocaine, and he was held in custody pending test results on the powder due to his prior bail conditions. Health Canada tests of two samples of the powder tested negative for any drugs on February 20, 2017, though the RCMP allegedly did not receive the results until March 20, 2017. The Crown Prosecutor in the case – Erwin Schulz – claimed that he continued to ask the RCMP for test results after March 20, but they were never provided. Despite the RCMP's claims that they told Schulz that both tests were negative on May 3, 2017, Leighton Grey – Boucher's defence attorney – claimed that Schulz informed him that traces of cocaine were found on May 4, 2017.<sup>98</sup>

On May 31, 2017, Boucher pled guilty to a drug offence that he did not commit about a month after his common law wife Phyllis Favel died. After Boucher was released, he learned that the test results came back negative, and his conviction was overturned in September 2017. Boucher would go on to file separate complaints against Schulz and Grey to the LSA. However, both complaints were ultimately dismissed, with Schulz and Grey continuing to practice law.<sup>99</sup>

As part of an APTN News investigation into Boucher's Law Society complaints, Kenneth Jackson examined a number of law society documents related to Boucher's complaints.<sup>100</sup> Boucher's first complaint against Schulz and Grey were determined by the LSA's intake department to not meet the threshold test to allow the complaints to proceed to the Conduct Committee – who ultimately decides whether there will be an investigation, hearing, or other form of intervention. This occurred without any public

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

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

<sup>99</sup> *Ibid.*

<sup>100</sup> Kenneth Jackson, "Law Society Documents Reveal How Crown Avoided Discipline in Wrongful Conviction of Metis Man", *APTN News* (2 July 2020), online: <[www.aptnnews.ca/national-news/law-society-documents-reveal-how-crown-avoided-discipline-in-wrongful-conviction-of-metis-man/](http://www.aptnnews.ca/national-news/law-society-documents-reveal-how-crown-avoided-discipline-in-wrongful-conviction-of-metis-man/)> [perma.cc/79VZ-E7SJ].

publication of Boucher's complaints or the Intake Department's reasoning for dismissal.

The LSA would later appoint Allan Fineblit as independent counsel to investigate Boucher's respective complaints against Grey and Schulz. After investigation, Fineblit declined to forward the complaints against both lawyers to the Conduct Committee for failure to meet the LSA's threshold test. Declining to forward the complaints effectively dismissed Boucher's complaint, as the Conduct Committee is the body at the LSA that determines whether there is a hearing and/or sanctions. While Boucher appealed both findings, the appeal panel made up of three law society benchers dismissed the complaints against Grey and Schulz.<sup>101</sup>

Fineblit's two separate letters to Boucher declining to forward the complaints against Grey and Schulz demonstrate the lack of transparency and accountability that imbue law society disciplinary processes.<sup>102</sup> Both letters were attached via Google Drive to Kenneth Jackson's article.<sup>103</sup> Fineblit's letter to Boucher regarding his dismissal of the complaint against Grey explains that one of Boucher's allegations against Grey was that he allowed Boucher to plead guilty prior to confirming whether the powder seized was drugs.<sup>104</sup> While Boucher explained to Jackson that he simply wanted to plead guilty to get out of prison in the aftermath of his common-law wife's death, Fineblit maintained in the letter that Grey followed Boucher's informed instructions. Specifically, Fineblit stated that extenuating circumstances "obviously led you [Boucher] to admit facts that were untrue just to get out of custody. This is not however the responsibility of Mr. Grey."<sup>105</sup> Therefore, despite possible negligence, Fineblit did not find that Grey engaged in any conduct that breached law society rules or amounted to professional misconduct.

In Fineblit's letter to Boucher declining to forward the complaint against Schulz, Fineblit found no evidence to support discrimination against Boucher as an Indigenous man or based on his criminal record.<sup>106</sup>

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

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

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

<sup>104</sup> "Letter from Allan Fineblit to Clayton Boucher Regarding Complaint Against Leighton B. U. Grey, Q.C." (18 January 2018), online: <[drive.google.com/file/d/1McORXGn-THdHfLLqGDIZsjta\\_RFbfiWu/view](https://drive.google.com/file/d/1McORXGn-THdHfLLqGDIZsjta_RFbfiWu/view)>.

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

<sup>106</sup> "Letter From Allan Fineblit to Clayton Boucher Regarding Complaint Against Erwin R. Schulz by Clayton Boucher" (31 January 2018) <[drive.google.com/file/d/1ZL9jcnD](https://drive.google.com/file/d/1ZL9jcnD)>

With respect to the seized substance and subsequent test results, Fineblit held that “there is however no good explanation for why he would have assumed the samples were ‘spitballs’” and that Schulz “had no analysis to suggest they were controlled drugs” and consequently made a mistaken conclusion.<sup>107</sup> Most significantly, in finding no professional misconduct, Fineblit wrote:

Does Mr. Schulz’s conduct in jumping to a mistaken conclusion amount to professional misconduct? It was certainly a mistake that resulted in a wrongful conviction. It was a mistake unsupported by the text of the document he relied upon. In the end however I conclude it was a mistake and nothing more.<sup>108</sup>

With respect to both complaints, Boucher’s appeals to the Law Society were dismissed by an appeal panel made up of benchers.<sup>109</sup> In the complaint against Grey, the panel found that it was not unreasonable for a defence lawyer to rely on the Crown’s word regarding drug tests without further investigation. However, in the complaint against Schulz, the appeal panel found that Fineblit’s findings were unreasonable and allowed the appeal. The panel held that Fineblit was wrong in accepting Schulz’s claim that the reason the analyst certificates were withheld was because they were in the middle of a plea negotiation, citing that Crown disclosure obligations persist even during such negotiations. The process after an appeal involves the matter being referred to the Conduct Committee panel. Nonetheless, the Conduct Committee still dismissed Boucher’s complaint against Schulz after Schulz met with a bencher appointed by the Conduct Committee to resolve the issue.<sup>110</sup>

### ***3. What Do These Cases Say About Law Society Disciplinary Processes?***

Although both cases relate to the LSA, the similarity in the disciplinary processes of law societies across Canada suggests that the concerns with these cases are likely applicable to other law societies. Both the Alberta Disclosure Wrongful Convictions and Clayton Boucher’s wrongful conviction illustrate a disciplinary system for lawyers in Canada that lacks transparency and accountability through disciplinary processes. These

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> “*Clayton Boucher v Leighton B.U. Grey, QC*” (17 May 2018), online: <[drive.google.com/file/d/1ge\\_Pqg6naB1BJUiMtpy7HgGQvdaYAJ\\_y/view](https://drive.google.com/file/d/1ge_Pqg6naB1BJUiMtpy7HgGQvdaYAJ_y/view)>.

<sup>110</sup> Jackson, *supra* note 95.

processes rely too heavily on decision-making that is overly discretionary where no fulsome explanation of decision-makers' reasoning is required and where a decision-maker's reasoning does not need to be made publicly available unless a complaint goes to a hearing.

Boucher's struggle to compel the LSA to discipline Schulz and Grey for their roles in Boucher's wrongful conviction is illustrative of the Law Society's highly discretionary approach to dismissing complaints. For example, the Intake and Resolution Department initially dismissed both complaints without providing adequate reasoning for doing so and without publishing its decision, as there is no requirement to make such decisions publicly available.

The LSA's website explains that complaints are frequently dismissed at this stage because they do not meet the threshold test requiring both that the conduct occurred and that the lawyer would be disciplined for that conduct. However, it is unclear how a determination of whether a lawyer would be disciplined for their conduct in a wrongful conviction can be made without a further investigation into the complaint – an investigation, which, paradoxically can only occur if the threshold test is met. Moreover, the Law Society documents disclosed in Jackson's article demonstrate that Fineblit was accorded wide discretion in determining whether misconduct occurred. For example, Fineblit decided that the contradictory stories surrounding the negative drug test results amounted to a mistake on Schulz's part, rather than professional misconduct.<sup>111</sup>

The LSA does not explicitly define professional misconduct in its Code of Conduct. Professional misconduct is defined by the LSO, however, as “conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession.”<sup>112</sup> We will never know for certain whether Schulz knew about the negative drug test results. Nonetheless, assuming that there were spitballs attached to the negative drug test results seems to discredit the legal profession, as it demonstrates a violation of the presumption of innocence, while also suggesting that Crown prosecutors are more concerned with obtaining a conviction than reaching a fact-based outcome. Yet, Finneblit did not rely on any definition of professional misconduct in his report.

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<sup>111</sup> Letter, *supra* note 106.

<sup>112</sup> Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2014, Rule 1.1-1.



Ultimately, Boucher's experience complaining to the LSA illustrates the Law Society's willingness to take lawyers' explanations at face value instead of more critically engaging with a lawyers' actions and how those actions affect the reputation of the legal profession as a whole. The wide discretion given to investigators, coupled with very few regulatory rules to follow, suggests that the decision-making surrounding whether to dismiss a complaint lacks transparency. This may create opportunities for impunity for lawyers despite having played a role in a wrongful conviction.

There are also several issues with disciplinary processes for prosecutors across Canada which may suggest a culture of secrecy and lack of accountability among prosecutors. For example, the former head of Alberta's prosecution service, Gregory Lepp, denied the allegation that autopsy reports which could have exonerated convicted individuals were not disclosed to their respective lawyers.<sup>113</sup> It is difficult to know what actually transpired given the pending external review,<sup>114</sup> and there was no evidence of any complaints to the LSA.

The *Law Society Act* in Ontario and the *Legal Profession Act* in Alberta give both law societies the power to investigate conduct that comes to the attention of the law society by complaint or other means.<sup>115</sup> The CBC's investigation was national news, but there is no evidence that the LSA used its powers to investigate the prosecutors involved. This, coupled with the lack of transparency in disciplinary proceedings against prosecutors and an unwillingness to track complaints internally, suggests a lack of checks and balances on prosecutorial discipline. Further, limited public records about complaints might work to protect prosecutors rather than discipline them, suggesting a culture of secrecy embedded within the mechanisms for disciplining prosecutors internal to the Attorney General's Office.

A culture of secrecy also seems to persist in disciplining both prosecutors and defence counsel through law societies. For instance, there was no public record of Boucher's complaints prior to Kenneth Jackson's article, and the initial dismissal of Boucher's complaints by the Intake and Resolution Department did not provide an explanation of why the complaint was dismissed.<sup>116</sup> Both the lack of transparency in disciplinary processes and the lack of precise rules for determining whether a complaint

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<sup>113</sup> Cashore, Ward & Dunn, *supra* note 90.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Law Society Act*, *supra* note 63, s 49.3(1); *Legal Profession Act*, RSA 2000 c L-8, s 53(1).

<sup>116</sup> Jackson, *supra* note 95.

should be dismissed mean that the public, and often complainants themselves, are not privy to the precise reasons why a lawyer was not disciplined for their alleged conduct. Although law societies are tasked with regulating the legal profession in the public interest, this does not seem to extend to disciplinary proceedings against their members. Without adequate disciplinary mechanisms, it appears there is very little incentive for defence counsel and prosecutors to ensure that their actions do not result in a wrongful conviction.

## V. WHERE DO LAW SOCIETIES GO FROM HERE?

In order to play a greater role in preventing wrongful convictions, there are a number of reforms law societies across Canada can implement. Law societies should take cultural competence more seriously since it helps lawyers understand the systemic racism and colonial legacies in the justice system that make Indigenous peoples particularly vulnerable to false confessions and false guilty pleas. Law societies can do this by including cultural competence as a distinct lawyer competency in their rules of professional conduct. Doing so would allow for complaints of incompetency against lawyers who do not demonstrate cultural competence in their practice.

In doing so, however, Nicholas Healy argues law societies must ensure that in fulfilling their cultural competence obligations, lawyers are not only provided with training.<sup>117</sup> Instead, law societies must also work towards ensuring that any training given requires attendees to actively implicate themselves in what is being taught, such as pushing lawyers to understand their individual role in perpetuating discriminatory systems. Healy also maintains that in a system driven by complaints, law societies should clearly communicate to their members that lawyers can and will be disciplined for any kind of cultural ineptitude. As such, disciplinary hearings that have any element of cultural ineptitude should make explicit references to it.

Second, while defence counsel are ethically bound in the Model Rules of Professional Conduct to not plead their clients guilty if they are innocent, there is nothing in the Model Rules that puts an onus on defence counsel to investigate the true voluntariness of their clients' guilty pleas.<sup>118</sup>

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<sup>117</sup> Nicholas Healy, "Ethics, Legal Professional and Reconciliation: Enacting Reconciliation through Civility" (2018) 26 *Dalhousie J Legal Stud* 113 at 113.

<sup>118</sup> Model Rules, *supra* note 4, Rule 5.1-8.

While this is a legal requirement in the *Criminal Code*, a lawyer who has not been sufficiently trained in cultural competence may be more likely to engage in miscommunications with their client due to cultural differences. Accordingly, a client's behaviours and motivations may be misinterpreted as voluntarily pleading guilty when that is not the case.

Therefore, the Federation of Law Societies of Canada should consider including additional ethical rules on guilty pleas to ensure that lawyers are thinking critically about cultural circumstances that may lead their client to enter into a false guilty plea to ensure that guilty pleas are truly voluntary. Nonetheless, guilty pleas are part of larger issues in Canada, including, among other things, backlogged courts and underpaid and overworked defence lawyers. Consequently, changing ethical rules alone will not dispense with the false guilty plea problem.

In addition, law societies must reform their disciplinary practices in order to play a greater role in preventing wrongful convictions in Canada. First, there must be more transparency in disciplinary proceedings, starting at the intake stage. When complaints are dismissed at the intake stage, a more in-depth explanation of the law society's reasoning should be given to complainants. Moreover, as complaints proceed through the disciplinary process, documents discussing why a complaint was dismissed at the investigatory stage should be made publicly available by law societies. Greater publicity of disciplinary processes will allow for greater accountability within the law society, which can combat the potential for a culture of secrecy that allows for impunity.

While the Ministry of the Attorney General's Office has its own internal disciplinary mechanisms for prosecutors, *Krieger* allows law societies to discipline prosecutors for professional misconduct that falls outside prosecutorial discretion. Thus, law societies should take more initiative to discipline prosecutors when such misconduct occurs. Law societies also cannot simply rely on formal complaints to address professional misconduct.

Instead, law societies must take greater onus in investigating alleged professional misconduct that is made known through other sources, such as the news media. For instance, even though Amanda Carling published an article in the *Globe & Mail* about Richard Catcheway's wrongful conviction, there was no evidence to suggest that Catcheway's former defence counsel was investigated or disciplined by the Law Society of Manitoba. His former defence counsel continues to practice law today,

despite pleading his client guilty for a crime that he could not possibly have committed because he was imprisoned 200 kilometers away. In addition to sanctions, law societies might consider a model for dealing with professional misconduct that is more remedial in nature, including meeting with complainants and issuing formal apologies to individuals who were wrongly convicted as a result of their conduct. While law societies cannot single-handedly end wrongful convictions in Canada, there are various ways in which they can work to prevent wrongful convictions and ensure that they are not perpetuating the problem.

## **VI. CONCLUSION**

Law societies are supposed to self-regulate in the public interest. However, law societies currently play a role in wrongful convictions in Canada. This role is played both by not prioritizing cultural competence and by inadequately deterring lawyers from engaging in professional misconduct that results in wrongful convictions through a lack of transparency and culture of secrecy in disciplinary processes. If law societies do not take measures to ensure that they are part of the solution to wrongful convictions instead of part of the problem, an important question arises: are law societies self-regulating in the public interest or self-regulating in the interests of their members?