47th ANNUAL

FALL CONFERENCE

NOVEMBER 15-16, 2019

CONFERENCE MATERIALS · #CLACPD · *criminallawyers.ca*

The 47th Annual CLA Fall Conference – being held on November 15-16, 2019 has been accredited for 1 hour of EDI Professionalism Content and 2 hours and 10 minutes of Professionalism content. Six hours and 55 minutes substantive (if hours are not needed for EDI and/or professional they can be added to substantive)

Date & Location
November 15-16, 2019
Toronto Marriott
Downtown

PASSWORD:
CLA2019

Conference Co-Chairs
Elizabeth Barefoot
Lori Anne Thomas

Committee
Craig Bottomley
Michael Lacy
Eric Neubauer
Sevag Yeghoyan

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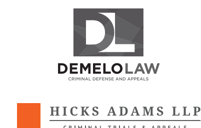
THOMSON REUTERS, BRAUTI THORNING LLP BT LEGAL	COPPER LAW FIRM, HENEIN HUTCHISON LLP	 DEMELO LAW, HICKS ADAMS LLP

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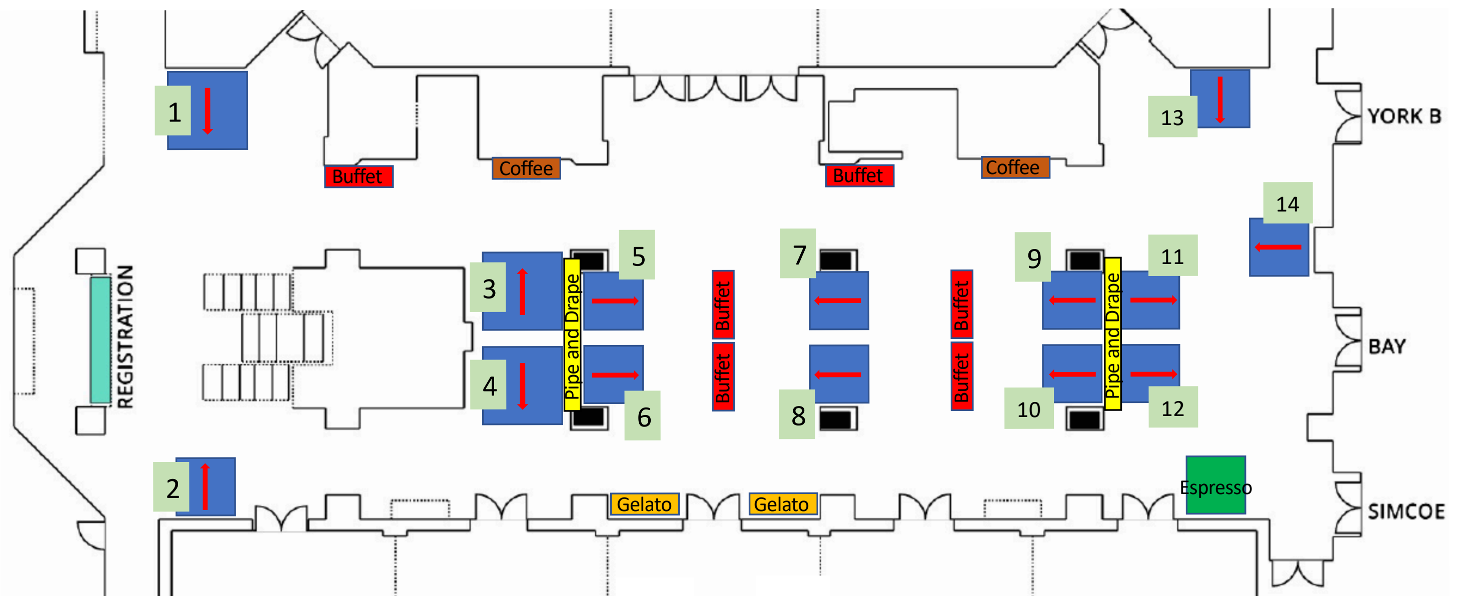

EXHIBITORS FLOORPLAN

Criminal Lawyers' Association 2019 Fall Conference
Toronto Marriott Downtown Eaton Centre Hotel
Ballroom Foyer Exhibitor Table Layout

Exhibitor	Booth
Accounting for Law Inc.	7
CosmoLex	12
Drug Recognition Expert Consulting	10
Edward Jones	8
Emond Publishing	1
Giroux Imperial Robes Limited	13
Irwin Law Inc.	4
Law Practice Program (LPP) - Ryerson University	2
Legal Services Board of Nunavut	6
LexisNexis Canada	5
MKD International Inc.	11
Pardons Canada	14
Recovery Science Corporation	9
Thomson Reuters	3

EXHIBIT PASSPORT

Be sure to visit all the exhibitors at the CLA 2019 Fall Conference. Take a few moments to meet the exhibitors and learn about their products and services.

Make sure to ask each exhibitor to stamp the appropriate box on your exhibit passport card for a chance to win one of the following prizes:

- **One FREE registration** to the 48th Annual Fall Conference
- **One FREE registration** to the 2020 CLA Spring Conference
- **One $100 Amazon.ca Gift Card** courtesy of CosmoLex
- **One prize of a 25% discount on bookkeeping fees** for 6 months courtesy of Accounting for Law Inc.

The prize winners will be drawn at a later date and announced in an upcoming CLA Communiqué.

Women in Criminal Law Dinner

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FRIDAY LUNCHEON

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47th ANNUAL
CRIMINAL LAWYERS' ASSOCIATION
FALL CONFERENCE
NOVEMBER 15-16, 2019

Advocacy Lecture in Memory of the Honourable Justice John Sopinka

This annual luncheon is offered in memory of the Honourable Justice John Sopinka. Justice Sopinka was a respected advocate for 29 years and as a Justice of the Supreme Court of Canada continued to made significant contributions to criminal justice in Canada.

While criminal law was not the main stay of his practice he more than understood not only the role of defence counsel, but the absolute necessity of defence counsel in a democracy. In November 1997, shortly after he was to appear again at this very conference, Justice Sopinka passed away at age 64. Shortly thereafter, as a tribute, the board of Governors of the Criminal Lawyers' Association instituted this advocacy lecture in his memory.

2019 Speaker
Frank Addario

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Summary of Advocacy Lecturers

2018 Marie Henein
2017 Tom Curry
2016 The Honourable Jody Wilson-Raybould
2015 Clayton Ruby
2014 The Honourable Beverley McLachlin
2013 Jeffrey R. Manishen
2012 Alan N. Young
2011 John Rosen
2010 Marlys Edwardh
2009 David Scott
2008 Alan D. Gold
2007 William Trudell
2006 The Honourable Patrick Lesage
2005 The Honourable Michael Moldaver
2004 Brian Greenspan
2003 Eddie Greenspan
2002 The Honourable Frank Iacobucci
2001 Don Stuart
2000 William Moffat
1999 The Honourable Michel Proulx
1998 Alan Lenczner

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- The Practitioner's Criminal Code (Gold)
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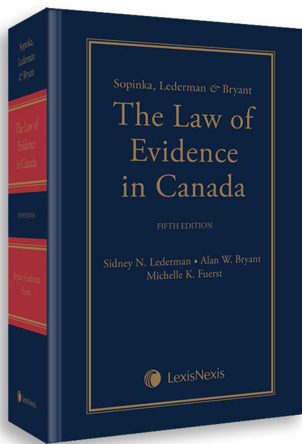

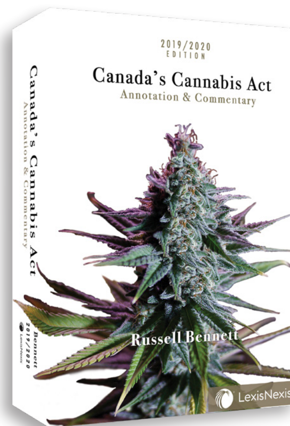

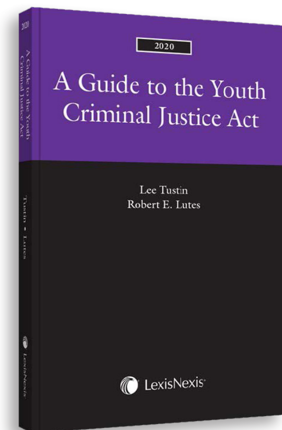

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COCKTAIL RECEPTION

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G. Arthur Martin Criminal Justice Award

2019 Award Winner:
The Honorable David H. Doherty

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Award History

This annual award named for G. Arthur Martin, is awarded to an individual in Canada who has made a significant contribution to criminal justice. The award selection committee consists of:

- The President of the Criminal Lawyers' Association
- The current Chief Justice of Ontario or their designate
- A prominent criminal law academic nominated and approved by the governing body
- A member of the community nominated and approved by the governing body

The 2019 selection committee

- **Michael Lacy**, *CLA President*
- **Chief Justice George Strathy**
- **Shannon Kari**, *Legal Journalist, Canadian Lawyer/Law Times group*
- **Palma Paciocco**, *Professor, Osgoode Hall Law School*

Past recipients

1989	G. Arthur Martin
1990	Arthur Maloney
1991	John J. Robinette
1992	Charles L. Dubin
1993	John Ll. Edwards
1994	Martin L. Friedland
1995	Antonio Lamer
1996	Earl J. Levy
1997	Alan D. Gold
1998	Louise Arbour
1999	Peter deC. Cory
2000	Austin Cooper
2001	Edward Greenspan
2002	Marlys Edwardh
2003	Fred Kaufman
2004	James Lockyer
2005	Jack Pinkofsky
2006	Donald Bayne
2007	Paul Copeland
2008	David G. Humphrey Sr.
2009	The Honourable Marc Rosenberg
2010	Brian Greenspan
2011	The Honourable Mr. Justice Morris J. Fish
2012	Don Stuart
2013	The Honourable Roland (Roy) McMurty
2014	Richard C.C. Peck
2015	Mark J. Sandler
2016	Frank Addario
2017	The Honourable Beverley McLachlin
2018	John M. Rosen

SATURDAY LUNCHEON

Martin Medal luncheon generously sponsored by

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Transcription of the Martin Medal and Sopinka Lecture Proceedings generously supplied by Neeson & Associates Court Reporting and Captioning Inc.

The association also thanks the volunteers from the Seneca College Law Program.

CONFERENCE SCHEDULE • FRIDAY, NOVEMBER 15, 2019

8:45 a.m. - 9:00 a.m. **Welcoming remarks** by Michael Lacy, President, CLA

9:00 a.m. - 9:40 a.m. **Don't Blow It: Impaired Litigation in the Wake of Bill C-46**

- Brett Moodie (MAG)
- Michelle Johal, Defence Lawyer

9:40 a.m. - 10:20 a.m. **Three's a Crowd: Sexual Assault Litigation in the Wake of Bill C-51**

- Adam Weisberg, Defence Lawyer
- Francesca Yaskiel, Barrister and Solicitor

10:20 a.m. - 11:00 a.m. **Not Every One's a Winner: Prison Conditions and Parole**

- Michael Mandelcorn, Defence Lawyer
- Jeff Rybak, Defence Lawyer
- Chris Sewrattan, Criminal Lawyer

Break

11:30 a.m. - 12:00 p.m. **Cultural Assessments Reports for Black Clients in Sentencing and Bails**

- Gail Smith, Defence Lawyer
- Nana Yanful, Black Legal Action Centre (BLAC)

12:00 p.m. - 12:30 p.m. **Key Considerations When Representing Aboriginal Clients**

- J. Scott Cowan, Defence Lawyer
- Shaunna Kelly, Defence Lawyer
- Shannon McDunnough, Defence Lawyer

12:30 p.m. - 1:00 p.m. **Sopinka Lecture**

How Can you Defend Those People and Other Notes from the Frontlines of Defending in the Criminal Courts

Featuring Frank Addario, Addario Law Group and CLA Past President

Luncheon

1:00 p.m - 2:30 p.m. **Fireside Chat** with The Honourable Enzo Rondinelli and The Honourable Aston Hall.

2:30 p.m - 3:15 p.m. **Litigating Search Warrants in the Shadow of Step Six**

- Kerry Benzakein, Crown counsel at Public Prosecution Service of Canada
- Nathan Gorham, Gorham Vandebeek LLP
- Lynda Morgan (MAG), Assistant Crown Attorney

3:15 p.m - 3:45 p.m. **Dealing Effectively with Concurrent Criminal and Regulatory Proceedings**

- Lisa Freeman, Defence Lawyer
- Megan Savard, Addario Law Group LLP

3:45 p.m - 4:15 p.m. **Keynote: No Kill Bill C-75 – Now What?**

- Daniel Brown, Defence Lawyer
- Stephanie DiGiuseppe, Ruby Shiller Enenajor DiGiuseppe, Barrister
- Annamaria Enenajor, Ruby Shiller Enenajor DiGiuseppe, Barrister
- Richard Litkowski, Hicks Adams LLP

4:15 p.m - 5:00 p.m. **What's Yours is Mine: Getting Paid Through Alternative Means**

- Gregory Lafontaine, Defence Lawyer

5:00 p.m - 5:30 p.m. **CLA Annual General Meeting**

5:30 p.m - 7:30 p.m. **Cocktail Reception**

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CONFERENCE SCHEDULE • SATURDAY, NOVEMBER 16, 2019

9:00 a.m. - 9:30 a.m. **Decoding Digital Evidence**

- Gerald Chan, STOCKWOODS Barristers
- Nader R. Hasan, STOCKWOODS Barristers

9:30 a.m. - 10:15 a.m. **Emerging Developments in DNA Technology – transference and trace evidence**

- Jack Laird, Section Head – Biology, Centre of Forensic Sciences, Ministry of the Solicitor General
- Jill R. Presser, Defence Lawyer
- The Honourable David Rose, Ontario Court of Justice

10:15 a.m. - 11:00 a.m. **Top 15 Cases**

- The Honourable Bruce Durno, Superior Court of Justice
- The Honourable Michal Fairburn, Court of Appeal for Ontario
- The Honourable Mara Greene, Ontario Court of Justice

Break

11:30 a.m. - 12:15 p.m. **Mental Health Check-In for Criminal Practitioners**

- Orlando Da Silva, LSM, Senior Crown Counsel, Serious Fraud Office, Prosecution Division; Chief Administrator, Administrative Tribunal Support Service of Canada
- Janine Cutler, Ph.D., C. Psych, Clinical and Forensic/Correctional Psychology, CBT Associates

12:15 p.m. - 12:45 p.m. **Conducting a Trial Like You're Going to Lose**

- David Humphrey, Greenspan Humphrey Weinstein
- Jamie Klukach (MAG), Crown Law Office Criminal
- The Honourable John Laskin, Court of Appeal for Ontario

12:45 p.m. - 1:15 p.m. **Ethical Dilemmas: I can't do that! Don't ask me to do that! Here's why I did that!**

- Mark Sandler, Cooper, Sandler, Shime & Bergman LLP

1:15 p.m. - 3:00 p.m. **Martin Medal luncheon**

Featuring Justice David. H. Doherty. Noted as the longest-serving justice for the Court of Appeal for Ontario, Justice Doherty is being recognized for his lifelong career and contribution to the administration of justice as well as legal educator.

CRIMINAL LAW & LITIGATION/ADVOCACY CONFERENCE

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MAY 1 - 3, 2020

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with additional top speakers from the judiciary and bar.

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2. Litigation/Advocacy (suitable for all types of litigators).

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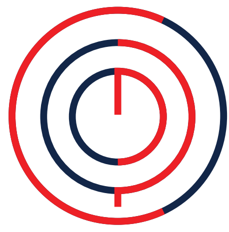

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Studio Schedule

Please note: *Photography sessions at the studio are first come first served.*

November 15, 2019

9:10 a.m. — 10:00 a.m.
10:30 a.m. — 11:30 a.m.
11:45 a.m. — 12:15 p.m.
12:45 p.m. — 2:00 p.m.
2:50 p.m. — 3:15 p.m.
3:30 p.m. — 4:00 p.m.
4:30 p.m. — 5:15 p.m.
5:30 p.m. — 7:30 p.m.
(During Cocktail Reception)

November 16, 2019

9:15 a.m. — 9:45 a.m.
10:30 a.m. — 11:45 a.m.
12:30 p.m. — 1:00 p.m.

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FALL CONFERENCE

NOVEMBER 15-16, 2019

FRANK ADDARIO

Frank leads ALG's criminal, quasi-criminal, white collar criminal defence and investigations practice. He is an experienced trial and appellate lawyer, regularly appearing in the trial courts and on appeals before the Ontario Court of Appeal. He has one of the leading Supreme Court of Canada practices in the country, having appeared in that Court over 40 times as counsel. Frank is also sought after for internal and government investigations. In 2016, he was awarded the G. Arthur Martin Criminal Justice Medal for his life-long commitment to the criminal law. Frank is a fellow of the American College of Trial Lawyers, the premier organization of trial lawyers in North America. He is also a fellow of the American Board of Criminal Lawyers. He is ranked by Chambers Canada for white collar crime and government investigations and as a top criminal law practitioner nationwide. Who's Who Legal recommends Frank as a Global Leader in business crime defence and investigations. He is a Director of the Canadian Civil Liberties Association, an advisor with the Supreme Court Advocacy Institute and a past President of the Criminal Lawyers' Association.

KERRY BENZAKEIN

Kerry was called to the Ontario Bar in 2002 after articling at the Crown Law Office – Criminal. Following her call, she was a sole practitioner in criminal defence until she joined the Public Prosecution Service of Canada in the fall of 2007 and became Crown counsel. Kerry was the Deputy Team Leader at Old City Hall from 2010 to 2015. Since then, she has conducted large and small drug prosecutions in Toronto, Newmarket and Oshawa. Kerry also runs a half marathon in under 2 hours.

DANIEL BROWN

Daniel Brown is a criminal defence lawyer and lead counsel at Daniel Brown Law LLP, recently recognized as one of Canada's 10 best boutique criminal law firms by Canadian Lawyer Magazine. Since his call to the bar in 2005, Daniel has devoted his practice to criminal, constitutional and regulatory law and has appeared at every level of court in Ontario and at the Supreme Court of Canada as both an appellant and an intervenor. He is certified by the Law Society of Ontario as a specialist in criminal law and sits as a Vice President of the Criminal Lawyers' Association (CLA). In his role as VP with the CLA, Daniel chairs both the Communications Committee and the Litigation Committee, which directs interventions on behalf of the CLA to the Court of Appeal for Ontario and the Supreme Court of Canada. He also acts as review counsel for Innocence Canada. Daniel co-authored *Prosecuting and Defending Sexual Offence Cases* from Emond Publishing and contributed a chapter to *Social Media and Internet Law* (2nd Ed.) from LexisNexis. He has also written articles for a number of legal journals and editorials for The Toronto Star on a wide range of criminal law topics. Outside the courtroom, Daniel mentors young lawyers and frequently lectures at law schools and at continuing legal education programs hosted by the Crown and defence bar.

GERALD CHAN

Gerald Chan is a partner at Stockwoods LLP in Toronto where he practices criminal, constitutional and regulatory litigation. He has been counsel in 21 cases in the Supreme Court of Canada, including cases on digital privacy and electronic searches and seizures, foreign corruption, insider trading, and medical marijuana. He is also a member of the Ontario Inmate Appeal Duty Counsel Program (a roster of criminal lawyers who argue pro bono appeals for indigent inmates) and argues regularly before the Court of Appeal of Ontario. He also frequently acts for lawyers, including as LawPRO counsel on claims of ineffective assistance of counsel. Gerald is co-author of the 8th and 9th editions of *Sentencing* (LexisNexis), as well as *Digital Evidence: A Practitioner's Handbook* (Emond Publishing). He is co-editor of *Digital Privacy: Criminal, Civil and Regulatory Litigation* (LexisNexis). He is on the faculty of the Federation of Law Societies of Canada's National Criminal Law Program, and he is a frequent speaker at National Judicial Institute conferences. He is President of the Federation of Asian Canadian Lawyers, Ontario, and a member of the Judicial Appointments Advisory Committee. In 2019, *Canadian Lawyer* named Gerald one of Canada's Top 25 Most Influential Lawyers in the "Human Rights, Advocacy and Criminal" category. Before joining Stockwoods, Gerald clerked for the Honourable Rosalie Silberman Abella at the Supreme Court of Canada. He graduated as co-Gold Medallist from Osgoode Hall Law School.

J. SCOTT COWAN

Scott Cowan carries on a mixed trial and appellate practice across Ontario and Nunavut. Scott received his LL.B. from the University of Saskatchewan in 2000 and completed his articles with Greenspan, Henein & White in 2001, and commenced his career practicing in Toronto as an associate at Derstine Penman. In 2012, Scott completed his LL.M. in Criminal Law and Procedure at Osgoode Hall Law School. He has served as an Adjunct Professor in Criminal Procedure and Youth Justice at the Faculty of Law - University of Western Ontario. He is a member of the Legal Aid Area Committee at London and has served as a Regional Director of the Criminal Lawyers' Association, and as a member of Innocence Canada's review committee. He currently serves as President of the Huron Law Association. He has been tapped as an authority on criminal law by Peter Mansbridge on The National, CFRB radio, The Globe and Mail, the Toronto Star, National Post, and London Free Press.

DR. JANINE CUTLER

Dr. Cutler has worked in the mental health and criminal justice systems. She was a Program Manager for the Canadian Mental Health Association, prior to working within Corrections. Dr. Cutler has been the Chief of Psychology at Stony Mountain Institution, Ontario Correctional Institute and Grand Valley Institution for Women. She worked in a private practice setting prior to moving to Toronto, and she currently works at CBT Associates, North York Clinic. Dr. Cutler has expertise in the assessment and treatment of violent, sexual and/or special needs male and female offenders. She also has expertise in conducting other psychological and medical-legal assessments. Dr. Cutler has worked with individuals, couples, families and groups. She has worked extensively in the area of mental health, abuse, trauma, anger and emotions management, grief and loss, identity and self-esteem, self-compassion, personality development, and substance abuse. She has been trained to provide workshops in the area of compassion fatigue and vicarious trauma.

ORLANDO DA SILVA

Orlando Da Silva was appointed Chief Administrator of the Administrative Tribunals Support Service of Canada (ATSSC) on October 28, 2019. The ATSSC is responsible for providing support services and facilities to 11 federal administrative tribunals by was of a single, integrated organization. Prior to joining the ATSSC, Mr. Da Silva served for nearly 25 years as a trial lawyer—most recently as a Senior Crown Counsel for the Province of Ontario's Serious Fraud Office—a specialized, expert team of police and crown attorneys responsible for investigating and prosecuting serious financial crimes, corruption, and bribery cases. He is also a former partner of one of Canada's largest law firms and former leader of the Corporate-Commercial Litigation team and member of the Indigenous Litigation Team for the Ontario Ministry of the Attorney-General. In 2019, Mr. Da Silva was a Bencher (Governor) of the Law Society of Ontario, which regulates Ontario's 55,000 lawyers and 12,000 paralegals. From 2014 to 2015, he served as President and CEO of the Ontario Bar Association. During this tenure, he championed a Canada-wide mental health and wellness campaign targeted at the legal profession, speaking publicly about his own experience overcoming depression that has led to a successful and rewarding professional and personal life. Mr. Da Silva is a recipient of a Law Society of Ontario Medal, the Ontario Bar Association's Distinguished Service Award, the Lexpert Zenith Award for Change Agents, the Deputy's Award of Excellence, the Tom Marshall Award of Excellence for Public Sector Lawyers, and the Transforming Lives Award from Canada's Centre for Addiction and Mental Health. He has also been recognized by Canadian Lawyer Magazine as one of the "Top 25 Most Influential" lawyers in Canada.

STEPHANIE DIGIUSEPPE

Stephanie DiGiuseppe is a partner at Ruby, Shiller, Enenajor, DiGiuseppe, Barristers, where she practices criminal, constitutional and regulatory litigation. Stephanie received her J.D. from Osgoode Hall Law School and her B.A. from McGill University. She has been practicing criminal law since 2011 at all levels of Court in Ontario, and regularly appears before the Ontario Superior Court of Justice and Ontario Court of Appeal. Stephanie is also involved in justice reform advocacy. She was a vocal opponent of bill c-75 and a member of the CLA's subcommittee killbill C-75.

THE HONOURABLE BRUCE DURNO

Justice Bruce Durno was born in Niagara Falls, Ontario. He graduated *cum laude* from Harvard University, in Cambridge, Massachusetts in 1971 with a Bachelors of Arts in Government and obtained the degree of Juris Doctor from the Faculty of Law at the University of Toronto. He was articled at Humphrey, Locke, Ecclestone and Kane, a firm to which he returned after being called to the Ontario Bar in 1976. His practice was exclusively in criminal law. He served as the President of the Ontario Criminal Lawyers' Association from 1994-1998. He was appointed to the Superior Court in Ontario in June of 1999 and assigned to sit in Brampton. Between 2000 and 2008 he was the Regional Senior Judge of the Central West Region.

In addition, Justice Durno has been involved in the following committees and projects: Member of the Criminal Justice Review Committee: 1997-1998; Co-chair with Mr. Justice David Watt of the Superior Court of Justice Report: *New Approaches to Criminal Trials in the Superior Court of Justice*, 2006; External Lead for the Justice on Target Initiative of the Attorney General regarding delays in the Ontario Court of Justice, and Chair of the Criminal Rules Committee for the Superior Court of Justice.

ANNAMARIA ENENAJOR

Annamaria Enenajor is a partner at Ruby Shiller Enenajor DiGiuseppe, Barristers. She currently practices criminal defence and constitutional law. She graduated from McGill Faculty of Law in 2012 as the David L. Johnson gold medalist. From 2012 to 2013, Annamaria clerked at the Supreme Court of Canada for Justice Richard Wagner. She then practiced litigation in the New York office of an international law firm, where she focused on defending government enforcement actions and conducting internal investigations into allegations of corruption and bribery. She is a strong public advocate for cannabis decriminalization and frequently writes, lectures and speaks to the media on this topic. She is the founder and Director of the Campaign for Cannabis Amnesty and sits on the Board of Directors of the Open Democracy Project.

THE HONOURABLE MICHAL FAIRBURN

Justice Fairburn obtained her undergraduate and law degrees from the University of Toronto and was called to the Ontario Bar in 1992. For over two decades, Justice Fairburn worked as Crown counsel and then general counsel within the Ministry of the Attorney General for Ontario. In 2013 she became a partner at Stockwoods LLP. Justice Fairburn was appointed to the Superior Court of Justice in December 2014, after which she sat as a trial judge in Brampton. She was appointed a judge of the Court of Appeal for Ontario in July 2017. Justice Fairburn held many roles within the administration of justice, including serving as an advisor to the Supreme Court Advocacy Institute. She was appointed a Fellow of the American College of Trial Lawyers and sat on The Advocates' Society's Board of Directors. She was a member of the Justice and Media Liaison Committee. She has been and remains actively involved in legal education, both within and outside of Canada, including with the National Judicial Institute. She is also the recipient of many awards and recognitions, including the Catzman Award for Professionalism and Civility.

LISA FREEMAN

Lisa Freeman is a lawyer practicing with Courtyard Chambers. She is a graduate of the Faculty of Law, University of Toronto and was admitted to the Ontario Bar in 1994. Lisa's focus is on defending and prosecuting professional discipline cases and representing respondents in workplace and organizational investigations. For 16 years, Lisa was a Discipline Counsel with the Law Society of Ontario, prosecuting complex professional discipline matters. Lisa has appeared at all levels of court in Ontario. Since 2009, Lisa has taught Trial Advocacy at the University of Toronto, Faculty of Law. In addition, Lisa is a regular speaker and panelist at CPD programs offered by SOAR, the Law Society of Ontario, the Criminal Lawyers' Association and others.

NATHAN GORHAM

Nathan Gorham is a trial and appeal lawyer at Gorham Vandebeek LLP, with offices in Toronto as well as Saint John, New Brunswick. As a part-time professor at the University of New Brunswick, Mr. Gorham teaches Legal Ethics and various criminal law related courses. He recently co-authored the book *Prosecuting and Defending Drug Cases*. Mr. Gorham is also completing his doctoral studies at the University of Toronto, researching miscarriages of justice in bail system.

THE HONOURABLE MARA GREENE

Justice Greene was appointed to the Ontario Court of Justice in 2009. Prior to her appointment, she was a partner in the firm of Schreck & Greene. As counsel, Justice Greene appeared in all levels of Court, including the Ontario Court of Appeal and the Supreme Court of Canada. During her practice, Justice Greene was certified by the Law Society of Upper Canada as a specialist in criminal law, and developed particular expertise in mental health and youth matters in the criminal context. Justice Greene was the President of the Elizabeth Fry Society from 2005 to 2008, and is currently on the editorial board of the Annotated Youth Criminal Justice Act Service.

THE HONOURABLE ASTON HALL

Justice Hall immigrated to Canada in 1983 and studied law at York University's Osgoode Hall Law School. Called to the bar in 1995, Justice Hall was a sole practitioner in the field of criminal law until 2002. He then became a senior partner at Hall & Vaughan until going on to opening his own law firm, Aston J. Hall and Associate, in 2009. Justice Hall has been a Director of the Criminal Lawyers' Association, Toronto, since 2009 and a member of the court's education secretariat since 2014. Justice Hall was appointed to the Ontario Court of Justice bench in 2011, and now holds the position of Regional Senior Justice for the Toronto Region.

NADER R. HASAN

Nader practises criminal, regulatory and constitutional law at the trial and appellate levels. He defends clients accused of criminal misconduct in a variety of cases, including white collar crime (fraud, money laundering, foreign corruption), violent offences (homicide, terrorism, sexual assault), drug offences, and professional misconduct. He has an expertise in digital privacy law and search and seizure, and has appeared in many of the leading cases in this area. Nader maintains an active appeals practice and has been recognized by Best Lawyers magazine as one of Canada's leading appellate lawyers. He has appeared in 15 cases at the Supreme Court of Canada, including as lead counsel to the successful appellants in Clyde River v. Petroleum GeoServices Inc., 2017 SCC 40, a landmark Indigenous rights decision. Nader is a veteran Adjunct Professor of law at the University of Toronto, Faculty of Law, where he has taught the Law of Evidence and currently teaches a popular class on crime and punishment. He frequently lectures on criminal law and civil liberties issues and is an associate editor of the Canadian Rights Reporter. He is a co-author of *Sentencing, 9th edition* (LexisNexis, 2017), a co-author and co-editor of *Digital Privacy: Criminal, Civil and Regulatory Litigation* (LexisNexis, 2018), a co-author of a forthcoming book on *Search and Seizure* (Emond Publishing), and author of numerous articles on criminal and constitutional law. Nader brings a cross-border perspective to his practice. He previously practised with a leading litigation firm in New York, appearing in both New York State and U.S. federal courts. Today, he regularly advises Canadian citizens in relation to criminal and regulatory issues with a multi-jurisdictional dimension, and regularly advises Canadians detained abroad. Nader also acts regularly for clients seeking to vindicate their constitutional rights in high-profile cases. He has acted for the wrongfully convicted and asylum seekers. He also acts for Indigenous groups and environmental NGOs in environmental and constitutional cases. He also acts for civil liberties groups, including the Criminal Lawyers' Association (CLA) and the British Columbia Civil Liberties Association (BCCLA). Nader is a graduate of Harvard University (B.A.), the University of Cambridge (M.Phil), and the University of Toronto, Faculty of Law (J.D.). Upon graduation from law school, Nader clerked for the Honourable Marshall Rothstein of the Supreme Court of Canada.

DAVID HUMPHREY

David Humphrey is a partner in Greenspan Humphrey Weinstein, with an advocacy practice focused on criminal trials and appeals, regulatory offences and professional discipline matters. He has been named in The Best Lawyers in Canada in the practice area of criminal defence since 2007. In 2007 he was inducted as a Fellow of the American College of Trial Lawyers. Mr. Humphrey was counsel to the Honourable Patrick T. Galligan, Q.C. on his Inquiry into the Karla Homolka plea resolution. He served on the Board of the Criminal Lawyers' Association from 1993 - 2009 (as director, secretary and vice-president).

MICHELLE JOHAL

Michelle completed her Honours Bachelor of Arts degree at the University of Toronto and attended Queen's Law School. In law school she worked at the local Prison Law clinic. She articled for a prominent law firm on Bay street, and was called to the Ontario bar in 2002. She worked for a stint as a labour and employment lawyer. She recognized early on that civil litigation was not her passion. She started her criminal law career in 2005 working in "the trenches" as an associate with a busy firm next to the Scarborough courthouse. She worked in that capacity for seven years gaining considerable experience and appeared at all levels of court in Ontario. In 2011, she left the firm to start her own practice. She now has Peel-region based practice and travels throughout the Greater Toronto Area representing defendants charged with a variety of criminal offences. Michelle has successfully defended individuals charged with offences ranging from theft to homicide. Today the primary focus of her practice is in the areas of impaired driving, domestic violence, drug offences and representing youth. Michelle is a member of the Criminal Lawyers Association, the Peel Criminal Lawyers Association and the South Asian Bar Association. Michelle has lectured and presented papers at several continuing legal education programs held by the Law Society of Ontario and at a destination program. She is a lecturer at the Trial Advocacy course at Osgoode Hall Law School where she tries to encourage students to follow their dreams and pursue a career in criminal law. She has authored articles for local news media and has been invited as a guest speaker on a popular local television program. In her spare time (which is scarce with two young children) she practices hot yoga and aspires to become a certified yoga instructor.

SHAUNNA KELLY

Shaunna Kelly identifies as First Nation/Canadian/Irish and has been the Gladue Court Representative to the CLA for downtown Toronto since 2015. She is partner of a small firm that focuses a majority of their work on the indigenous courts in the GTA. She sits on several committees and advisory groups with the purpose of providing a voice for both criminal defence lawyers and the urban indigenous community. She is a member of the CLA and IBA.

JAMIE KLUKACH

Jamie has been Counsel with the Crown Law Office, Criminal Division (Attorney General of Ontario) since her call to the Bar in 1989. Her practice pertains primarily to criminal appellate litigation in the Ontario Court of Appeal and Supreme Court of Canada. She is actively involved in legal education. She has been an associate professor at Osgoode Hall Law School for the past 18 years, teaching courses in criminal procedure, evidence, sexual offences and the law of homicide. She has participated as faculty at numerous legal education programs conducted by the Ontario Crown Attorneys Association, the Criminal Lawyers' Association, the Advocates Society, the Law Society of Upper Canada, Osgoode Professional Development and others. She has presented on various criminal law topics including appellate advocacy.

GREGORY LAFONTAINE

Gregory Lafontaine graduated from Osgoode Hall Law School in 1988 with the Helen Kinnear Prize in Criminal Law. He articled at the firm of Gold & Fuerst and, after his call to the Bar in 1990, practiced there as an associate. In 1994, he started his own criminal defence practice and has also maintained a busy criminal law practice before both the trial and appellate courts. He has been counsel on many reported criminal law decisions of the Ontario Court of Appeal and has appeared as counsel on a number of occasions before the Supreme Court of Canada. He was the editor of the Ontario Criminal Lawyers' Association Newsletter, "For the Defence" from 1999 to 2007. Since 2005, he has been on the faculty of the Trial Advocacy course at the University of Toronto Law School.

JACK LAIRD

Jack started his career as a technologist, working in both evidence recovery and DNA analysis, with the CFS in 1994. He has held a series of progressively responsible positions since then, including as a reporting DNA scientist, as Assistant Section Head for Biology and as CFS Quality Manager. He left the CFS in 2009 to help start up a private forensic DNA testing and consulting company, including preparing for and securing its accreditation, and returned to the CFS as Section Head for Biology early in 2015. Jack holds a M.Sc. degree in Forensic Science from the University of Strathclyde in Glasgow, Scotland and an undergraduate degree in microbiology from the University of Guelph.

THE HONOURABLE JOHN LASKIN

Graduated from University of Toronto Law School 1969; Civil and public law litigation practice 1971-1994; Counsel to a number of commissions of inquiry; Appointed to the Ontario Court of Appeal, January 1994. Following his appointment to the Court of Appeal, Justice Laskin has organized and taught in many programs on decision writing and advocacy, both in Canada and abroad. For many years he was co-chair of the annual CIAJ Judgment Writing Seminar, and then of the NJI-CIAJ advanced judgment writing seminar, called Mastering the Skill of Judgment Writing. He contributes frequently to the NJI's oral judgments program. And he has taught decision writing to many individual courts and tribunals in Canada. He has also spoken on advocacy at numerous programs, including OCAT's Annual Written Advocacy seminar. Abroad, he has taught judgment writing, advocacy, and judicial education in Hong Kong, China, Albania, The Hague, Tanzania, Spain, Scotland, New Mexico, Barbados, Jamaica, and Ukraine. Articles: *A View from the Other Side: What I Would Have Done Differently If I Knew Then What I Know Now* (1998)*; Forget The Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums* (1999)*; What Persuades (or What's Going on Inside the Judge's Mind)* (2004)*; How to Write a Persuasive Factum: A Judge's View* (2004)*; Why Are You Telling Me All This?* (2008)*; The Right Stuff: Marvin Catzman and Legal Writing* (2008)*; Teaching Judgment Writing in Canada* (2011)*; Memories of Marc Rosenberg* (2016).

RICHARD LITKOWSKI

Richard Litkowski is an appellate lawyer at Hicks Adams in Toronto. He was called in 1991 after clerking with Chief Justice Lamer. His practice focuses on appeals at the Court of Appeal. He also has experience before the Supreme Court of Canada. He has taught Evidence and Advanced Evidence at Osgoode Hall Law School, co-authors an annual chapter in The Supreme Court Law Review, taught Criminal Procedure at the Bar Admission Course from 1993-2005, and was a Review Counsel at Downtown Legal Services at the University of Toronto from 1996-2006. He also appears in Toronto and Kingston as part of the Pro Bono Inmate Appeal Program.

MICHAEL MANDELCORN

Born in Montreal, Quebec. Received B.A. (Honours) in political science from McGill University, 1982. Received LL.B from Queen's University, 1985. Called to the Bar in 1987. Practiced briefly in Toronto, and then was Assistant Director of the Correctional Law Project, Faculty of Law, Queen's University from 1987 to 1994. From 1994 to present, sole practioner in Kingston, practicing in the areas of criminal and correctional law. From May 2016 to present, Federal Standing Agent for the Public Prosecution Service of Canada. Former regional director of the Ontario Criminal Lawyers' Association and former president of the Canadian Prison Law Association. Former president of the Kingston Criminal Defence Lawyers' Association. From October 2017 to November 2019, vice president of the Ontario Criminal Lawyers' Association.

SHANNON MCDUNNOUGH

Shannon McDunnough received her LL.B from the University of Toronto in 2012 and then articled at Rosen Naster LLP in Toronto. After her call to the bar in 2013, Shannon continued as an associate lawyer for the same firm. In 2017, Shannon moved to Kenora to take a position with Nishnawbe-Aski Legal Services Corporation, acting as Supervisory Criminal Duty Counsel for unrepresented citizens of the Nishnawbe Aski Nation. She has since returned to Toronto and is currently working as investigative counsel for the Ontario Civilian Police Commission. In this role, Shannon has had the opportunity to conduct a number of investigations and reviews into a variety of allegations and possible systemic issues related to police services, members, and boards.

BRETT MOODIE

Brett is the Deputy Crown Attorney for Haldimand, Norfolk and Brant Counties. He previously spent the bulk of his career in the Hamilton Crown Attorney's Office after a brief stint in private practice.

LYNDA MORGAN

Called to the bar in 2009, Lynda Morgan practiced as a defence lawyer for nine years in Toronto, before joining the Guns and Gangs Unit of the Ministry of the Attorney General as an Assistant Crown Attorney in March of 2019. She has extensive experience litigating complex search issues, including wiretaps, and has a strong interest and Charter and search related issues.

JILL R. PRESSER

Jill R. Presser was called to the Ontario Bar in 1997. She is the principal lawyer at the law firm of Presser Barristers. Ms. Presser's practice is primarily devoted to trial and appellate criminal defence. She regularly appears in courts at all levels, including the Supreme Court of Canada, and represents clients before administrative tribunals. She was a staff lawyer to the Hon. Stephen Goudge on the Commission of Pediatric Forensic Pathology in Ontario. Ms. Presser is often appointed amicus curiae by the Court of Appeal for Ontario in appeals involving unrepresented mentally disordered appellants. She also assists the Court of Appeal for Ontario as duty counsel for unrepresented inmate and in-person appellants. She was a senior lawyer member of the Consent and Capacity Board of Ontario from 2006 – 2014, and prosecuted for the Attorney General of Ontario on a part-time basis from 2001 to 2007. Ms. Presser was an adjunct Professor at the University of Toronto Faculty of Law from 2011 to 2016. She is the founding co-chair of "Criminal Law and Technology Committee" of the Criminal Lawyers' Association. She teaches, writes and speaks on a variety of topics in relation to criminal law, mental health, law and technology, artificial intelligence and the law, privacy and surveillance, and women in the legal profession. The only thing she loves more than being in the courtroom, writing, and teaching, is spending time with her two teenaged daughters.

THE HONOURABLE ENZO RONDINELLI

Enzo used to stand in court as a criminal defence lawyer. Now he sits in court as a judge at Old City Hall.

THE HONOURABLE DAVID ROSE

David Rose has law degrees from Oxford University and McGill University. He was called to the Ontario Bar in 1992 and practised as a criminal lawyer in private practise doing trials and appeals in all courts, certifying as a Specialist in Criminal Law in 2011. In 2014 he was appointed to the Ontario Court of Justice, presiding over criminal cases in Newmarket. He is the editor of *Snows Criminal Code*, and co-author (with S. Hutchison and P. Downes) of *Law of Traffic Offences* (4th ed), and DNA – *A Practical Guide* (with L. Goos) all published by Thomson/Carswell.

JEFF RYBAK

Since 2015, Jeff Rybak, now with his associate, has represented clients in over 300 proceedings before the Ontario Parole Board. Although he continues in criminal defence as well, parole has become the substantial focus of his practice. Jeff is based in Toronto but travels to prisons throughout the province for hearings. In addition to his practice, he teaches part-time at the University of Toronto in the Rotman Commerce program, and sits on the Board of South Riverdale Community Health Centre – a leading agency in overdose prevention and supervised consumption.

MARK SANDLER

Mr. Sandler is the senior partner of Cooper, Sandler, Shime & Bergman LLP. He has been an appellate and trial criminal and regulatory litigator for over 39 years. He was elected to three terms as a Bencher of the Law Society of Upper Canada, and served for approximately 10 years as the Chair of the Appeal Panel. He co-chaired the annual Criminal Lawyers' Association Convention and Education Programme for three years. He is a past recipient of the G. Arthur Martin Criminal Justice Medal for his contributions to the administration of criminal justice. He was an Adjunct Professor at Osgoode Hall Law School for 14 years. He is currently Lead Counsel to the Independent Civilian Review of Missing Person Investigations in Ontario (the Hon. Gloria Epstein, Reviewer) and recently completed his work as Chair of the independent St. Michael's College School Respect and Culture Committee, examining the school's policies, practices and culture. In total, Mr. Sandler has served as counsel or senior advisor to over 20 public inquiries or systemic reviews, including the Inquiry into Pediatric Forensic Pathology in Ontario (the Goudge Inquiry), and the Commission on Proceedings Involving Guy Paul Morin (Hon. Fred Kaufman, Commissioner).

MEGAN SAVARD

Megan is a partner at ALG. She is an experienced trial and appellate advocate, regularly appearing at all levels of court. Megan is dedicated to finding creative solutions for her clients. She defends people facing all manner of charges, from shoplifting to murder. She has a particular interest in sexual assault litigation, privacy law, and the problem of justice system delay. She is consulted by individuals, boards, organizations and corporations on criminal and constitutional issues. Megan serves on the Criminal Lawyers' Association's Litigation Committee and is a former member of the Advocate Society's Young Advocates Standing Committee. She acts as duty counsel for the Ontario Court of Appeal's Inmate Appeal Duty Counsel Program. She is a sought-after speaker on criminal law issues in the media and at conferences. In 2019, Megan received the Precedent Setter Award, which recognizes lawyers for excellence and leadership in the legal community within their first ten years of practice. Megan earned her J.D. from the University of Toronto and holds a Bachelor of Arts from McGill University in English literature and North American politics. Before joining ALG, she clerked at the Saskatchewan Court of Appeal.

CHRIS SEWRATTAN

Chris Sewrattan is an experienced criminal lawyer who conducts trials and appeals at every level of court. He has successfully defended a wide range of charges, from impaired driving to murder. Chris' litigation strategy combines intense preparation and a thorough understanding of the law. Chris takes the time to work personally with his clients through every step of their case, ensuring that they understand their obstacle and how to defeat it. Chris has a distinguished academic legal background. He holds Masters of Law and Juris Doctor degrees from Osgoode Hall Law School, and an Honours Bachelor's degree in criminology from the University of Toronto. Chris received numerous course awards for finishing first in his classes in the Juris Doctor program. Outside of the courtroom, Chris remains active in legal research and writing. He has published a number of articles related to criminal law in academic legal journals, including the *UBC Law Review, Criminal Law Quarterly, Canadian Journal of Law and Technology, and the Windsor Review of Legal and Social Issues*. Chris is a member of the Ontario Parole Board and the Licence Appeal Tribunal, respectively. He determines whether convicted offenders should receive parole. Chris is also a member of the Sexual Assault Program Referral List (for sexual assault survivors), the Criminal Lawyers' Association Intervention Committee, and a former member of the Osgoode Hall Law School admissions committee.

GAIL SMITH

Gail D. Smith graduated from the University of Toronto with a B.A. Hons. (1986) and received her law degree from Osgoode Hall Law School (2003). She was called to the bar in 2004. After completing a 6-month contract position at the office of Alan Gold she continued as a sole practitioner practicing primarily criminal law for the past 14 years. Her practice focuses on criminal defence work at the Superior Court of Justice, representing clients at the Ontario Review Board and she has also appeared at the Ontario Court of Appeal. Most recently, Miss Smith was counsel in *Regina v. Morris* 2018 ONSC 5186 which is now the subject of a Crown appeal of sentence at the Court of Appeal.

ADAM WEISBERG

Adam Weisberg is a graduate of Queen's University, Faculty of Law and has been a criminal lawyer since 2003. Mr. Weisberg currently practices at his own firm, Weisberg Law PC. His career started at a national business law firm. Mr. Weisberg eventually "saw the light" and went to work for a highly regarded senior member of the criminal bar before joining another well-known firm. Mr. Weisberg is a Certified Specialist in criminal law and a member of Legal Aid's Complex Case Rate Panel. He can be found regularly conducting trials in the Ontario Court of Justice and Superior Court of Justice. Mr. Weisberg has written papers, instructed at Continuing Legal Education events, and has been a guest instructor with the trial advocacy program at Queen's Law. Mr. Weisberg is a Director of the Criminal Lawyers' Association.

NANA YANFUL

Nana is a Toronto-based Black feminist lawyer and racial justice advocate. Nana received her J.D. from the University of Windsor, Faculty of Law in 2013. Before attending law school, Nana spent almost a decade working as a diversity and equity educator across southwestern Ontario and the GTA. Nana completed her articles at the Ontario Superior Court of Justice as a Judicial Law Clerk, and was called to the Bar of Ontario in 2014. She then practiced criminal defence and education law at Simcoe Chambers in Toronto. Nana is deeply committed to community and legal work related to anti-Black racism, human rights, and anti-discrimination. For many years she has worked to build equitable and inclusive spaces in education, health care, and in community and non-profit organizations. Most recently, Nana worked as a Human Rights & Health Equity Specialist at Sinai Health System and as a Knowledge Translation Specialist for the National Collaborating Centre for Determinants of Health. Nana is a board member of Women's Health in Women's Hands Community Health Centre and is currently a Staff Lawyer at the Black Legal Action Centre, providing legal services to low and no income Black Ontarians facing anti-Black racism.

FRANCESCA YASKIEL

Francesca Yaskiel received her L.L.B. from the University of Western Ontario in 1986 and was called to the bar in 1988. She commenced her career as an Assistant Crown Attorney in Durham. For the past 29 years, she has practiced law at the trial level. From 1997 to 2006, she was the assistant head of section for criminal procedure at the Ontario Bar Admission Course. For ten years, she was an Alternate Chair at the Ontario Review Board. Since 2005, she has been a member of the Barrister's Advisory Group at the Law Society of Ontario.

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NOVEMBER 15-16, 2019

Don't Blow It: Impaired Litigation in the Wake of Bill C-46

C-46 LITIGATION- DON'T BLOW IT

Michelle Johal and Brett Moodie[1]

Criminal Lawyers Association Conference Fall, 2019

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[1] Views are my own personal views and do not reflect those of the Ministry of the Attorney General

C-46 LITIGATION- DON'T BLOW IT

This paper has been written for criminal law practitioners whose practice focuses on criminal driving offences and for those new to this area of law. Bill C-46 brought about a wholesale change to our driving offence laws and this paper will focus on the statutory changes and the known litigation to date.

In 2019 practitioners have primarily been litigating offences under the "old laws" that were in place prior to December 18th, 2018. As expected, the roll out of the new Bill C-46 provisions has sparked some "transitional legislation" litigation. There have also been a handful of cases decided under the new legislation, mostly in western provinces where the trial turnaround times are much quicker.

To bring you up to speed on where things stand with Bill C-46's roll out, this paper will cover the following topics:

1) A brief introduction to Bill C-46
2) C-46 "grab bag" of straightforward issues
3) The lack of constitutional rulings (to date)
4) Transitional issues
5) *Per se* limit cases (or the lack thereof) post C-46
6) C-46's changes to disclosure in drug impaired driving cases

1) Introduction: Bill C-46

- On December 18th, 2018, all *Criminal Code* driving provisions were repealed and replaced with a new comprehensive regime.
- The preamble and Recognition and Declaration sections highlight Parliament's objectives and guiding principles surrounding the changes.[2] This will no doubt be an important consideration in *Charter* challenges.

Recognition and declaration

320.12 It is recognized and declared that

- (a) **operating a conveyance is a privilege** that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;

- (b) the protection of society is well served by **deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;**

- (c) the analysis of a sample of a person's breath by means of **an approved instrument produces <u>reliable and accurate readings</u>** of blood alcohol concentration; and

[2] 2018, c. 21, s. 15

- (d) an evaluation conducted by an **evaluating officer is a reliable method of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination** of alcohol and a drug.

- Standard definitions changed (section 320.11):
  - ***Conveyance***:
    - "a motor vehicle, a vessel, an aircraft or railway equipment"
  - ***Operate***:
    - in respect of a motor vehicle, to drive it **or to have care or control of it;**
    - in respect of a vessel or aircraft, to navigate it, to **assist** in its navigation or to have care or control of it; and
    - in respect of railway equipment, to participate in the direct control of its motion, or to have care or control of it as a member of the equipment's crew, as a person who acts in lieu of a member of the equipment's crew by remote control, or otherwise.

- New police powers were created. Random breath testing/Mandatory alcohol screening is now legal.[3]
  - s.320.27(2) If a peace officer **has in his or her possession an approved screening device**, the peace officer may, in the course of **the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require** the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.
  - This will no doubt result in much litigation about whether such legislation is *Charter* compliant. Much in Court litigation is expected in late 2019, and early 2020.

- The new s. 320.14(1)(b) offence includes breath tests of "80 or over", which is a change from the previous "over 80" section 253(1)(b)[4]

  320.14(1)(b)
  - (1) Everyone commits an offence who
    - (b) subject to subsection (5), has, **within two hours** after ceasing to operate a conveyance, a blood alcohol concentration that is **equal to or exceeds 80** mg of alcohol in 100 mL of blood;
  - The offence is now a **continuing offence** and captures being 80+ for **up to two hours** after ceasing to operate a conveyance.

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[3] It used to be that a police officer under section 254(2) could only make a demand that a driver provide a sample of their breath into an approved screening device if they had a "reasonable suspicion" that the driver had alcohol in their system and was operating a motor vehicle within 3 hours. Now, a police officer that *lawfully* pulls over any motorist may demand a breath sample from the driver whether or not they suspect that the driver has recently consuming alcohol if they have an approved screening device.

[4] Previously, it was a criminal offence to operate a motor vehicle if your blood alcohol concentration *exceeded* 80 mg of alcohol per 100 ml of blood.

- The new law (320.14(5)) seeks to **eliminate the defence of post offence drinking**.[5] It does not seek to criminalize those who drink *after* driving without a reasonable expectation they would be required to provide a sample of breath. We expect this to be an area of litigation moving forward and this change has caused widespread media and general public attention.[6]
  - Exception — alcohol (s. 320.14(5))

    (5) No person commits an offence under paragraph (1)(b) if
    (a) they consumed alcohol after ceasing to operate the conveyance;
    (b) **after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood**; and
    (c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.[7]

- The new "80 plus" offence **criminalizes bolus drinking**[8]. The offence is now a continuing offence for up to two hours after ceasing to operate a conveyance as indicated. You simply cannot claim now that you consumed large amounts of alcohol before operation, and it was simply "not in your blood yet" at the time of stop. (section 258 d.(1) is no longer)

- **Codification of important cases** on impairment and DRE experts
  - *R. v. Stellato* [1993]O.J. 18: for impaired operation offence , s.320.14(1)(a) Everyone commits an offence who operates a conveyance while the person's ability to operate it is impaired **to any degree** by alcohol or a drug or by a combination of alcohol and a drug;

  - *R. v. Bingley* [2017] S.C.J. 12: drug recognition officer expert evidence s. 320.31(5):
    "An evaluating officer's opinion relating to the impairment, by a type of drug that they identified, or by a combination of alcohol and that type of drug, of a person's ability to operate a conveyance is **admissible in evidence without qualifying the evaluating officer as an expert**."

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[5] Post offence drinking refers to cases where following an accident the driver either consumes alcohol at the scene or at another location prior to the breath test.

[6] See for example the attention surrounding *R. v. Lowrie* (unreported) as commented on https://globalnews.ca/news/5326941/nanaimo-woman-wins-court-challenge-breathalyzer/

[7] A similar provision exists with respect to drugs or the combination of alcohol and drugs (section 320.15(6) and (7)).

[8] Under the old law, a claim of bolus drinking involved a defendant arguing that they consumed alcohol shortly before driving and the alcohol and not been fully absorbed into their bloodstream at the time of the actual driving. The old defence was although they were "over 80" at the time of the testing at the police division, they were under 80 at the time of driving and thus entitled to an acquittal.

- **Compelled statements** under the *Highway Traffic Act* are now admissible for the purposes of grounds for a demand. This was parliaments reaction to the decision of the Court of Appeal in *R. v. Soules* 2011O.J. 429 prohibiting this. (section 320.31(9)).

- **Judicial "read backs**" of blood alcohol concentrations are now codified.
  - There is no longer a need for a toxicologist in most cases and no need for the Judge to take judicial notice of elimination rates etc.

    - 320.31(4) For the purpose of paragraphs 320.14(1)(b) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance and the person's blood alcohol concentration exceeds 20 mg of alcohol in 100 mL of blood, the person's blood alcohol concentration is conclusively **presumed to be the concentration** established in accordance with subsection (1) or (2), as the case may be, **plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours**

- **A new care or control presumption** (s. 320.35)
  - "In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused **occupied the seat or position ordinarily occupied** by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion."

- **Sentencing changes**. Bill C-46 enacted higher mandatory fines for driving offences in some situations. These are based on the blood alcohol concentration readings of the offender[9]
  - Of note, there appears to be a trend in the Ontario Court of Justice to consider jail for first time offenders if there are aggravating factors such as a collision and/or very high readings. This appears to be regional in nature at this time.[10]
  - The new law also has higher maximum penalties for driving offences.[11]

- **Drug investigations**. The police can use approved drug screening equipment (e.g. oral fluid drug screeners) to detect the presence of a drug in a driver.[12]

[9] A first offender with a blood alcohol concentration (BAC) of 80 to 119mg of alcohol per 100 ml or blood is subject to the same mandatory fine of $1,000.00. However, the mandatory minimum fine for a first offender with a BAC of 120 to 159 mg of alcohol per 100 ml of blood has been raised to $1,500. The mandatory minimum fine for a first offender with a BAC of 160 mgs or over is raised to $2,000. A first offender who refuses to comply with a lawful demand is subject to a $2,000 minimum fine.

[10] See for example *R. v. Greavette*, 2018 ONCJ 10 and *R. v. Sivanadi*, 2017 ONSC 5740 at paras 16-24.

[11] This may have *significant* implications for permanent residents who could face deportation if convicted.

[12] As of June 2018, police can demand a sample of oral fluid (saliva) on approved drug screening equipment at the roadside. At the moment oral fluid drug screeners are being used by *some* law enforcement agencies but *not* for criminal

- There are new *per se* criminal offences of being at or over a prohibited blood drug concentration for certain drugs within two hours of driving (the levels are set by regulation).

2) Straightforward items

- There are (still) no magic words - Mandatory ASD demand in s 320.27(2) does not have to mirror the wording of that section. (*R v Azram*, [2019] AJ No 1001, (ABPC))

- The presumption of care or control is (still) enough - A lawful ASD demand only requires the officer have a reasonable belief that the accused was in care or control. If the presumption is engaged, that's sufficient to make a demand. The fact the presumption might be later rebutted at trial in no way affects the validity of the demand at the time it was made. (R v Haqyar, [2019] AJ No 1049)

- A single sample will (still) suffice – Even though s 320.27(1)(b) reads "samples", a single failed sample is enough for an officer for form their grounds to make an Intoxilyzer demand. The new legislation does not require a motorist provide two ASD samples at the roadside. (*R v Singh*, [2019] AJ No 711 (ABPC))

- Reduced Interlock ineligibility is retroactive – s. 320.24(10), which reduced the ineligibility period for applying to be enrolled in an "alcohol ignition interlock device program" while serving a Criminal Code prohibition applies retroactively. (*R v Luker* 2019 NLPC 1318A00206)

2) C-46's Constitutional considerations

As in the past, this new legislation will be the subject of *Charter* challenges. At the time of print of this paper there have not been any rulings, though litigation is pending in several jurisdictions. We can expect to see many decisions in the coming months as we start to see the wave of offences post December 18, 2018 come to trial. For now, we have the transitional issues identified below to watch and monitor as counsel plan ahead.

3) Transitional issues

3.1) Shaikh

For the better part of this year judges at the Ontario Court of Justice have been dealing with the "Shaikh" issue in the context of transitional cases[13]. Simply, there are two competing lines of judicial authority: one concluding that the evidentiary shortcut to prove the BAC of the accused at the time of driving is not available and the other line of considerable cases that say it does still apply.

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investigations in Ontario. The current oral fluid drug screening technology is not able to detect drug-blood concentration with the same precision as an approved screening device can detect alcohol-blood concentration.

[13] Transitional cases refer to cases where a person was charged under the old regime but prosecuted after the amendments came into effect on December 18, 2018.

This issue arose in *R. v. Shaikh* 2019 ONCJ 157 where Justice Burstein concluded that the evidentiary presumption in s. 258 was repealed on December 18th, 2018 and was not available to the Crown at a trial of a s. 253 offence which commenced after.

Some judges initially opted to follow Burstein J, but the winds have overwhelmingly blown against the adoption *Shaikh* as the year progressed

Porchetta, McAlorum and *Sivalingham* are the leading Ontario Court cases that decline to follow the analysis in *Shaikh*. In fact, in recent months several judges are adopting Justice Rahman's refusal to '**spill more judicial ink'** on the issue any further. They are essentially dismissing the defence argument with simple reference to these cases.[14] It appears this issue is not settled.

Followed *Shaikh*	**Opted not to follow *Shaikh***
R v Jagernauth, [2019] OJ No 1927[15] R v Melhado, [2019] OJ No 1993[16]	**R v Sivalingham, 2019 ONCJ 239** **R v Porchetta, 2019 ONCJ 244** **R v McAlorum, 2019 ONCJ 259** R v Arumaithurai, [2019] OJ No 4612 R v Paradzayi, [2019] OJ No 4390 R v Patel (2019), OJ No 3993 R v Yip-Chuck, 2019 ONCJ 367 R v Hickson, [2019] OJ No 4796 R v Zebrowski, [2019] OJ No 4312 R v Patel, [2019] OJ No 3993 R v Chaudhry, [2019] OJ No 4656 R v Aulenbach, [2019] OJ No 4315 R v Benoit, [2019] OJ No 3474 R v Couto, [2019] OJ No 3208 R v Ranger, [2019] OJ No 3203 R v Cox, [2019] OJ No 3582 R v Magondo, [2019] OJ No 3017 R v Sten, [2019] OJ No 2947 R v Brar, [2019] OJ No 3138 R v Raeisi, [2019] OJ No 2997 R v Chuck, [2019] OJ No 2773 R v McRae, [2019] OJ No 2493 R v Fram, [2019] OJ No 2276 R v Reyes, [2019] OJ No 2470 R v Bhandal, [2019] OJ No 2615 R c Brazeau Morin, [2019] JQ no 8438 R v Phee, [2019] AJ No 954 R v Taylor, [2019] AJ No 911 R v Hanna, [2019] AJ No 878 R v Kettles, [2019] AJ No 792

[14] *R v Patel*, 2019 ONCJ 544 at para 20.

[15] Justice Renwick later overruled himself in *Bhandal*, opting to follow *Porchetta; McAlorum* and *Sivalingham* instead.

[16] Justice SD Brown issued a 3 paragraph ruling simply adopting Burstein J's analysis in *Shaikh*.

3.2) Flores Vigil

The question of how the Crown may prove that the alcohol standard solution was certified by an analyst, and what the target value was, became a live issue in trial courts in the Ontario Court of Justice. Justice Parry in *R v. Flores-Vigil* 2019 ONCJ 192 held that the breath technician cannot provide evidence that the approved instrument used a solution certified by an analyst, or evidence of the target value of the solution as required in s 320.31(1)(a), calling it inadmissible hearsay.

This question has also begun to die off as a live issue in trial courts. First, the weight of the trial level decisions have preferred Justice Rose's analysis in *R v. Porchetta*, 2019 ONCJ 244, and have opted to follow it over Justice Parry's decision in *Flores-Vigil* .[17]

Second, Justice Roberts sitting on appeal effectively settled the issue in *R. v. Wu, [2019] O.J. No. 5000.* While no explicit reference to *Flores-Vigil* was made by Justice Roberts, she addresses the same issues square on, finding that the Crown does not need to prove that the statutory pre-requisites of s.320.31(l) of the *Criminal Code* have been met in order for the results of breath tests to be admissible and found reliable. Instead, she found that the presumptions are just that, presumptions and not elements of the offence. Where the Crown elects to call *viva voce* evidence from the breath technician, the results of the Intoxilyzer can be accepted into evidence without recourse to the statutory shortcut.

Justice Roberts points out that this isn't a novel position, citing *R v Harding* [1994] OJ No 410 (ONCA) where Ontario's Court of Appeal concluded that it has long been the law "that it is enough for a technician to testify that he or she tested the breathalyzer by means of an alcohol standard and found it to be in proper working order. Unless there is reason to question this, the breath technician need not testify about the suitability of the alcohol standard used."[18]

Further, she adopts MacDonnell J's ruling in *R v McCarthy*, 2013 ONSC 599, and finds that the Crown, in calling *viva voce* evidence, could have the samples admitted into evidence based on the *common-law* admissibility of the results of scientific instruments. In Justice MacDonell's words:

> Measurements performed by a scientific instrument or device are admissible at common law if the court is satisfied that the instrument or device was capable of making the measurement in question, that is was in good working order, and that it was properly used at the material time [citations omitted]. Having regard to Parliament's designation of the Intoxilyzer 8000C as an 'approved instrument' – 'an instrument of a kind that is designed to received and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person' - the first of those requirements is easily satisfied. The *viva voce* evidence of a qualified technician will normally suffice to establish the other two.[19]

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[17] Justice Parry has recently suggested the Crown is able to prove this in a variety of ways. *R v Chavez*, [2019] OJ No 2247

[18] *R v Wu*, [2019] OJ No 5000 at paras 13 & 14.

[19] *R v McCarthy,* 2013 ONSC 599 at para 22.

To date, while there has been no explicit appellate scrutiny of the *Shaikh* issues in Ontario, Justice Rose's decision in *Porchetta* is under appeal, with both the *Shaikh* and *Flores-Vigil* set to be argued.

The Alberta Queen's Bench in *R v Goldson*, 2019 ABQB 609 ruled on the issue in appeal, finding neither *Shaikh* or *Flores-Vigil* to be good law.

4) Driving in excess of the *per se* drug limits post C-46

It was certainly anticipated that there would be a significant number of driving in excess of the *per se* limits cases post cannabis legalization. The new laws permit police to make a drug-screening demand as part of their investigation. [20] However, police departments across the board have not observed a significant increase in *per se* charges.[21]

Why the lack of *per se* arrests? While the new law empowers police to take a blood directly, perhaps not all police departments are trained to do it yet.[22] Indeed it appears most cases to date rely on SFST, DRE and urine, but not blood (save hospital cases).

We can foresee that if and when police departments start to regularly seize blood samples or have a medical practitioner available to do so there will be an increase in arrests. Until then we expect you will not see a lot these cases unless the defendant is involved is injured and taken to the hospital where their blood is drawn.[23]

5) Bill C-46 impact on drug impaired driving litigation *(*post-*Stipo)*

Rolling logs

In early 2019, the ONCA ruled that a DRE's rolling log[24] was first party disclosure, and was "obviously relevant" (R. v. *Stipo*, 2019 ONCA 3 at para 120). That decision proved to be short-lived in its utility, as *Stipo* was litigated on the pre-C-46 regime, and was released a month after Bill C-46 was proclaimed. Bill C-46 has specific disclosure provisions that were both different from those found under the preceding legislation, *and* explicitly retrospective.

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[20] The new law, specifically Section 320.27 permits police to make a drug-screening demand as part of their investigation. If the driver fails the SFST evaluation *or* drug-screening test, the police officer can rely on this failure to form grounds that the driver's ability to operate a motor vehicle is impaired by drug or that they are over the *per se* limits. The driver is then taken before a Drug Recognition Expert (DRE) for further testing at the police station.

[21] Mounties seeing smaller number of blood samples than expected under drug-impaired driving law, by Catharine Tunney, CBC news, posted: March 24th, 2019 [Internet] Available from: www.cbc.ca; Further, an anecdotal survey of practitioners who regularly practice in this area have not seen a spike in the number of *per se* cases post cannabis legalization in Ontario either.

[22] *Ibid.*

[23] What you will see is impaired by drug cases with the same SFST tests and examination by a DRE at the station and a report of a toxicologist based on urinalysis not blood analysis. Nathan Baker's comprehensive materials from last year's Fall Conference and his book on drug-impaired driving may be of benefit to you for some time to come.

[24] A rolling log is a list of each drug evaluation they've completed, including the date and time it took place, the name of the subject evaluated, the 'call' the DRE made about which category of drug ingested by the accused and whether or not that call was matched by toxicological analysis.

Three of the changes made by Bill C-46 have unsettled whatever clarity *Stipo* attempted to bring to this issue, and litigation surrounded rolling logs is ongoing. In addition to the two presumptions mentioned above, s. 320.36(2) the section that specifically governing the disclosure of rolling logs, was reworded and is more restrictive that the predecessor s. 258.1(2)(b).

The effect of these changes to the legislation post-*Stipo* have been litigated in both the OCJ and the SCJ. While several judges in the OCJ have ruled *Stipo* still the governing authority (*R. v. Sutherland*, 2019 ONCJ 113 - Bourgeois J, disclosable; *R. v. Gorman*, 2019 ONCJ 261 - Wendl J, disclosable; *R. v. Rajathurai,* 2019 ONCJ 294 - Botham J, disclosable).

Others have ruled that C-46 changes the landscape and has effectively overturned *Stipo*. (*R. v. Sukhdeo*, 2019 ONCJ 150 - McKay J, not disclosable; *R. v. Derakhshandeh*, 2019 ONCJ 502 - Blouin J, not disclosable. *R. v. Lutz*, [2019] O.J. No. 4940 - Brochu J, not disclosable.) In doing so, they've found that the prohibition found in Section 320.36(3) is sufficiently different from the one in s 258.1(2)(b) litigated in *Stipo* to prohibit lawfully disclosure of the logs.

The only post-*Stipo* decision from the SCJ[25] comes from Beaudoin J via a *certiorari* decision in *R. v. Amarelo-Gemus*, 2019 ONSC 2675. **Beaudoin J ruled the logs *not* to be disclosable, unless the DRE's call doesn't match the toxicological analysis.** That is to say, if the presumptions in 320.31(6) is engaged, the rolling logs are not relevant. If the presumption is *not* engaged, then they are.

He came to this conclusion based on relevance alone, finding that the new wording of 320.36(2) did not create a different statutory prohibition against disclosure that didn't exist at the time of *Stipo*. His Honour also concluded the more fulsome evidentiary record now bring proffered by the Crown did not affect the application of the dicta of *Stipo*.[26]

<u>Conclusion</u>

We are still in the relatively early litigation stages regarding the new *Criminal Code* provisions that relate to Bill C-46. Those defendants charged under the new provisions have set their cases down for trial that will be heard over the course of the next year. Counsel are now increasingly mounting constitutional challenges to the new legislation. There will undoubtedly be more C-46 litigation to discuss about this topic at the next Fall conference. Stay tuned.

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[25] Justice O'Bonsawin's *certiorari* decision in *R. v. Branson*, 2018 ONSC 6014, upholding the decisions of Justices Wadden, Dorval and Hoffman to order the Crown to produce the rolling logs predated *Stipo* and the proclamation of C-46.

[26] This includes an affidavit or *viva voce* evidence from the Centre of Forensic Science explaining the limited utility that a rolling log may play.

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Three's a Crowd: Sexual Assault Litigation in the Wake of Bill C-51

The Reverse Disclosure Regime in Sexual Assault Cases: Accused Communications with the Complainant – An UPDATE

Introduction

Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* came into force on December 13, 2018. Along with other changes to the *Code* such as the repeal of some inoperative and obsolete provisions, Bill C-51 made several significant changes to the *Code*'s sexual assault provisions.

The Bill added s. 278.92*,* a new admissibility screening requirement for complainant-related records already in the possession of an accused. An accused seeking to adduce such records must file an application and justify its admission. Under the new provisions, the complainant has the right to appear and make submissions at these hearings, and to be represented by counsel (rights the complainant also now enjoys at s. 276 hearings regarding evidence of other sexual activity).

This paper is an update to a previous article published in "For the Defence".

Considerations under the new records regime

While the legislation was making its way through Parliament, the new s. 278.92 provisions were sometimes referred to in the media as the "*Ghomeshi*" amendments. The legislation, in actuality, was drafted several years prior to the *Ghomeshi* proceedings. It is my position that records of communications between an accused and a complainant—some of the most notable evidence in the Ghomeshi case—are not within the scope of the new provisions.

Overview of the new regime

Previously, an accused in a sexual assault trial had to comply with special procedures under s. 278.2 before he or she could obtain third-party records by subpoena. There was no special bar or procedure for the *use* of these records at trial, once they had been obtained. One consequence of the new legislation is that successful *Mills* applications under s. 278.2 will have to be followed by a new application under 278.92 before the records can be used at trial.[1]

The operative new provision reads as follows:

> 278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in

respect of [certain sexual offences].

To be admissible, the evidence must be relevant to an issue at trial and have ***significant*** probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice (s. 278.92(2)(b)). In assessing the prejudice, a list of factors is set out in s. 278.92(3), echoing the factors to be considered under s. 276(3), plus the addition of "society's interest in encouraging the obtaining of treatment by complainants of sexual offences".

<u>Tactical considerations</u>

An application under this section will impair or likely diminish the effectiveness of any future cross-examination since the complainant will inevitably become aware through her own counsel of the nature of the "record" in the accused's possession. Section 278.94(3) states a judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

In one recent sexual assault case, our office secured Crown counsel's agreement prior to trial that there was no reasonable expectation of privacy in communications between an accused and a complainant for the purposes of section 278.92. If you have records of communications between your client and the complainant that you wish to use at trial, consider approaching the assigned Crown counsel to determine their position. It would be prudent to schedule a brief appearance before the trial judge to confirm the joint position and ensure the trial judge is content with the agreement.

If you are not able to secure an agreement with Crown counsel assigned to your case, consider bringing a motion for directions from the judge as to whether records of communications between an accused and a complainant are "records" for the purposes of s. 278.92. If the judge directs that they are "records", consider mounting a constitutional challenge. Signaling to the judge and Crown counsel at a judicial pre-trial that there is a potential constitutional challenge should these communications be considered "records" under s. 278.92 may encourage resolution of this issue in your case. The motion for directions should be scheduled well in advance of the trial and be framed in a manner that makes it clear that if the communications are considered "records", then a constitutional challenge will be scheduled.

The main advantage of scheduling this question as a motion for directions is that it will not trigger the participation of complainant's counsel in the way a formal application under s. 278.92 will as per s. 278.94(3). In *R. v. R.M.R.,* however, the trial judge allowed complainant's counsel to make submissions on whether or not certain evidence was a "record" analogizing the question to s. 276 and whether evidence is prior "sexual activity".[2] In seeking directions from the court on the general question as to whether communications are "records", defence counsel should strongly resist complainant counsel's involvement at this early stage.

Why s. 278.92 should not apply to communications between a complainant and an accused

Section 278.92 of the *Code* should not apply to any communications (electronic or otherwise) exchanged between a complainant and an accused because the complainant does not have a reasonable expectation of privacy *vis-à-vis* the accused in records of communications voluntarily exchanged between themselves and the accused.

The legislative definition of "record"

Until Bill C-51 came into force on December 13, 2018, section 278.1 of the *Code* defined a "record" only for the purposes of the *Mills* third-party production regime. The definition now applies to "records" for the purpose of the *Mills* third-party production regime (s. 278.2) and the new screening procedure for admissibility of complainant records (s. 278.92). The new section reads:

> Definition of record
>
> 278.1 For the purposes of sections 278.2 to 278.92, record means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

The only change from the prior version, other than the provisions referred to, was the removal of "without limiting the generality of the foregoing". This feature of the legislation was not present in the French provision. The removal of that phrase from the English version, however, demonstrates that Parliament turned its mind to the definition of "record" under section 278.1 when they made the legislative changes regarding 278.92.

Rosenberg J.A., writing for the Court of Appeal in *R. v. Clifford*, stated that the fact Parliament specified certain types of records in s. 278.1 is "intended to assist the court in determining the scope of the provisions".[3] Despite turning its mind to the definition of "records" under the new legislation, Parliament continued to omit personal correspondence from the enumerated list of records.

The enumerated list in s. 278.1 assists with the interpretation of what type of record fits within the scope of the provisions, meaning a record that "contains personal information for which there is a reasonable expectation of privacy". The records listed are all records for which there is a professional obligation with respect to confidentiality, or for which the record was only intended for the author's use and review.

The new s. 278.92 codifies recommendations made in a 2012 report by the Senate Standing Committee on Legal and Constitutional Affairs concerning the third-party records legislative regime for sexual assault cases. In the 2012 report, the Senate Committee made several recommendations in response to *R. v. Shearing* (where the defence was in possession of the complainant's diary), as well as hypothetical scenarios where therapeutic records might come into the hands of an accused without their lawyer obtaining such through a s. 278.2/*Mills* Application. There was no discussion at the committee hearings about personal communications exchanged between a complainant and an accused person.[4]

The purpose of the legislation is to prevent an accused from fishing expeditions (s. 278.2) and misuse (s. 278.92) of information created or shared for specific and limited personal or professional purposes (diaries, counseling records, police occurrence reports, etc.). Communications between an accused and a complainant do not fit within this rationale. Had Parliament intended for personal communications between the complainant and the accused to be captured by s. 278.1, it could have added such communications to the enumerated list.

No reasonable expectation of privacy in messages between a complainant and an accused

There is an important distinction between a reasonable expectation of privacy *vis-à-vis* state intrusion versus *vis-à-vis* a private individual. This distinction is reflected in the jurisprudence on reasonable expectations of privacy. Support for this distinction is also found in the jurisprudence interpreting "record", albeit in the context of the *Mills* regime for production of third-party records. While the *Mills* jurisprudence is informative for the interpretation of the scope of s. 278.92, it must be considered in light of the different contexts of s. 278.2 (a limit on compelled production) and s. 278.92 (a limit on admissibility).

The majority of the Supreme Court in *Mills* noted that the broad definition of "record" was rendered constitutional by its limitation to those records in which there is a reasonable expectation of privacy. Privacy is not, however, an all or nothing right. When a record relating to a witness or a complainant comes into the possession of the police or the Crown, there remains sufficient privacy interest in the record to trigger the protection of s. 278.2 unless the complainant has waived those protections.[5]

In *R. v. Quesnelle,* the Supreme Court held that police reports from occurrences unrelated to an accused person's charges were "records" for the purpose of section 278.2, although they were not one of the types of records listed in s. 278.1. Unrelated police occurrence reports were held to be records in which witnesses retained a reasonable expectation of privacy because witnesses who provide personal information to police reasonably expect the police to maintain the confidentiality of those records except for certain purposes.[6]

Writing for the dissent in *R. v. Marakah*, Justice Moldaver explained the Court's holding in *Quesnelle* by noting that complainants expect professionals like the police to safeguard their private information. The other examples in the jurisprudence of "records" found to be subject to a complainant's reasonable expectation of privacy also involve compelled production from

institutional record-holders such as medical or therapeutic professionals, police services, or schools.[7]

What then of text messages? The majority in *Marakah* held that the sender of a text message retained a reasonable expectation of privacy in the message *vis-à-vis* state intrusion. However, the majority was careful to say that this holding did not mean that every communication occurring through an electronic medium will attract a reasonable expectation of privacy.[8] Defence counsel should argue that while an individual may have a reasonable expectation of privacy in communications that he or she is a party to in other contexts, such as for the purpose of s. 8 *Charter* standing, it does not follow that a complainant has a reasonable expectation of privacy *vis-à-vis* an accused in communications voluntarily exchanged with the accused, for the purpose of s. 278.92.

To support this argument, defence counsel should consider referring to the very recent Supreme Court decision in *R. v. Mills* (2019). In that case, again in the context of s. 8 of the *Charter*, the Court addressed whether the accused had a reasonable expectation of privacy in electronic communications that he sent to an undercover police officer online, whom the accused thought was a 14-year old girl. Justice Karakatsanis, in concurring reasons, held that the accused could have no expectation of privacy in communications *vis-à-vis the intended recipient* of the messages, even if unbeknownst to him, that recipient was in fact an undercover police officer. That the recipient then went on to use those communications in the context of a criminal trial did not change the analysis.[9]

The British Columbia Supreme Court in *R. v. Phagura* recently considered whether an accused had standing to mount a s. 8 *Charter* challenge to Whatsapp messages exchanged between the accused and the complainant. These messages were voluntarily disclosed to the police by the complainant. The accused sent messages that included: a demand to not to tell anyone, an apology, and an offer to pay the complainant's college fees. The Court concluded that whether a sender has a reasonable expectation of privacy in messages in the hands of a recipient depends on the totality of the circumstances. The Court concluded that there was no objectively reasonable expectation of privacy since the accused and complainant had different interests in keeping the messages private. The Court held that the sender cannot have absolute confidence that a text message will remain private and found that these messages fell into one of the exceptions contemplated in *Marakah*.[10] Similarly, it could be argued that in the context of s. 278.1, a complainant who makes a sexual assault allegation must realize that her interests become different from the accused and she can no longer have a reasonable expectation of privacy in messages sent to the accused.

The distinction between a reasonable expectation of privacy against state intrusion and a reasonable expectation of privacy against a private individual is illustrated in the case of *R. v. S.W.* In that case, Justice Schreck considered an application under s. 278.2 for production of several types of records including telephone records relating to a phone that the accused used to speak with the complainant. Justice Schreck noted that these records would show the date, time, and duration of telephone calls between the accused and the complainant—individuals have a reasonable expectation of privacy in this information vis-à-vis the State. However, Justice Schreck held that because the *accused* – rather than the state – was seeking records of his own

communications with the complainant, the protection of the *Mills* regime was *not* triggered:

> [18] However, as noted in *Quesnelle*, a reasonable expectation of privacy is not an all or nothing concept and depends on the circumstances or nature of the relationship in which the information was shared. In this case, the complainant chose to telephone the applicant. He could have made a record of those calls at the time they were made. Indeed, he could have surreptitiously recorded them. **In my view, the nature of the relationship in which the information was shared, that is, voluntary calls the complainant made to the applicant, was such that although she may have a claim of privacy with respect to the state having access to this information, she has no claim of privacy in relation to the applicant's ability to access the information**. As a result, I conclude that the Bell records are not "records" for the purposes of s. 278.1 and the *Mills* regime does not apply.[11] [emphasis added]

Justice Schreck's reasoning logically extends to recorded communications between an accused and a complainant for the purpose of s. 278.92. Where the communications are voluntarily exchanged between the complainant and the accused, the complainant has no claim of privacy in relation to the accused's ability to adduce the information.

The futility of extending "records" to cover communications between an accused and a complainant

Extending the meaning of "record" to include personal communications exchanged between an accused and a complainant would not further any privacy interests of the complainant. Communications exchanged between the complainant and an accused are available to the accused through his or her own memory of the communication. Section 278.92 does not limit an accused's ability to testify as to the contents of his or her own communications with the complainant, subject to the usual rules of relevance, probative value, and prejudicial effect. The only effect of a presumption against the admissibility of *records* of such communication would be to diminish the accused's ability to prove the contents of the communication.

Some jurisprudence seems to limit the accused's ability to cross-examine on the contents of such records without an application.[12] This position is nonsensical because it creates a very strange result—a defendant can cross examine on a private conversation at large, but not without an application if it is recorded or transcribed.

An undesirable alternative approach to assessing reasonable expectation of privacy in the context of s. 278.92

A tempting but undesirable alternative approach to assessing whether the complainant has a reasonable expectation of privacy in a record is to focus on the information contained in the record rather than the nature of the record. One would ask whether information contained in a text message between the complainant and the accused is private rather than asking whether the complainant has a reasonable expectation of privacy *vis-à-vis* the accused in any communications

voluntarily exchanged between them. It will already be necessary for counsel to consider whether the content of the communications can be considered sexual "communication" under the new s. 276(4) (the definition provision for "sexual activity") such that a s. 276 application is required. However, taking a content-based approach versus a categorical approach in the context of s. 278.92 is unhelpful and unworkable.

In *Quesnelle*, in the context of the *Mills* regime for third-party records, the Supreme Court adopted an approach to reasonable expectation of privacy based on *category* of the records, rather than their contents. Although in most *Mills* applications, neither the accused nor the court will know the content of the records in advance, the same approach should be adopted under s. 278.92. The question is the same in both contexts: is the type of record subject to a reasonable expectation of privacy such that it is captured by the definition of "record" under s. 278.1? Shifting to a content-based analysis to determine a "reasonable expectation of privacy" under s. 278.92 would create a whole new level of uncertainty in sexual assault trial litigation. This level of uncertainty combined with the various notice requirements in the legislative scheme would likely create unnecessary applications and mid-trial adjournments.

<u>Recent non-binding decisions finding s. 278.92 applies to communications between a complainant and an accused</u>

In some recent non-binding trial-level decisions, judges ruled that electronic communications between the accused and the complainant are records pursuant to s. 278.1. In *R.M.R.*, MacNaughton J. explained that Parliament received submissions proposing an amendment to the Bill to clarify that records of correspondence between the accused and complainant would not fall into the regime and no such amendment was made. The analysis then reflects on the actual messages that contained feelings, discussions about friends, preferences, and social interactions, and concludes that these communications were not intended to be shared with the public in determining that these messages are "records".[13]

In *R. v. McKnight*, Sulyma J. accepted that when an accused discloses a complainant's texts to him or her to the state, the complainant's expectation of privacy in those texts is weakened. However, her Honour did not accept that this meant that *any* voluntary disclosure of electronic communication by the recipient completely extinguished the complainant's reasonable expectation of privacy. The defendant in that case argued that it would create parity between sexual assault defendants (under s. 278.92) and the police in a criminal investigation (under s. 8 of the *Charter*) if disclosure by the accused/recipient extinguished the sender's reasonable expectation of privacy. Sulyma J. declined to follow this reasoning given "the equality concerns inherent in sexual offence prosecutions" and determined that electronic communications are "records" pursuant to s. 278.1.[14]

In *R. v. M.S.*, Chapman J. found that the complainant had an ongoing reasonable expectation of privacy in relation to text messages between herself and the accused, noting that those communications contain "personal information such as the parties' thoughts, aspirations, feelings, friendships, social interactions and the details of their daily activities. It may be inferred from their

content that they were not intended to be shared with the public".[15] Chapman J. found that "while a complainant may not have reasonable expectation of privacy in respect of an accused being in possession of a text or email message between them, she could retain a reasonable expectation of privacy as it relates to the use of the message in a criminal trial.[16] This analysis fails to consider that the complainant's reasonable expectation of privacy may change when she reports a criminal allegation against the accused recipient of the messages. Objectively, a sender of a message or communication knows they are entrusting the recipient of that message.

In *R. v. Ekhtiari* during a motion for directions, Horkins J. noted that many of the communications in question in that case had sufficient hallmarks of being private records, as defined by s. 278.1, and that many of these discussions concerned sexual preferences. He held that "[d]igital communications between two individuals in a relationship that discuss intimate aspects of their relationship are presumptively private records in which it can be inferred there is a reasonable expectation of privacy".[17] Horkins J. concluded that a screening process would be required prior to any use of these communications at trial.[18]

Constitutional considerations

Bill C-51 raises constitutional issues and interpretation issues that will require litigation. The complainant's right to appear and make submissions at hearings under 278.94, the legislated right for complainants to be represented by counsel, and the requirement that an accused person show that the evidence possesses "significant" probative value[19] need to be further interpreted by courts and potentially challenged constitutionally.

The reverse disclosure regime in the new s. 278.92 raises other constitutional concerns that were not present in the 278.2 regime (upheld in *Mills*) or the previous 276 regime (upheld in *R. v. Darrach*[20]).

If communications between a complainant and an accused are *not* subject to reverse disclosure under s. 278.92, then the provision may well be narrow enough to survive constitutional scrutiny. Narrowly interpreted, the legislation merely provides advance judicial screening for private records to prevent their use at trial when the prejudice to the administration of justice substantially outweighs their probative value. This additional screening procedure may be justified for records in which the complainant retains a privacy interest, such as counselling or medical records.

However, if the legislation is broadly interpreted to include communications between an accused and a complainant, then this aspect of the legislation serves no legitimate purpose and has the potential to compel the accused to prematurely disclose their defence in a large percentage of cases.

To impeach the complainant with his or her own communications intended for the accused, an accused would have to disclose, in advance of trial, detailed particulars regarding the complainant's prior inconsistent statements. This reverse disclosure would have to be made not

only to the Crown but also to a complainant represented by their own counsel. The accused would have to disclose these communications to the complainant even if the accused did not intend to testify. The disclosure would often likely have the effect of providing a roadmap of the accused's position and defense to the charge.

While the Supreme Court noted in *Darrach* that there is no right to trial by ambush, the legislation at issue in that case (s. 276) was narrowly tailored to evidence that carried a particular risk of prejudice: the twin myths. There is no such prejudice associated with complainant communications with an accused. If s. 278.92 were interpreted to apply to complainant communications with an accused, there would be no benefit to the administration of justice or the complainant's privacy. The legislation would be constitutionally overbroad because it would unjustifiably infringe the accused's right to silence and right to a fair trial. The only clear result of this overly broad interpretation of the legislation would be to assist complainants in adjusting their perjurious evidence. That cannot be a constitutionally acceptable objective.

In the Provincial Court of Saskatchewan, Justice Henning found that the combined effect of ss. 278.92(1), 278.92(2)(b), and 278.94(2) seriously impaired an accused person's ability to effectively challenge the veracity of a complainant in a trial. Justice Henning declared the provisions invalid in that case after finding breaches of ss. 7 and 11(d) of the *Charter*.[21]

In *R. v. F.A.*¸ Caponecchia J. determined that the legislation only created a screening process and there is no right to adduce evidence that would distort the search for the truth or to adduce irrelevant evidence. Her honour found that the "requirement to hold a *voir dire* and establish the relevance of potentially probative evidence is not a departure from the usual rules of evidence" and the legislation created no risk to an accused's fair trial rights. Further, that the *voir dire* being held in advance ensures the trial will be held without interruption.[22]

In two other recent Ontario Court of Justice decisions, the courts recognized that ss. 278.93(2) and 278.94(2) and (3) potentially offend the principle against self-incrimination and the right to a fair trial. In both cases, the Justices find that the statutory scheme permits the defence to make application under s. 278.93, during cross-examination of the complainant, thereby respecting the principles against self-incrimination.[23] There are several potential difficulties with this judicial strategy: 1) potential adjournments and delays of trial; 2) ethical issues with regard to complainant's counsel providing advice and discussing trial evidence with a witness under cross-examination; and 3) the lack of binding authority on other justices as to the preferred procedure and timing for these applications.

The Constitutional question was not before the court in a motion seeking directions before Justice Chapman in the Ontario Court of Justice. She concurred with Justice Doody in *R. v. Boyle* that cross examining on the contents of the record (without putting the record into evidence) would be considered "adducing" the record.[24] This interpretation, of course, makes it impossible to set up an impeachment in an effort to test the complainant's veracity to lie. With respect to timing, Justice Chapman also found the application should be brought in advance as a pre-trial motion to avoid trial mismanagement. Justice Chapman commented that inadequate notice logically invites a

response that is generated by fear, humiliation, confusion, or anxiety, and not one that is conducive to getting at the truth. Further, she opined that mid-trial applications could have an adverse impact on the complainant's desire to dispute certain evidence knowing it could cause the bifurcation of proceedings.[25]

The legislation ultimately must be struck down if all recorded communications between the accused and the complainant are interpreted as "records" pursuant to s. 278.1. Further, if defence counsel are not even allowed to cross-examine on the contents of "records" to confirm the truth or setup impeachments, then fair trial rights are essentially gutted. Imagine a scenario where the accused possessed exculpatory text messages that were deleted before the complaint was made to the police. The defence lawyer would not be able to cross-examine on the contents of the deleted texts without an objection. An objection that would alert the perjuring complainant that the accused no longer has the text messages. The complainant is effectively put on notice as to when the defence has proof of their client's narrative and when they don't have proof of that narrative. The legislation if interpreted broadly creates a roadmap for complainant perjurers to successfully navigate and defeat cross-examination.

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[1] *R. v. Brown*, 2019 ONSC 1335; *R. v. Boyle*, 2019 ONCJ 226.

[2] *R. v. R.M.R.*, 2019 BCSC 1093, at paras 19–22.

[3] *R. v. Clifford,* [2002] O.J. No. 865 (C.A.), at para 49.

[4] Standing Senate Committee on Legal and Constitutional Affairs, 20th Report, December 2012; *R. v. Shearing*, 2002 SCC 58.

[5] *R. v. Mills,* [1999] 3 S.C.R. 668, at paras 99–100, 106–108; *R. v. O'Connor,* [1995] 4 S.C.R. 411, at paras 7–9.

[6] *R. v. Quesnelle*, 2014 SCC 46, at para 45.

[7] *R. v. Marakah*, 2014 SCC 46, at paras 138–139.

[8] *Ibid*, at paras 54–55.

[9] *R. v. Mills*, 2019 SCC 22, at paras 36–51.

[10] *R. v. Phagura,* [2019] B.C.J. No. 1807 (Sup. Ct.), at paras 43–54.

[11] *R. v. S.W.*, 2015 ONCJ 562, at paras 16–18.

[12] *R. v. M.S. (Young Person)* (25 September 2019), Toronto (Ont. Ct. J., per Champan J.), at para

72; *Boyle*, *supra*, at para. 15.

[13] *R. v. R.M.R.*, *supra*.

[14] *R. v. McKnight*, 2019 ABQB 755, at paras 22–29.

[15] *R. v. M.S. (Young Person)*, *supra*, at para 72.

[16] *Ibid*., at para 68.

[17] *R v. Ekhtiari* (25 October 2019), Toronto 4817 998 18-75003118 (Ont. Ct. J., per Horkins J.), at para 24.

[18] *Ibid.*, at para 23.

[19] See s. 278.92 (2)(b).

[20] *R. v. Darrach*, 2000 SCC 46.

[21] *R. v. A.M.*, 2019 SKPC 46.

[22] *R. v. F.A.*, 2019 ONCJ 391, at paras 43, 62, 66, and 72.

[23] See *R. v. R.S.(A.)* (17 September 2019), Toronto 16-45003115 (Ont. Ct. J., per Breen J.) and *Ekhtiari*, *supra*.

[24] *R. v. M.S. (Young Person)*, *supra*, at para 71, citing *Boyle*, *supra*.

[25]*Ibid.*, at paras 81, 105–107.

Three's a Crowd: Sexual Assault Litigation in the Wake of Bill C-51

Notable Changes & Practical Solutions for s.276 Litigation

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Overview

On December 13, 2018, Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* received Royal Assent. This Act ushered in numerous changes to the *Criminal Code* and modified s.276 in a manner that has rightly caused concern amongst lawyers and members of the judiciary alike.

In the pages that follow, the important changes to s.276 will be highlighted and an assessment of the current case law will help to address the practical issues facing defence counsel in light of these changes.

Historical Background

Major legislative reforms related to sexual offences were undertaken in 1975, 1982, 1985, 1987, 1992 and 1997[2]. In 1992, as a result of the Supreme Court's decision in *R. v Seaboyer,* legislative provisions[3] "were also enacted preventing complainants from being examined on their sexual history "solely to support the inference that the complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue on the trial; or (b) less worthy of belief as a witness." These provisions, commonly referred to as "rape shield" provisions, have spawned extensive litigation over the years. The constitutionality of the provisions were upheld by the Supreme Court in *R. v. Darrach,* [2000] 2 SCR 443. That decision continues to be a focal point in assessing the constitutionality of the amendments brought in by Bill C-51.

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[2] Legislative Summary for Bill C-51, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C51E#txt34

[3] *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, held to be unconstitutional by the Supreme Court of Canada in *R. v. Seaboyer; R. v. Gayme*. Parliament responded by amending the rape shield provisions of the Code in 1992. See *An Act to amend the Criminal Code (sexual assault)*.

Although the underlying reason and timing behind the passage of the C-51 reforms has been the subject of much speculation, the government's stated reason for reform was as follows:[4]

> The Supreme Court's jurisprudence on sexual offences over the last 30 years has made it clear that evidence based on rape myths and stereotypes is not admissible because it distorts the truth-seeking purpose of a criminal trial. The equality and privacy rights of sexual offence complainants must be considered and protected. That said, the Supreme Court has stressed that an accused's right to make full answer and defence is paramount. Trial judges must have discretion to weigh competing constitutional rights in the specific factual context of the case and make case-specific determinations about relevance and admissibility.
>
> Despite legislative reforms and decisions from the Supreme Court holding that rape myths and stereotypes have no place in a criminal trial, concerns continue to be raised about the continued prevalence of myths and stereotypes in sexual offence proceedings. Some academics have also expressed the view that the criminal justice system as a whole gives insufficient weight to women's equality rights. Specific areas where commentators argue that myths and stereotypes still find their way into judicial reasoning include the following:

- assessments of complainants' credibility;
- interpretation and proof of consent, including the defence of honest but mistaken belief in consent;
- inferences about the truthfulness of a complaint based on its timeliness;
- the judicial treatment of spousal and intimate-partner sexual assaults, as well as assaults on women who are members of marginalized groups;
- sentencing decisions; and
- continuing attempts by defence counsel to exploit sexual assault myths and stereotypes to discredit complainants during cross-examination.

Supporting this statement, the government pointed to various sources including:

> *In the Matter of Section 65 of the* Judges Act, *R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Robin Camp of the Federal Court: Report of the Canadian Judicial Council to the Minister of Justice*, Ottawa, 8 March 2017. A number of court decisions have raised the issue. See *R. v. Barton*, 2017 ABCA 216 (leave to appeal to Supreme Court of Canada granted 8 March 2018 [Docket 37769]); *R. v. A.D.G.*, 2015 ABCA 149; *R. v. Adepoju*, 2014 ABCA 100; *R. v. C.M.G.*, 2016 ABQB 368; and *R. v. J.R.*, 2016 ABQB 414. For media coverage of the persistence of these stereotypes, see, for example, "Justice minister denounces judge's comments on teen sexual assault victim's weight," *CBC News*, 25 October 2017; "La ministre de la Justice demande une enquête sur les propos du

[4] See Footnote #2

juge Braun," *ICI.Radio-Canada.ca*, 25 October 2017; and David Burke, "Complaints about N.S. judge who said 'a drunk can consent' will be investigated," *CBC News*, 7 September 2017.[5]

Whether the amendments can actually address the government's concerns is best left to the halls of academia and the eventual judgment of history. Whether it was a timely recognition that some sexual assault victims have been re-traumatized in the criminal justice system or simply a way to garner political vote is of no consequence. From the perspective of the criminal justice system, it remains to be seen how the amendments serve to enhance the truth-seeking function of a criminal trial. Do the amendments promote truth seeking or simply make it easier to convict an accused? Do the amendments give the complainant a voice or do they add another voice against the accused? Do the amendments promote transparency or are they a means to conceal it? Whether the administration of justice is better served as a result of these changes will depend largely on how the laudable goals of the legislation are interpreted against the backdrop of a system predicated on the presumption of innocence and the right to a fair trial. This paper will attempt to illustrate how Parliament has attempted to provide the complainant with participatory rights and to demonstrate how the immediate and obvious problems with the amendments can be addressed in order to protect the fair trial rights of the accused and to protect the integrity of the administration of criminal justice in Canada.

Two Important Changes to s.276

As the Legislative Summary explains, two significant changes have been enacted with respect to the "rape shield" provisions:

[5] See Footnote #2

> With respect to the first step in this process, new section 278.93 reproduces the substantive provisions in existing section 276.1, detailing the contents of the application and the requirements for granting the application to hold an admissibility hearing.
>
> The bill makes substantive amendments **only to the provisions governing the second step in the process**: the admissibility hearing itself. In addition to restating the existing rule that the complainant is not a compellable witness at the hearing, new **section 278.94(2) specifies that a complainant may appear and make submissions in such admissibility hearings**. Moreover, new section 278.94(3) for the first time gives any participating complainant a right to be represented by counsel in rape shield proceedings and requires that the judge inform complainants of this right as soon as feasible (clause 22, repealing existing section 276.2; and clause 25 adding new section 278.94). Similar provisions already appear in the Code in the context of applications for the production of complainants' private records held by third parties under sections 278.4(2) and 278.4(2.1). However, complainants have not previously had the right to appear and make submissions in rape shield hearings.[6]

The complainant's right to participate and make submissions becomes problematic from the point of view of defence counsel given the other notable change made to s.276, that is, the definition of "sexual activity".

"Sexual activity" is defined in s.276(4) as including "any communication made for a sexual purpose or whose content is of a sexual nature." This would necessarily include text messages, e-mails, social media communications and voice mail messages. Each of these categories has, historically, been a source of information for defence counsel that could be used to undermine the complainant's credibility in an effort to demonstrate the innocence of the accused. As a result of this provision, an application brought pursuant to s.276 has major ramifications for cross-examination.

[6] Legislative Summary, see Footnote #2

It is where the accused has possession of such communications that the issue of the timing of the application becomes of particular concern and importance to defence counsel.

Application for Hearing – Section 278.93

The two-step process governing whether s.276 evidence is admissible is found in s.278.93 of the *Code*. Section 278.93(1) through (3) set out the form and content that the application must conform to. The application must be made in writing, must set out the detailed particulars of the evidence that the accused seeks to adduce and set out the relevance of that evidence to an issue at trial. The application must be provided to the Crown and the clerk of the court. If those steps are satisfied, s.278.93(4) becomes operational:

> (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

Under subsection (4), the application must be provided to the Crown and clerk "at least seven days previously" OR "any shorter interval" in the interests of justice. On the face of this subsection, an accused may opt for a "shorter interval" before providing the application. In other words, an application brought under this section may need not be a "pre-trial application."

In the Criminal Rules of the Ontario Court of Justice, Rule 2.4 and Rule 2.5 differentiate between a "pre-trial application" and a "trial application". The latter states that "a trial application shall be heard at the start of the trial or during the trial, unless the court orders

otherwise." For the purposes of 2.5(1), trial applications include (b) complex evidentiary applications such as applications for the admission of (ii) evidence of a complainant's prior sexual activity.

A combined reading of the *Code* and the Rules of the Ontario Court of Justice clearly support the position that an application brought pursuant to s.276 need not be brought by way of a pre-trial application.[7]

This language is important because of the operation of s.278.94.

Under that section, once a hearing under s.278.93(4) is granted, s.278.94(2) allows the complainant to "appear and make submissions" on the application. Further, under subsection (3), "the judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel." Accordingly, the timing of the application is crucial from a trial strategy perspective. If the application is brought too soon, the potential value of impeachment evidence may be minimized or eliminated when the complainant has said something materially different in examination in chief or in her statement to the police. This also holds true when defence counsel has text messages, emails, voice mail or other social media communications which have potential impeachment value.

(i) The Current State of the Law: Timing of the Application

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[7] Unlike the Ontario Court of Justice Rules, the Rules of the Superior Court of Justice do not specifically refer to s.276 applications. However, the Judicial Pre-Trial form would indicate that the timing of such applications is discretionary and the time for service and filing may be fixed by the judge

In *R. v. M.S.,* 2019 ONCJ 670, Chapman J. concluded that the application must be brought by way of a pre-trial application. Concerns over judicial expediency and *Jordan* were given considerable weight:

> [96] Looked at strictly from a rape shield perspective, surely Parliament's decision to broaden the definition of other sexual activity evidence to include communications was not meant to suggest that sexual history applications could now be routinely reserved to the conclusion of the complainant's evidence in-chief or even during her cross-examination. If they did intend this, they would have to be a lot clearer.
>
> [97] If the 7 days notice requirement stipulated in the *Criminal Code* means that the defence can bring their application at the close of the complainant's evidence then what is the point in the stipulation of 7 days? Realistically this would mean that many sexual assault trials will take place on a bifurcated basis. First the complainant would testify in-chief. Then the application would be brought. And then the application would be heard and decided at stage one. At that point, the trial would be adjourned to facilitate the complainant's right to obtain counsel. The trial would then resume at some later point with a stage 2 hearing. Then, once that is argued and decided, the trial will continue. This is unmanageable and not at all what Parliament intended.
> …
>
> **[**107**]** From a practical perspective, the defence strategy in this case, which contemplates a mid-trial application is not something that should be encouraged. Clearly the section contemplates a discretion in a trial judge to waive notice requirements where circumstances have changed or for some other reason the interests of justice require that they do so in exceptional cases. Further, in some cases s. 276 applications may be reconsidered at a later stage in the proceedings. However, pre-screening of any records that might reasonably fall under the s.276 or s. 278.92 regime should ordinarily take place in advance of trial so that last-minute adjournments do not take place and *Jordan* timelines can be met.
>
> [108] If an application is to be brought, it should be brought seven (7) days prior to trial.

Before considering the competing authorities, mere acceptance of this decision as authority creates significant challenges for defence counsel who may have in his or her possession material that would be undermine the complainant's credibility. Consider then the state of the law as it relates to what must be provided to the complainant.

(ii) What must be provided to the complainant?

Although s.276 does not make reference to the application being provided to the complainant, and only requires that the application be given to the prosecutor and the clerk of the court, the law that has developed as a result of s.278.94(2) has, thus far, held that the complainant is entitled to the entirety of the application record. At present, there is no appellate authority on this point.

In *R. v. Boyle,* [2019] O.J. No. 155:

> [42] The section in issue gives complainants a right to appear and make submissions. That right, to be meaningful, requires that they be able to see, hear, and read the basis of the application. The right is the complainant's. It is not a right which can be diminished or attenuated by any state actor, including the Crown. Prior to the enactment of the new section, the contents of the application could be shared with the complainant should Crown counsel choose to exercise their discretion to do so. The new section is different. What was previously a possibility is now a right.
>
> [43] In my view, the complainant is entitled to see the application record of the defendant sufficiently in advance of the hearing to allow her to prepare and make meaningful submissions. I need not rule now on the manner in which that is to be accomplished. In this case, the complainant already has counsel. He can obtain the record from either Crown counsel or defence counsel.

It is noteworthy that the conclusion in *Boyle* was at least partly informed by the finding in *Darrach, supra,* that providing the application materials in advance did not offend s.7 of the *Charter*. Left out of the analysis, however, was the fact that the court in *Darrach* arrived at that conclusion without a statutory provision allowing the complainant to participate in the hearing.

A similar conclusion, based on largely the same reasoning, was reached in *R. v. F.A.,* [2019] O.J. No. 3041, at paras. 63-69. The court in *R. v. Simon*, [2019] A.J. No. 984 likewise found that the complainant should have access to the complete record as filed. See also *R. v. Barakat,* [2019]

O.J. No. 705 at para. 4. In *R. v. T.P.S.,* [2019] N.S.J. No. 47 (N.S.S.C.), the court found that the application in full should be provided to the complainant. The court in *T.P.S.,* however, went further and required that the complainant be provided with the full application at the threshold stage. This latter finding is inconsistent with *Boyle* and *Barkat*.

At present, the law requires that the complainant be provided with the complete application record. If the application is to be made and determined in advance of trial, the complainant, having full possession of potential impeachment material, will have a detrimental effect on the ability to effectively cross-examine the complainant.

(iii) Re-Visiting the Timing of the Application

In *R. v. A.R.S.,* 2019 ONCJ 645, Justice Breen provided a fulsome analysis of these concerns. Counsel for the defence argued that sections 278.93 were unconstitutional since they compel "the disclosure of defence evidence and strategy, in advance of trial, resulting in a breach of ss.7 and 11(d) of the *Charter*." The application was dismissed as the learned Justice concluded that the sections could be "applied in a manner consistent with the principle against self-incrimination, the right to a fair trial and the complainant's rights to privacy and equality." The reasoning offered by Breen J. exhibits a thoughtful and robust approach to the balancing act required in applications of this nature.

Justice Breen considered by analogy the need for the defence to seek a ruling with respect to third-party suspects. In *R. v. Jacobson,* Ferguson J. considered the general principles of defence disclosure:

[10] I accept the law is as stated by Watt J. in his text, Watt's Manual of Criminal Evidence, Thomson-Carswell, 2003, s. 25.01:

General Principles of ***<u>Defence Disclosure</u>***

Commentary

As a general rule, D is under no obligation, common law, statutory or constitutional, to disclose the nature of his/her defence, the evidence upon which s/ he relies, or the witnesses, if any s/he proposes to call. To some extent, however, pre-*voir dire* conferences reveal certain aspects of the defence position, but not in any formal or binding way.

[11] The only exception to the general rule which the Crown suggested was applicable here is the common law requirement set down in the line of cases following McMillan. These cases set certain pre-requisites to the admissibility of evidence which tends to suggest that a third party suspect (someone other than the accused) committed the offence

...

[16] ...if counsel know there are pre-requisites to admissibility of proposed evidence or know that the opposite party opposes or will likely oppose its introduction then the counsel wishing to introduce it is obliged to first seek a ruling on a voir dire. That is what has happened so far in this trial.

[17] This traditional rule requires the defence to seek a ruling in advance of asking questions about third party suspects. As discussed below, the McMillan line of cases imposes pre-requisites to admissibility and consequently, where that line of a cases applies, the defence must seek a ruling before adducing such evidence as otherwise the trial judge cannot make a determination as to whether the pre-requisites are met.

[18] The voir dire could be sought any time before the question is asked. Obviously, it would be much less disruptive to the trial if the matter were raised during pre-trial motions or at least on notice so that the trial judge could make arrangements to minimize the inconvenience to the jury. However, in my view the defence is entitled to wait, if it insists, until it proposes to put the question.

This led Breen J. to conclude, at para. 92:

> [92] An interpretation of the statutory scheme that permits the defence to make application under s.278.93, during cross-examination of the complainant, respects the principle against self-incrimination. In addition, it permits the defence the opportunity to establish a foundation for contradiction before entering upon the *voir dire*. Proceeding in this fashion best preserves the integrity of the complainant's evidence and the fairness of the trial.

The approach offered by Breen J. properly balances the appropriate considerations. While expediency and efficiency are important principles, the need to ensure that the integrity of the trial process is respected should be viewed as paramount.

A.R.S., supra, has most recently been followed by Justice Horkins in *R. v. Ekhtiari,* [2019] O.J. No. 5525. Building on *A.R.S.,* Horkins J. writes:

> [29] There is no doubt that these new provisions in the Criminal Code impact very significantly on the fair trial rights of the accused. This aspect of the statutory scheme was very apparent to Parliament when it was enacted. The impact is significant enough that the constitutional validity of the scheme has been seriously questioned (see *R. v.A.M*.). In order to balance the objectives of the legislation with the constitutional rights of the accused the Court has a duty to minimize the offending impact on the fair trial rights of the accused.
>
> [30] Justice Breen's approach in *R. v. A.R.S.*persuades me that in order to preserve the fair rights of the accused it is best to defer any obligation on the accused to produce the materials for review until such time as the evidence at trial triggers the necessity to do so. The contextual assistance of the evidence at trial may be necessary to provide an adequate foundation to determine the relevance and probative value of the materials. I am also concerned that the premature production of potential impeachment materials may very well neutralize their effectiveness in cross-examination and significantly impair the fair trial rights of the accused.
>
> [31] <u>Forcing premature disclosure of impeachment materials to both the Crown and the complainant creates obvious, significant and potentially unnecessary negative impact on the ability of the accused to properly defend the case. When weighed against the logistical challenges that mid-trial applications may cause, the fair trial rights of the accused should clearly be given priority</u>.
>
> [32] For this reason, I am not directing that an application for leave to adduce the materials be brought in advance of trial. I will defer to counsel for the accused as to when

> and if she wishes to adduce the material and seek the required leave of the Court to do so. **(<u>emphasis</u> added)**

In *M.S., supra,* Justice Chapman expressed concerned that a mid-trial application would result in a bifurcated trial and could bring an already overburdened system to come to a halt since counsel for a complainant would need to be secured, informed and sufficiently prepared to advocate on the complainant's behalf. Horkins J. offered a practical solution to this:

> [34] In this case the complainant is aware generally that there are communications in the possession of the accused in which she may have an expectation of privacy and which may require screening prior to their use at trial. I am told that counsel is on standby to act for the complainant should a hearing be triggered.
>
> [35] Counsel for the accused has asked that I give direction restricting the scope of the participation of counsel for the complainant. I am not prepared to do that without input from counsel for the complainant.
>
> [36] As requested through Crown counsel, I will sign an Order for funding for counsel for the complainant <u>in anticipation of her involvement being necessary at some point in time</u>.

The effect of *A.R.S.* and *Ekhtiari* is to provide counsel, Crown and defence alike, with a properly balanced approach to handling such applications. Respecting that Parliament has specifically chosen to give the complainant a voice in matters that involve issues of privacy and dignity can be reconciled with the important role that defence counsel play in ensuring that the innocent are not convicted. Reliance on *A.R.S.* and *Ekhtiari* serve to ensure that the complainant is not being "whacked" or "ambushed" while also ensuring that the truth finding function of a trial is not lost by allowing legitimate challenges to credibility.

(iv) Complainant's Participation

Irrespective of when the application is brought, the complainant's right to participate allows the accused to be cross-examined on the application by both the Crown and the complainant. The complainant may also make submissions. Important considerations that are developing include:

(1) Can the complainant cross-examine solely on the affidavit of the accused or can it be at large?

In *R. v. J.M.,* [2019] O.J. No. 5161, the accused was in possession of messages from Whatsapp that he sought to introduce. He provided a detailed affidavit. The court concluded that cross-examination by the Crown would be confined to the affidavit stating "that the cross-examination should be limited to the completeness and provenance of the material the accused sought to introduce." In *R. v. Boyle,* [2019] O.J. No. 155, at para. 33, the court in explaining that the complainant had the right to participate implied that cross-examination of the accused would be confined to issues of relevance and admissibility.

Also in *Boyle,* [2019] O.J. No. 2085 , the court held that in order for the right to appear and make submissions be meaningful, the complainant was entitled to cross examine the accused. The court added that there may be evidence that the complainant wishes to flush out in order to make full and meaningful submissions. At paragraph 6:

> [6] I start with the proposition that the right to appear and make submissions must be meaningful. Parliament has decided that the complainant's perspective is important to the issue in this application and the court should take that perspective into account. Her perspective may require evidence to flush out her submissions. Submissions made without evidence are often of limited use. And Parliament wanted to ensure her rights to privacy were protected, and that may require that certain things be brought out by cross-examination.
> …
>
> [14] The defendant submits that it is fundamentally unfair that he be subject to double cross-examination. I do not accept this. Accused persons who choose to testify are often cross-examined by more than one person. Examples are multiple accused cases and

prosecution by both the Federal and the Provincial Crown counsel on a single information or indictment. Parliament decided that the complainant's interests are different than the Crown's and she should be heard and her interests considered. That does not mean that the cross-examination of the Crown and the complainant can be duplicative. I will not allow that. Nor will I allow them to stray beyond what is at issue on this application as the Supreme Court of Canada warned about in *R. v. Darrach*, [2000] 2 SCR 443, 2000 SCC 46 at paragraph 64.

[15] Defence counsel submitted that it was fundamentally unfair to allow complainant's counsel to cross-examine on the basis of information he has and the Crown does not because such information need not be disclosed. That submission did give me pause, but I have concluded that this is consistent with Parliament's intention of allowing complainants to be heard. That intention must rest on a determination that complainants have different information and different perspectives from the Crown on the issues at play in a s. 276 hearing. And when the defendant makes the decision to testify, he exposes himself to cross-examination.

[16] The defendant's fair trial rights are of fundamental importance, but they are not the only interest to consider. As the Supreme Court noted in *R. v. Darrach* at paragraph 70:

> The fair trial protected by s. 11(*d*) is one that does justice to all the parties.

[17] Parliament has decided that complainants have the right to appear and make submissions. In my view, making that right meaningful means that the complainants have a right to cross-examine on issues relevant to the application.

In *F.A., supra,* at paragraph 71, Caponecchia J. observed that cross-examination by the complainant would be limited in the same manner as it would be by Crown counsel:

> [71] As for cross-examination by two potential counsel at a hearing, in *Darrach* the Supreme Court of Canada signalled guidelines for cross-examination of the defendant on a *voir dire* that were borrowed from the *Corbett* application procedure. Namely, cross-examination cannot be treated as an excuse for the Crown to deeply probe the case for the defence. The point is to provide the trial judge with the information he or she needs to make an informed decision, but the Crown has no right to require more than that. The same would hold true with respect to cross-examination by counsel for the complainant. Moreover, a trial judge can preclude questioning that is repetitive. The use of a defendant's *voir dire* evidence is limited by s. 13 of the *Charter*.

See also *R. v. Simon*, supra, where the court followed *Boyle* and *F.A.* at paragraphs 52 through 57.

(2) During the course of submissions, are the complainants submissions restricted to the factors set out in s.278.92(3)(e) through (h) or can the complainant also make submissions on:

> **(a)** the interests of justice, including the right of the accused to make a full answer and defence;
>
> **(b)** society's interest in encouraging the reporting of sexual assault offences;
>
> **(c)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
>
> **(d)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(3) Does the complainant have a right to adduce evidence on the voir dire?

These issues, and unquestionably many more, will certainly arise as more jurisprudence develops.

Conclusion

As members of society, we share a common interest in ensuring that complaints about sexual assault are brought forward and that victims of crime are treated with respect and dignity. As participants in the criminal justice system, we must respect these laudable goals while also ensuring that the criminal justice system is protected. The presumption of innocence and the right to a fair trial must never become a secondary consideration.

LIST OF AUTHORITIES

R. v. Darrach, [2000] 2 SCR 443

R. v. M.S., 2019 ONCJ 670

R. v. F.A., 2019 ONCJ 391, [2019] O.J. No. 3041

R. v. Simon, 2019 ABPC 186, [2019] A.J. No. 984

R. v. Barakat, [2019] O.J. No. 705 (C.J.)

R. v. T.P.S., 2019 NSSC 48, [2019] N.S.J. No. 47 (N.S.S.C.)

R. v. A.R.S., 2019 ONCJ 645

R. v. Ekhtiari, 2019 ONCJ 774, [2019] O.J. No. 5525

R. v. J.M., 2019 ONSC 5747, [2019] O.J. No. 5161

R. v. Boyle, 2019 ONCJ 11, [2019] O.J. No. 155 & [2019] O.J. No. 2085

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Not Every One's a Winner: Prison Conditions and Parole

Conditions, Classification and Parole in the Federal System[1]

Depending on the offence, many offenders are often finding that their first sentence is being served in the federal system. This paper will give a very basic overview on the federal prison classification and federal parole processes, which should give interested parties at least a starting point in answering the most common sort of questions that often arise. A very brief review of the conditions in federal prisons will also be addressed, although it should be noted that the author of this paper has not actually served time. As most offenders entering the federal system are male and the process for female offenders is different in many respects, the following discussion will be restricted to male offenders.

It should be noted that paper borrows heavily and should be considered as an update to the paper entitled ***A Preliminary Primer on Prison and Parole*** that was presented at the 2012 CLA Fall Conference.

Where Can One Find Information?

The Correctional Service of Canada[2] and the Parole Board of Canada[3] operate websites that can be extremely helpful in obtaining at least an overview of the prison and parole system. On the Correctional Service of Canada (CSC) website, one can gain access to the ***Corrections and Conditional Release Act*** [4] (***CCRA)***, the ***Corrections and Conditional Release Regulations***[5] (***CCRR***) and the Commissioner's Directives (CD). These documents provide the legislative and policy framework concerning the

[1] Michael S. Mandelcorn, B.A.(Hon.), LL.B
[2] www.csc-scc.gc.ca
[3] www.pbc-clcc.gc.ca
[4] S.C. 1992, c. 20
[5] SOR/92-620

incarceration and parole procedures relating to federally incarcerated offenders, including information about visits, items that the offender is permitted to have in the institution and how money can be sent to offenders. The Parole Board of Canada's website gives access to the Parole Board of Canada's Policy Manual, which gives a fairly comprehensive, if optimistic, review of the parole process.

There should be a word of warning about the Commissioner's Directives. Commissioner's Directives are policy statements and rules that are issued pursuant to the authority of the Commissioner of Corrections. The Directives are not law; rather, they are directions under which the correctional authorities carry out their duties[6]. Accordingly, when an offender calls and tells you that he is being held in the Assessment Unit longer than what is provided in the Commissioner's Directives, it is suggested that counsel do not immediately run out and file an application for judicial review. On the other hand, a blatant disregard of the relevant Commissioner's Directive may be an indication that the correctional authorities have breached their duty to act fairly to the offender, and the resulting decision may be subject to judicial review.

For information regarding how pre-sentence custody, bail, parole ineligibility and statutory release all relate to each other, the recent case of ***R. v. Passera***[7] provides a good overview.

In terms of texts, Fergus J. O'Connor's review of the law pertaining to federal penitentiaries, provincial and territorial prisons and the rights and obligations of prisoners is highly recommended.[8]

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[6] ***Martineau v. Matsqui Institution***, [1977] S.C.J. No. 44, [1978] 1 S.C.R. 118 (S.C.C.)
[7] 2019 ONCA 527 (CanLII)
[8] ***Halsbury's Laws of Canada, Penitentiaries, Jails and Prisoners (2018 Reissue)***, LexisNexis Inc.

Conditions in the Federal Prisons

A prison is a prison is a prison. That being said, in the federal system, minimum-security institutions are generally conducive for an offender to serve "easy" or "quiet" time, bearing in mind that he is still subject to rules and whims of his keepers. In maximum and medium security institutions, offenders are subject to lockdowns, violence and restrictions in program and employment opportunities. All in all, however, it is fair to say that the conditions in the federal system are more favourable than those in the provincial detention centres and jails.

For a review of the history and current state of the use of segregation in the federal system, the following cases are helpful: ***British Columbia Civil Liberties Association v. Canada (Attorney General)***[9], ***Reddock v. Canada (Attorney General)***[10], ***Brazeau v. Attorney General (Canada)***[11] and ***Canadian Civil Liberties Association v. Canada***[12].

What is the Classification Process?

After being sentenced to the penitentiary, the offender will be taken to the local remand centre. In order to facilitate the filing of an appeal or to attend to personal affairs, the offender will not be transferred to the penitentiary until the expiration of fifteen days after the day on which the offender was sentenced, unless the offender waives the fifteen-day waiting period[13]. The first stop for the offender in his federal institutional journey would be the Joyceville Institution Assessment Unit (JAU). The Commissioner's

[9] 2019 BCCA 228
[10] 2019 ONSC 5053
[11] 2019 ONSC 1888 (CanLII)
[12] 2019 ONCA 243
[13] ***CCRA***, ***supra***, section 12

Directives provide the following timeframes for the completion of the assessment process: 60 days from admission for those offenders serving a sentence of four years or less for non-violent crimes; 70 days from admission for those offenders serving a sentence of four years or less for other than non-violent crimes; and 90 days from admission for those offenders serving a sentence of greater than 4 years[14]. At the end of this period, the offender can be expected to be classified to his "home" institution, with the caveat that certain types of programming now take place at the Assessment Unit, which would delay the transfer. One should keep in mind the warning that Commissioner's Directives are not law and that frequently these time frames are extended due to parole officers' workload, lock-downs and a host of other intervening events.

One question that is often asked is there anything that can be done to speed up the classification process. The subtext to that question is "can't you (the lawyer) call the institution and/or parole officer and/or warden (sometimes even the Commissioner of Corrections) and get them to do the paperwork." The simple answer is that except in the case of the most egregious delay, such interventions are mostly a waste of time. What can be done, however, is to ensure that supporting documentation is sent to the institution to allow the parole officer to complete the assessment as quickly as possible. The type of documentation that should be sent will be summarized in the discussion concerning the parole process.

One last word on the classification process may be helpful in advising the client prior to his entering the federal system. He will be subjected to a multitude of tests and assessments in order to determine his dynamic and static risk factors. After the initial

[14] CD 705-6, paragraph 10

reports are completed, future reports often are based on the "cut and paste" method. In other words, what the offender says initially and the results of any tests and assessments will be repeated in almost any future report that is prepared. Therefore, it is crucial that the offender take the assessment process seriously and be reasonably consistent in his telling of his role in the offence, his understanding of any factors that led to his offending history, and any support that he may have in the community (in other words, it is a good idea for the offender not to, as an example, list two different common-law partners as support persons).

The Parole Process

The Parole Board of Canada may grant parole to an offender if in the Board's opinion:

> a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
>
> b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen[15].

The hearing itself is relatively straightforward. The hearing, which is held in the institution where the offender is incarcerated, is before two Board Members. Most hearings are now convened via video conference; that is to say, the Board Members and hearing officer (whose duties are similar to those of a court clerk) are at the Board's office in Kingston while all other parties are at the institution. For those offenders who are serving a life sentence and are on day parole and now applying for full parole, the hearing will be via video conference with the offender being at the parole office under

[15] ***CCRA***, ***supra,*** section 102

which he is being supervised and the Board Members and hearing officer being in Kingston. Other people at the hearing are of course the offender, his parole officer, the offender's assistant (who may be a family member, a spouse, a friend, or a lawyer); less often, upon application, there may be observers present who may have a specific interest in the case (such a media representatives) or a general interest (such as Board trainees), and finally, victims and victims' families. It should be noted that lawyers are not present at hearings as counsel-they are present as assistants with the same rights to participate as any other assistant[16].

At the commencement of the hearing, the hearing officer introduces him/herself, has all those persons who are participating in the hearing introduce themselves, as the hearing is audio taped, and basically ensures that the offender has all of the necessary documentation and is ready to proceed with the hearing. After the introductions, the hearing officer turns to the parole officer and asks if there is any new information to present to the Board. The new information may consist of documentation that was not previously shared or security information that has just come to light (at that point, the lawyer may just as well close his or her file). Once the parole officer has either advised that there is no new information or relays what the new information is, he/she then presents his/her oral report, which is normally around five minutes in length and is basically a summary of the Assessment for Decision, which is the main document that is prepared by the Correctional Service and is relied upon at the hearing. The parole officer will conclude with his/her recommendation as to whether parole should be granted. Once the parole officer completes his/her oral presentation, the offender is then questioned by the Board. The two Board Members have an equal vote on the case; however, one takes

[16] ***CCRA***, ss. 140(7) and (8)

the role of the "lead" member and asks the majority of the questions. The second Board Member either asks no questions (not a good sign), ask his/her questions after the lead Member finishes, or more frequently, interjects with questions at any time during the hearing. There are three main areas that the Board Members cover in their questions:

a) the offender's criminal history and circumstances of the offence;

b) the offender's institutional performance;

c) the offender's release plan.

Once the Board Members complete their questioning of the offender, they will turn to the parole officer and ask if he/she has anything to add. The Board then asks the assistant for his/her submissions. Although there is no stipulated time limit on the assistant's submissions, for the vast majority of the cases anything beyond the 10-minute range appears to tax the patience of the Board Members. Finally, the offender is told that it is his hearing (in case he was not already aware of that fact) and that he has the last word. Once the offender completes what hopefully will be his <u>short</u> last comments, everyone, with the exception of the Board Members and the hearing officer, leave the room and the two Board Members begin their deliberations. When the Board Members are ready to deliver their decision, everyone is called back in the room and the offender is told whether his application for parole (day and/or full) is granted or denied. The Board Member who was the lead in the hearing usually delivers short oral reasons for the decision, and the offender is sent the formal written decision several days after.

Counsel who do not normally represent offenders at parole hearings find it frustrating that their role is quite restrictive: counsel (that is to say, assistants) are discouraged from interrupting the Board Members during their questioning; they are not

permitted to cross-examine the parole officer or any other authors of the reports that are submitted at the hearing (indeed, writers of reports other than the parole officer, such as psychologists or psychologists, are not present at the hearing); and they are not permitted to bring their own witnesses to the hearing, although they are permitted to submit letters of support and other documentation in support of the application for parole. The real work of counsel is preparing the offender for the hearing, by reviewing the reports with them and conducting "practice" hearings so that the client will be better prepared to answer the, at times difficult, questions from the Board. It can be fairly stated that most offenders perform better if they have had counsel represent them and in "close call" cases, counsel may make a difference as to whether the offender is granted parole.

Eligibility for Parole

For most sentences imposed, the offender is eligible for day parole six months prior to his full parole eligibility date or six months, whichever is greater[17]. Offenders are eligible for full parole at the one-third mark of their sentence[18]. Reference should be made to the ***CCRA*** for eligibility dates for those offenders serving life or indeterminate sentences, and for those cases where the offender has been sentenced to additional concurrent or consecutive sentences.

When Should One Start Preparing for Parole?

The time to start preparing for the parole hearing is at the time of the sentencing hearing. It is important to remember that the Judge's Reasons for Sentence and "any relevant

[17] ***CCRA, supra***, section 119(c)
[18] ***CCRA, supra***, section 120(1)

reports" are automatically sent to CSC[19]. The Reasons for Sentence and other documentation used at sentencing proceedings can be crucial in both assisting the client with his penitentiary placement and eventually at his parole hearing. Therefore, it is important to make the sentencing record as fulsome and as beneficial to the accused as possible. Go into some detail in your sentencing submissions, in the hope that the judge will adopt them in his/her reasons. Try to "cleanse" the facts that are being read in as much as possible, as from that moment on it will be assumed that your client has adopted ALL the facts that were read in by Crown counsel as being true. It is obviously better to have the client plead to assault as opposed to sexual assault but be warned: the CSC and the Parole Board of Canada will have knowledge of the withdrawn charges as well as the police reports relating to them. It has been held that the Parole Board of Canada's duty to act fairly is not breached when it refers to the offender's history of withdrawn charges and charges in which the offender was otherwise not found guilty as "that information with regard to these charges is relevant in so far as it is indicative of the applicant's lifestyle and associations[20]. The key, at the eventual parole hearing, is to make sure that the Board does not cross the line and assume that the offender had committed those offences.

Even though the accused may be facing a penitentiary sentence, it may beneficial to have a presentence report, a Gladue report (if applicable) and letters of support filed at the sentencing hearing. If the accused has undergone a psychiatric, psychological or other mental health assessment, those reports should be filed as well, assuming of course that they are favourable. Counsel are encouraged to not only file those reports but refer

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[19] ***Criminal Code***, section 743.2
[20] ***Prasad v. Canada (National Parole Board***, [1991] F.C.J. No. 1165 (F.C.T.D.), at page 4

to them in submissions, as one cannot guarantee that parole officers or the Board Members will read those reports in their entirety when it comes time to make decisions about risk assessment and release back into the community.

Although the Judge's Reasons for Sentence and any relevant reports "shall" be sent to CSC, experience has shown that the word "shall" is a relative term. Counsel can ask that the reports relied upon at the sentencing hearing be attached to the warrant of committal. In an abundance of caution, counsel can forward copies of those reports to Case Management at the Assessment Unit.

With respect to preparing for the actual parole hearing, counsel should make sure that the offender has all of the relevant documentation that will be relied upon at the hearing. Relevant documentation includes, but is not limited to, the Assessment for Decision, Intake Assessment, Correctional Plan, FPS Sheet (which includes convictions and offences otherwise disposed of) and Community Strategy. The FPS Sheet is particularly important, as it is dangerous to rely solely upon the offender's memory regarding his offence history. In meeting with the offender for the first time, it is a good idea to remind him to bring all of the documentation that he has to the next meeting and not to destroy any reports that he thinks are not favourable. Experience has shown that some parole officers take the position that the reports have been shared with the offender once and they will not copy any reports that are now lost or unavailable. The parole officer's response is often that the offender can make an Access to Information Request to obtain his files, a process that can take a half a year to complete. Going over the parole officer's head to his/her supervisor or the warden often resolves the problem, but much time is wasted in the process.

Counsel should note that the actual written application for parole and request for admission to a halfway house must be done through the parole officer; however, counsel can encourage the offender to write to the halfway house on his own so that that the executive director of the house will become familiar with the case prior to the actual formal application. Depending on the halfway house in question, representatives regularly visit the institutions and they will visit the offender if they know he is interested in attending their house on day parole. A word of warning, however: offenders at times becomes overly optimistic when they either get a response to their letter or meet with the house representatives and feel the interaction has gone well: it is the Community Assessment Team (CAT), composed of the halfway house representative, the community parole officer and often a representative from the police, who make the decision as to whether the offender will be accepted at the halfway house.

In addition to CSC generated reports, counsel should obtain updated letters of support, employment letters and any other supporting documentation that may be available. Counsel should send the documentation in advance to the Parole Board's regional office in Kingston as well as bringing a copy of the documents to the actual hearing to ensure that the Board Members will read them. Having the reports in a clear plastic binder does not guarantee a favourable decision.

Counsel's most important work in the parole process is ensuring that the offender is well prepared for the hearing. Make sure that the offender is familiar with all of the official reports as well as the documents that you intend to submit on his behalf. Doing practice hearings with your client is a must — even the most articulate of them will be nervous at the hearing. It may take more than one practice session to have the client

comfortable and reasonably ready for the hearing. He may ask if he can bring in written material that he can read out at the hearing. Prudent advice would be that the client can write out some notes for himself that he can refer to at the hearing, but he should be discouraged from reading out a text that would inhibit a proper assessment of his responses by the Board Members.

As mentioned above, counsel's submissions should be short. The submissions should concentrate on the three areas that are reviewed by the Board; that is to say, the criminal history (and circumstances of the offence); the institutional performance; and the release plan. Obviously, counsel should be alert for areas that were of particular concern for the Board during the hearing. This is the time where counsel is arguing the risk to reoffend is not undue, or to put it in another way, the risk of the offender reoffending is manageable. Distinguish and even critique CSC reports or opinions that are not favourable to the client but be wary of commencing a full-frontal attack on CSC or the parole officer except in the most unusual of circumstances — the Board Members will cut you off immediately.

Some Concluding Words of Advice

NEVER EVER EVER should counsel advise their client, at any time from trial preparation to sentencing submissions, that X sentence means that the accused will end up at Y penitentiary, or will be released on parole in Z years. There is so much discretion in the prison and parole process that such claims only serve to disappoint the client in the future. CSC is very cautious in recommending parole and even when they do, the Parole Board of Canada is very cautious in its assessment of manageable risk. The best advice

that the trial lawyer can give the client is that when it comes time to prepare for parole, retain a lawyer who is familiar with the myriad of policies and personalities that make up the parole process.

YOUR CLIENT IS GOING TO JAIL: WHAT HAPPENS NEXT?
PROVINCIAL PAROLE IN ONTARIO

Jeff Rybak

INTRODUCTION

Levels of awareness around provincial parole in Ontario vary wildly. For the federal counterpart, it is generally safe to assume that legal professionals, most offenders, and even the general public is broadly aware of the federal parole system. If nothing else, it gets into the news occasionally, whenever a particularly notorious offender is due for consideration. With provincial parole, however, even knowledgeable and diligent defence counsel sometimes have very little awareness of how it operates and may be surprised to learn their clients are even eligible for parole on reformatory sentences. Sentencing judges themselves may be surprised. Clients facing sentencing typically do not know or ask anything about this because they are likewise unaware. But particularly savvy and experienced clients are starting to catch on and may ask questions their lawyers are unprepared to answer.

This paper will address provincial parole only in the context of the Province of Ontario, as adjudicated by the Ontario Parole Board (OPB). The **Corrections and Conditional Release Act (CCRA)** empowers each province to create a provincial parole board if they so choose.[1] Only Quebec and Ontario have elected this option, though there have been recent signs that Alberta is considering this path as well.[2] Where a province does not opt to create a separate provincial board, the Parole Board of Canada continues to exercise authority over provincial sentences as well as federal.[3]

To state the obvious, the primary reason why defence counsel should be interested in this topic is simply because it can give many clients the opportunity to be out of jail sooner. Provincial prisoners are eligible for parole at one-third of their sentences, in place of the statutory release they would otherwise get at two-thirds. Parole can cut the real time that a client spends in jail by half.

In preparing this paper, it is not at all my expectation that most defence lawyers will start routinely representing clients in parole hearings. But there is quite a lot that defence counsel can do to ensure that a client has the best possible shot when he reaches that point. Whether represented by counsel before the Ontario Parole Board or not, proper information and preparation can make a big difference.

Note that throughout this paper I refer to the client as male, though I do recognize that women are incarcerated as well. In fact, it has been my observation that female

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[1] Corrections and Conditional Release Act (CCRA) s. 112

[2] www.edmontonjournal.com/news/politics/kenney-says-ucp-would-create-alberta-parole-board-cut-ties-with-parole-board-of-canada

[3] Corrections and Conditional Release Act (CCRA) s. 108

clients often make better parole candidates than men, yet seem to pursue this option at a lower rate – certainly they are less inclined to seek help from counsel. I can only speculate as to why, but one theory is that due to a general lack of awareness among defence counsel, the primary source of information available to clients in jail is simply from other inmates. Some provincial detention centres have a culture where knowledge of parole is fairly strong whereas at others it is weaker. For whatever reason, this knowledge is not common at Vanier and at other places where women are incarcerated, and so the disparity persists. With greater awareness amongst counsel, this might be corrected.

HISTORY AND OVERVIEW

For a general review of the recent history of corrections in Ontario, including the operation of Ontario Parole Board, there is no better source than *Corrections in Ontario: Directions for Reform* – the review generally known as the *Sapers Report*, released in September of 2017.[4] This report exposed a shocking decline in parole and a variety of procedural and practical deficiencies in the operation of the Ontario Parole Board. Among the more incredible findings is that the total number of offenders being supervised on parole in Ontario declined by over 90% in the ten-year span following 1993, and had not recovered as of 2015. To add my own commentary to these findings, I believe that the general lack of awareness of provincial parole is due to this long drought in system-wide efficacy. When something never works there is little incentive to remain aware of it. But older lawyers with long institutional memories still recall when provincial parole was a meaningful area of practice, and even remember lawyers who used to specialize in it – notably Justice David Cole, while he was still in private practice.

Another area that the *Sapers Report* focuses on is the lack of institutional supports available in the provincial parole system. Halfway houses, rehabilitative programs, etc. were all eliminated in the 90's. And it is unsurprising that a system lacking in these resources would parole inmates at a far lower rate. Essentially, the *Sapers Report* exposed a system that had stopped functioning properly at all, and a Parole Board that no longer fulfilled its mandate in a meaningful way.

What the *Sapers Report* fails to capture, simply due to the timeframe it examines, is that improvement was actually underway at the very same time the report was exposing just how badly everything had declined. I am not in a position to discuss exactly how or why reform began to take hold. I am certain the *Sapers Report* itself had quite a lot to do with it. But I can report with absolute confidence that the Ontario Parole Board is aware of the problems exposed in this report and is quite genuinely trying to do better. The only

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4 www.mcscs.jus.gov.on.ca/english/Corrections/IndependentReviewOntarioCorrections/IndependentReviewOntarioCorrectionsDirectionsReform.html

caveat is that the Board is trying to do better without any significant injection of resources into the system.

The bottom-line consequence of these various trends is simply this. Clients *are* getting parole, at least sometimes. Even candidates who might seem objectively weak prospects for parole – those with extensive records, a history of breaches, precarious living situations – may be successful with the right plan. But in all cases, these applicants are essentially putting together their own parole plans. With very limited institutional assistance, applicants are cobbling together the best plans they can manage, and the Parole Board is doing their level best to grant parole to anyone who qualifies. There are no updated figures to the *Sapers Report* to properly capture this trend, but it is real. And just as awareness of provincial parole almost disappeared in the years when no one was getting it, awareness has returned as a groundswell of interest from clients themselves. Nothing is more noticeable on the range than the guy who got out sooner than anyone expected.

From a practice perspective, therefore, I would suggest it is simply irresponsible to discount the possibility of provincial parole. At the same time, you cannot trust that when a client is sentenced to provincial custody the system will take over and operate properly. The Ontario Parole Board has achieved enough reform that every eligible candidate will receive a parole hearing unless they explicitly waive their right to one. But as stands, it is still a build-your-own-parole-plan system, and many otherwise good candidates will fail at doing this effectively, if they lack assistance and appropriate advice.

WHEN AND HOW (AND IF) TO RETAIN PROFESSIONAL HELP

At the risk of promoting my own practice, I do believe that counsel can assist clients in obtaining better results in their parole applications. But it is still the exception, rather than the rule, that clients use lawyers to assist them, and the system does not assume representation by counsel. There are many cases where unassisted applicants do get parole, so lawyers are by no means necessary.

There is no parole application so that simple legal assistance is obviously unneeded. I have seen even the best parole candidates imaginable fall afoul of ridiculous issues. There are cases that are hopeless, of course, and there is no sense in retaining counsel then. But if a client is trying at all, rather than waiving his right to a hearing, I believe assistance is important.

Throughout this paper, I have tried to offer the best information both for when the client is assisted by counsel and when not. Either way, I do recommend planning at the earliest stage possible. If your client will not have access to a parole lawyer, then once you are done serving him, he is essentially on his own. Whatever preparations he hopes to make are best made while he still has access to his defence lawyer. Meanwhile, if the client wants to retain counsel for parole, that is also best done in advance, and

knowledgeable parole counsel may even have advice for how to approach certain issues at sentencing.

Legal Aid is available for parole proceedings. The funding is not generous, and it was reduced significantly in the June 2019 cuts.[5] There are numerous challenges associated with these certificates. But funding is still available, at least, and my office will accept Legal Aid as will others. I feel it is very important to emphasize this information because it is not well-known, and it would be a shame if anyone imagined that legal assistance for parole is only for cash clients.

CONSIDERATIONS BEFORE AND AT SENTENCING

In every case where your client does end up going to jail, there is a point in time when it becomes clear this is the likely – if not the inevitable – outcome. It may be when you lose a contested trial and come as a shock to both you and your client. It may not be until sentencing, when you pitch for a conditional sentence or time served and you instead get a custodial sentence. It may be foreseeable some time in advance, where your role is simply to secure the best deal possible on a guilty plea. Whenever you realize your client will be heading into a custodial sentence, or it is even likely, you should start thinking about what that will mean for parole.

One issue that is often overlooked by both clients and counsel is that pre-sentence custody or "dead time" is not an efficient way to serve a sentence, and it is especially bad for any client who might be eligible for parole. Credit granted for pre-sentence custody is based on *not* getting parole and presumes a scenario where the client serves two-thirds of his sentence. If a client gets a sentence of nine months with no pre-sentence custody, he will be out in six months, and likewise if he serves six months pre-sentence custody it will be enhanced to nine months. If the same client serves two months pre-sentence custody for a credit of three months and has six months remaining, he will serve four more for the same total of six. But if this client were granted parole, or *could have* been granted parole, the numbers look very different.

If a client is sentenced to nine months with no pre-sentence credit, and ultimately gets parole, he will be out in three months. If the same client does two months up front and receives six months remaining, his parole eligibility will be based on his *remaining* sentence and *not* the total sentence. He could get paroled at two months of his remaining six, but he will still have served four real months in jail rather than three. The results are worse if the remaining sentence after credit drops below six months. If the same client was sentenced to nine months and served three months pre-sentence custody, he would not receive a parole hearing at all.

[5] https://www.legalaid.on.ca/en/news/newsarchive/2019-06-12_changes-to-legal-services.asp

The Ontario Parole Board will automatically consider every inmate for parole if they have received a sentence of at least six months – that is six months after credit is applied. Unless the client waives his right to a hearing, the OPB is required to consider that client for parole before his Parole Eligibility Date (PED) at one-third of his sentence. A client on less than six months will still have a PED calculated, but there is no hearing automatically scheduled and there is no requirement that any hearing occur before the PED. Instead, the client has a right to ask for a hearing if he wants one, and the OPB will generally accommodate this request eventually, but it does take time. Without extensively canvassing the issues relating to short-sentence parole hearings, it comes down to this. Anyone with a sentence of less than around four months might as well not bother pursuing it, and anyone who wants a short-sentence parole hearing has to know enough to ask for one almost immediately for it to do any good. In practice, the vast majority of clients who receive a sentence of less than six months will never have a hearing. For that reason, it is also very important to know exactly where the Board draws the line at six months.

Although sentences are commonly expressed in months and years, the OPB defines six months as 181 days or more. As six months can be a common sentence – either because it is a nice round number or as the result of a mandatory minimum – it is not at all unusual for a client to be sentenced to six months but entitled to a few days of credit for time served before bail was obtained. If those few days of credit reduce the total remaining sentence to less than six months, the client will not have a parole hearing at all unless he knows enough to ask for and receive a short-sentence hearing, and even then it could be later than he would otherwise be entitled to. In other words, getting your client credit for those few days may result in him spending longer in jail. To navigate around this problem, I recommend two things. First, if you are at all unsure about how long the sentence will end up being, ask the court to express the remaining sentence in terms of days (181 or more) rather than months. And second, discuss the issue with your client and obtain clear instructions regarding the pros and cons of both scenarios before seeking or agreeing to a sentence of slightly less than six months.

If your client is looking at a sentence at the upper reformatory range, you may have the option of pushing it one way or the other – either a full two years or slightly less. Many clients express a preference for provincial time, although to many lawyers that preference is difficult to explain or endorse. If a client is a potentially suitable candidate for parole, you would want to canvass both federal and provincial options. Federal parole offers more supports to help structure gradual release (including halfway houses and day parole) whereas provincial parole is an all-or-nothing affair. I would recommend consultation with lawyers who can speak to each if it comes to that. I will also note that pre-sentence custody can result in an otherwise federal sentence being served entirely in provincial jail and depending on the client and the situation this can take good options off the table.

FOR BEST RESULTS, PLAN EARLY

In any criminal defence, the outcome of the case often depends on choices the client made long before obtaining advice or counsel. Parole is no different. Although it is most common to start working on parole only once a client is already sentenced, some of the key factors that may determine if he is successful date back prior to his conviction. The lawyer defending him at this stage will understandably be most focused on trying to secure an acquittal or failing that the most lenient sentence possible – but it is important to know how decisions made along the way will help or hinder a parole application should it come to that.

First, the very experience of being on bail, if successful, is a strong recommendation for parole. The Parole Board is primarily concerned about the risk of any offending behavior, including any breach of parole conditions. When a client demonstrates that he is able to follow similar conditions on bail, it addresses that concern directly. For a client who simply cannot follow conditions, it may well be that parole is a bad idea in the first place. But for one who can, the opportunity to demonstrate this in advance can be a great advantage. When a parole candidate has been on bail for years without issue, the OPB will find it difficult to conclude he is a risk to the public. Even a shorter period of successful release would be helpful, such as between conviction and sentencing.

Second, the best parole plans for most offences will involve some element of professional counselling or treatment. Typical examples include treatment in relation to addiction, compulsive behavior, anger management, domestic violence, sexual dysfunction, etc. A plan that has this treatment lined up for when the client is released is good. But a plan that can show he started that treatment before going to jail – even before conviction – is far better. Defence counsel may feel that accessing treatment early could create some jeopardy and lead to evidence that could potentially be used at trial. I have encountered a range of opinions on this subject, and I will not presume to adopt a general rule. I will only say that if this risk exists at all – and it may – it should be balanced against the potential gains should the matter end in a parole hearing. A small risk at the early stage of a proceeding may well be worth the large gain in the event that parole is required. It may also assist at sentencing.

Third and finally, there are significant hurdles to planning for parole while in custody, and not a lot of support available. Any and all arrangements that a client may wish to make are more easily made prior. This includes treatment, of course, but also confirming the availability of a job or a residence post-incarceration. It could also include the opportunity to consult with and potentially retain legal counsel in advance. Regardless of how much or how little a client chooses to prepare in advance, I feel safe in suggesting that standard practice should be to draw every client’s attention to this opportunity, as soon as it appears that a custodial sentence is likely. The client may prefer to focus on

defence right up until the moment all hope of acquittal is lost. But this is at least a choice that should be made with eyes open.

ONCE IN CUSTODY, THINGS MOVE FAST

For the longest provincial sentence, a client would be parole eligible at one-third of two years. For the shortest sentence typically eligible for parole, it would be at one-third of six months. Even in the case of longer provincial sentences, things move fairly quickly. For shorter sentences, they move very, very fast.

After a client has reached their sentence jail, their case will be assigned to an Institutional Liaison Officer (ILO). This is a Probation and Parole Officer who is either posted in the institution (in the case of larger jails) or else a part-time ILO who is otherwise based in a Probation and Parole field office (in the case of smaller remand jails). The ILO is responsible for taking the parole plan from the client, for assisting the client (at least minimally) in developing the plan, and for receiving instructions relating to parole. And here is typically where things start to get difficult.

Some ILOs are very competent and knowledgeable. Others less so. But they are all operating under tight constraints. To start with, they *are* Probation and Parole Officers, employed by the Ministry of the Solicitor General (previously MCSCS) and are beholden to the views of their employer. Nevertheless, they are the only conduit through which most parole applicants have access to any information. It is as if clients before the court were entirely dependent on police to provide them with any information at all. Even the most conscientious ILOs have limited resources to work with. There are few programs that offenders in custody have access to, and no community-based programs at all that are specific or exclusively available to offenders in custody – so accessing help to develop a strong plan is difficult. Perhaps the worst feature is this. ILOs in the jail are responsible for recording the plan and taking note of the applicant's intentions, but they are not responsible for investigating this plan or making any recommendation to the Parole Board. That job will be assigned to a Probation and Parole field office in the community where the applicant proposes to reside.

A Probation and Parole Officer in the field will investigate the plan, based on the ILO's written request, and write a Pre-Parole Report (PPR) for the Board. This task is meant to be assigned and to start approx. 5-6 weeks before the applicant's Parole Eligible Date. For shorter sentences, this means that at the very first interaction with the ILO, a client will be asked to relate his entire plan for parole. He will be told it must be submitted immediately, and then cannot be changed or modified. In longer sentences the warning may not be quite so abrupt, but the ILO will still relate that the client needs to provide all details of the plan up front, some two months before they are eligible for parole, and there is simply no opportunity to change the plan or introduce new elements any closer to the hearing date. And this is simply not true.

It is accurate that the client needs to provide information about his plan well in advance for investigation and inclusion in the Pre-Parole Report. Any information not received at this time will not make it into the official investigation and will not be in the PPR. But the PPR is not at all the whole story, and the quality of these reports is very uneven regardless. This is true of Pre-Sentence Reports (PSRs) and also true of PPRs. Not coincidentally, the same officers are authoring both. A PPR generally contains a recommendation for or against parole, and I would estimate upwards of 95% of the time the author recommends against it – often based on reasoning that is entirely contrary to the mandate and procedures of the Board. As a result, the Board can and does routinely reach decisions that disagree with the recommendation in the PPR, and is entirely open to considering materials and submissions that have not been investigated in the report.

The deadline clients are confronted with in jail – by the Institutional Liaison Officer employed by the Probation and Parole Office – is *their* deadline and *not* the Parole Board's. As far as the Parole Board is concerned, they will receive any information and evidence available to them at the hearing – even materials and submissions that may have come the day before or on the day of the hearing itself. It is absolutely true that when certain details have not been investigated that may make things more difficult. It is very important for the residence, at least, to have been investigated by the Probation and Parole Officer. But other plans, such as counselling or therapy, may well have come together shortly before the hearing date and so long as that information is reliable and available – such as in the form of a letter from the treatment provider, and backed by submissions from counsel – the Parole Board will receive and consider it. It is a terrible shame if any client is discouraged from trying to develop a stronger parole plan simply because they have been told they are out of time to do so. Until the actual day of the hearing, that is never true.

WHAT THE PAROLE BOARD SEES

Prior to any hearing, the Board will review materials provided by the Ministry of the Solicitor General. They may have between 50-100 pages or so. Like most disclosure, some of this material is empty of real content. But much of it is meaningful. In addition to the Pre-Parole Report, there will be a formal risk assessment, a psychological report, criminal and institutional records, any pre-sentence report, and more. This record generally includes any police synopsis but not the actual findings of the court or any materials received or adopted by the court at sentencing.

There are huge procedural issues here – some flagged by the *Saper Report* and not yet addressed meaningfully. First, because the Board is dependent on the Ministry of the Solicitor General for information, they only see what the Ministry itself has unless the parole applicant somehow gets other information and documents before the Board. Notionally, Institutional Liaison Officers are responsible for helping applicants do that, but

it would be an exceptional client who somehow had a copy of the reasons for his sentence, or any Agreed Statement of Fact that may have been filed. As a result, sometimes the only confirmed information before the Board is the initial synopsis, and we all appreciate how inaccurate and prejudicial those can be.

Second, the Board currently does not provide disclosure to applicants in any routine way and does not provide it even when the applicant is assisted by counsel unless by direct request. The result is that any unassisted client is going into a hearing blind, and in some cases even clients who bring counsel are attending with lawyers who never obtained or reviewed disclosure. I doubt I need to dwell on how terrible this is.

Third, where disclosure is available and where there is counsel knowledgeable enough to ask for it, it gets to the Parole Board (from the Ministry of the Solicitor General) incredibly late, and then needs to be vetted, and is typically provided to counsel just a day or two before the hearing. In any other context, disclosure this late would be an immediate basis for adjournment. I am sure the Board would grant a postponement of any hearing if requested to properly review disclosure, but unfortunately the result would be that the client waits in jail longer instead of potentially being released on time. My approach is to prepare the client in advance, as much as possible, and deal with any unexpected surprises in disclosure when it comes – sometimes immediately before the hearing. This is far better than not getting disclosure at all, but still a huge problem.

In terms of how to cope with these challenges, I have several pieces of advice. One suggestion I first heard from Simon Borys in relation to federal parole, and it applies equally to provincial. At sentencing, any document that may tend to help the client such as an Agreed Statement of Fact, supporting materials, favorable reports, etc. should be attached to the Warrant of Committal. Counsel can and should ask the judge to do so. If this happens properly, those documents will follow the client into jail and become part of the Ministry records and will, presumably, reach the Board's attention. This is one way that defence counsel can help a client going forward into parole regardless of whether the client has any assistance at the next stage.

The rest of my advice presumes the client has legal assistance. While it may seem that parole applicants are entirely at the mercy of the ILO to get materials to the Board, that is only true because the client is in jail and has no other way to send documents. In fact, the Parole Board will gladly receive documents from outside parties – certainly from counsel – and will consider them at the hearing. These documents may augment the plan that has been investigated or may even add elements that have not been investigated at all.

Counsel obviously should request disclosure and review it properly. It may be impossible to fully review disclosure with the client, but certainly issues in disclosure should be identified in advance, and the client advised of them. Prejudicial materials and conclusions should be flagged and called out as such. While there is no basis to keep the

Board from considering these materials, the client should have an opportunity to respond and rebut. This is particularly important if the client's version of events differs from the narrative in materials, as may be the case if the Board is going off a police synopsis. Properly handled, it may be clear the client accepts his guilt and first version of the story was simply inaccurate. Improperly handled, or not addressed at all, and the client may be seen as dishonest by the Board.

THE HEARING ITSELF

Parole hearings are very informal. Two Members of the Parole Board attend at the jail and convene in a little room. Typically the only people in the room are the two Board Members, the applicant, the applicant's counsel if any, and a Correctional Officer who may sit in the corner but does not take part in the hearing. The Members sit at a table across from the applicant and talk with him.

Additional people may attend. The applicant is entitled to request assistants at the hearing – typically family or close friends – and provided this request is made properly the Board approves without issue. The more problem, however, is that the institution must clear assistants to enter the jail. Parole hearings happen outside normal visiting areas, and every jail will require that assistants obtain criminal record checks and submit them in advance. ILOs are supposed to assist with this. As noted, the reliability of this assistance is uneven. Policies differ from jail to jail, it takes time to obtain a criminal record check, and as a result very often assistants are not able to get in. This is a terrible shame, because assistants can directly address the Board, and this can be very important. Responsible parents, a strong and forthright spouse, even good friends who are serious about helping the applicant to rehabilitate himself – these supports can make a huge difference in the outcome of a parole proceeding.

It is also possible that victims may attend, if there are identifiable victims. This is rare, but it happens. I will not attempt to canvass this situation, except to say that when victims attend the otherwise informal atmosphere of a parole hearing tends to become much more formal, of necessity. Victims also have a chance to directly address the Board.

The format of parole hearings presents both challenges and opportunities. For many clients (and their lawyers) who are used to situations where the lawyer does the talking and the client keeps his mouth shut, it can be very disconcerting for the client to do most of the talking. The informality and the directness of the experience allows clients to present themselves honestly, and for clients who are properly prepared this can go very well. The Board absolutely does not expect polish and poise. Applicants are very often raw and unsophisticated in their interactions with the Board, but Members do make an effort to see through to the content of their submissions. That said, all of the usual warnings apply about decision-makers having an inflated sense of their ability to judge honesty, and clients who simply lack the ability to express themselves at all may be at a

terrible disadvantage. To assist a client properly in a parole hearing, he simply must be prepared to interact with the Board in the same way he would be prepared to testify at trial.

The Parole Board has two fundamental criteria for parole. First, whether the release of the applicant will cause "undue risk" to the community. Second, whether the release of the applicant will contribute to his rehabilitation and reintegration into society. Risk is always the primary concern. What "undue risk" really looks like is a moving target. In my own view (never explicitly endorsed by the Board, but frequently in my submissions) evaluation of risk is a combination of both the risk that the client would commit a new crime or violate a term of release *and* how serious the harm would be if that happened. A recovering addict will likely always present some risk that he will possess and use illegal drugs, but that risk may not be "undue" in context, considering the lesser harm of this behavior. Meanwhile, a client convicted of sexual assault against a child will need to convince the Board that the risk of this happening again is zero – because any amount of risk in this case would be considered "undue." Rehabilitation and reintegration can be a combination of ordinary productive activity such as work and school, and specific rehabilitation that may be unavailable in the jail, such as therapy or counselling. Unless a client is already incarcerated at a treatment jail, it usually is not hard to demonstrate that a reasonable parole plan is better from the perspective of rehabilitation than remaining in custody. That is why the major hurdle is generally risk.

The Board speaks with the client for around half an hour to an hour. Then any assistants at the hearing and the client's lawyer have an opportunity to make submissions. After receiving these submissions and giving the client a chance for a last word, the Board will deliberate and reach a decision. Sometimes they will issue a decision immediately, after a short adjournment. More recently, they tend to reserve decisions and release them some few days later. Regardless, the client will receive a written decision around 5-7 pages in length and will either be granted parole or denied. If granted parole, the client will be released on or shortly after his Parole Eligible Date. If denied, nothing else will happen prior to the statutory release date, unless the client takes further action.

IF DENIED – WHAT NEXT AND OTHER OPTIONS

Unlike the federal system, in provincial parole the one hearing scheduled is an all-or-nothing shot. There is no day parole, no graduated release, and no system for the Board to say "not quite yet but maybe later." The applicant either gets full parole, or nothing.

There is, however, a fairly generous review system. The Board retains the ability to grant a new hearing based either on new information not available at the first hearing (such as a different parole plan) or else based on some defect in the original hearing. As may be imagined, it is far easier to get a review hearing based on the first criterion. My

experience has been that on any reasonable application for a review hearing, the Board will grant one. Once granted, it is a hearing *de novo* that is not concerned with the reasoning of the first hearing.

There is no theoretical maximum number of hearings any client might have, but the reality of shorter sentences quickly limits attempts. Considering various delays in investigating a new plan, obtaining a new hearing, the time before release even if parole is granted, etc., I find I cannot recommend even attempting a review for any client on a total sentence of less than nine or ten months – and even then it is tight. Barring incredibly unusual circumstance, I would suggest any review beyond the first would be a waste of time, effort, and money for any client.

Clients may also bring up TAP – the Temporary Absence Program. A full review of this program could be a paper unto itself. I will simply note that any application for temporary absence beyond 72 hours is adjudicated by Parole Board at a hearing in a similar format, but with somewhat different considerations at play. In *some* cases, such an application may be more appropriate and useful to a client's circumstances than a parole hearing, or a review. I will note, however, that a lot of spurious applications for temporary absence are made, and a lot of time is wasted in adjudicating them. This is not a path I would recommend without a knowledgeable review of all possible options.

ABORIGINAL CIRCLE HEARINGS AND GLADUE FACTORS

For applicants who come from a First Nations background, the Parole Board offers circle hearings conducted in a traditional setting – or at least as traditional as circumstances allow. These hearings are facilitated by an Elder, who does not participate in decision-making but provides a culturally appropriate framework for the proceeding. I will not canvass all the differences from one format to the other, except to note that a circle hearing is almost invariably advantageous to any First Nations client who plans on pursuing parole. The more open format allows better exploration of the issues that led to the offender's behavior, discussion of options available in their community, and if nothing else the experience itself may be much more positive. The Elders who facilitate these hearings may also act as additional advocates, and often bring a perspective regarding First Nations experiences and conditions on reservations and in other communities that the Board would otherwise not have.

Whether in the format of a circle hearing or otherwise, the Ontario Parole Board recognizes *Gladue* factors in their decision-making. Where a *Gladue* report is available, the Board will obviously take heed of it, and where it is not the Board will still apply *Gladue* as fully as possible, based on information before it. This may contribute to more flexible considerations, especially in relation to the reality of First Nations experiences. In a particular decision that I quite like, the Board found it would not necessarily be inappropriate to release a First Nations parole applicant to a plan where he would live a

"traditional lifestyle" on the land, sustaining himself through hunting and similar activities. I cannot imagine the Board releasing another applicant to a similar plan, where he would have no fixed address.

For those with an interest in Aboriginal law, I note that circle hearings are a recent innovation (at least for the Ontario Parole Board) and potentially a worthy subject for additional study. My personal belief is that circle hearings not only benefit the First Nations applicants who are heard in this format, but that the influence of these hearings permeates the Board more generally. Principles and philosophies applied to First Nations parole applicants, and found to be positive and effective, are carried over into other hearings. I believe that the informality and openness that characterizes parole proceedings at this time may be partly traced back to the increasing use of circle hearings. This would mean, in a non-trivial way, Aboriginal law is influencing the legal system as a whole in this space.

SUSPENSION AND REVOCATION

A client who has been granted parole is on parole conditions all the way up to his final warrant expiry date, or three-thirds of his sentence. For this reason, it is absolutely the case that some clients are better off not getting parole even if it were an option for them. Some are better off just waiting for two-thirds and being released either to probation or to no conditions at all.

Parole can be suspended at any time if the Parole Board, on receipt of information (generally a report from a Parole Officer) believes that the client has breached parole, is about to breach parole, or is a danger to the public in some way. There is wide latitude here. If parole is suspended the client should be back in custody immediately – a Canada-wide warrant will be issued – and the client will then be entitled to a "post-suspension" hearing within thirty days. At this hearing, the Board will either return the client to parole, potentially on altered conditions, or else revoke parole. If parole is revoked the client will generally lose their earned remission to that point in time, though they will begin earning it again, and will be in custody for two-thirds of the time remaining until their final warrant expiry date.

There are strong incentives to retain professional help at a post-suspension hearing if the client has hope of returning to a parole plan that was otherwise functioning properly. New criminal charges are not necessarily a bar to being released, as the Board does recognize the principle of innocent-until-proven-guilty. That said, because the applicant is on parole, he will need to wait in custody for his post-suspension hearing before he can make that case. If a client's parole has been suspended without new charges, he is only in custody serving his existing sentence and the Parole Board has the authority to order his release. If there are new charges, then bail is also an issue and the client would need release on both to be at liberty again. In this scenario, deciding how best to proceed is a question of strategy. There is a bit of a chicken-and-egg problem

where the court is more inclined to grant bail in cases where parole has been reinstated, and the Parole Board is more inclined to release a client when he has already obtained bail.

IS IT WORTH IT?

Every case is unique. What is true for one client will not necessarily be true for the next. And yet we always face the same inevitable question – what are my chances? And lurking behind that question is the even more difficult one – is it worth it? Is it worth the expense, the effort, the psychological cost to hoping and planning for release and then potentially facing months of additional custody? Like all good legal answers, it depends.

In my practice I have assisted clients in over 300 proceedings before the Ontario Parole Board, and my success rate is just under 50%. But that does not tell the whole story. Some of those are very difficult, legally-aided clients with parole plans to go and live in a shelter. Some are addicts with long records and a history of relapse. Others are excellent candidates – first-time offenders with enviable family supports and resources. It would be a gross mistake to suggest that everyone has a 50/50 shot. There are very good applications and then there are long shots. But sometimes even the good shots do not land, and a longer shot does.

I would suggest that any client who can put together a real plan at all (starting with, at minimum, a place to live) and who has the capacity to avoid returning to criminal activity while on parole would be well-advised to take the shot absent some specific, compelling reason not to. Whether assisted by counsel or not, parole is a live possibility for almost anyone with a plan to present, and it would be a shame to give up that chance. There are clients who become so unreasonably fixated on parole that it interferes with other opportunities for treatment and rehabilitation, but that is another issue. For the most part, the biggest barrier to planning appropriately for parole is simply that many clients, and their counsel, do not realize it is available.

CONCLUSION

At several points in this paper, either stated or otherwise, I have abbreviated what could become complex topics and omitted whole areas of potential information. Despite this, it has become a very long paper and I hope not a chore to read. I hope to convey that provincial parole is both an important and a complex area of law. It is perhaps not as complex as some, but hopefully if anyone was tempted to imagine there is nothing to it, I have successfully dispelled that impression.

My motivation in writing at this length is to emphasize that most clients serving provincial sentences stand viable chances of obtaining parole, and it is critically important that someone look out for their interests. Similar to immigration consequences in applicable cases, an awareness of parole should be a part of any proceeding where a

client is heading into custody. It may be that defence counsel will assist the client moving forward. It may be the client will be assisting himself. Or it may be that referral to another lawyer is appropriate. One way or another, it is important to think of parole well in advance, and not simply assume that the system will take over once your client steps into custody.

As a final note, I will observe that in any provincial parole hearing, the amount of time at issue is one-third of a sentence between six months and two years less a day – so the client stands to save between two months and eight months in jail, real time. These may not be the highest stakes in the legal system, but it is still a meaningful amount of time. Consider how much effort may be invested in a trial to spare a client those months in jail, or how much goes into a contested sentencing hearing. Care and attention to parole considerations can do as much or more for your client and should be part of any standard checklist of issues on every file.

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Cultural Assessments Reports for Black Clients in Sentencing and Bails

Cultural Assessment Reports for Black Clients in Sentencing and Bail

It is widely known that Blacks have been overrepresented in the criminal justice system. What is less known or recognized is that due to their history, Blacks are uniquely positioned. Sentencing, therefore, should be culturally specific to the needs and experience of the Black accused.

This position relies on several legal principles and areas of law. Section 718 of the *Criminal Code* sets out the principles of sentencing, specifically the importance of crafting a just and proportionate sentence. Sections 721 and 723 of the *Criminal Code* allow for expert reports and expert testimony to provide appropriate contextual information for a sentencing hearing.

The use of enhanced pre-sentence reports (aka Impact of Race and Cultural Assessments or IRCA's) in the sentencing of Black accuseds could assist in building upon existing and burgeoning jurisprudence that acknowledges systemic anti-Black racism within the criminal justice system and prioritizes a contextual, individualized approach to criminal sentencing.

As advocates for our clients, we should endeavor to establish further jurisprudence that recognizes the "speculative effect" of denunciation and deterrence *R v Hamilton*, [2004] OJ No 3252 (ONCA) at 148, *R v Reid*, 2016 ONSC 30545 at para 16 and the destructive community impact of such an over-reliance *R v Borde*, [2003] OJ No 354 (ONCA) at para 36, *R v Nur*, 2015 SCC 15 at para 113.

Recent Nova Scotia Superior Court of Justice decisions including *R v X* [2014] NSJ No 609 (NSSC) and *R v Gabriel*, 2017 NSSC 90) have paid attention to the importance of a fulsome, culturally-competent pre-sentence report during criminal sentencing. *R v X*, in particular, highlights the danger for minimal, culturally-insensitive pre-sentence reports to re-victimize lower-income Black-Canadians and perpetuate harmful stereotypes.

More recent Ontario Superior Court of Justice decisions have re-visited the importance of systemic anti-Black racism within the criminal justice process. *R v Smoke* [2011] OJ No 6458 (ONSC) notes obvious parallels between lower-income Black-Canadian communities and Aboriginal communities, arguing that a just and proportionate sentencing process would acknowledge

systemic and background factors (similar to a *Gladue* report). *R v Reid* 2016 ONSC 30545 examined academic reports and cited existing Supreme Court of Canada decisions to conclude that Black-Canadians are over-represented in the criminal justice system and that "societal circumstances" could contextualize an offender's actions and should be considered during sentencing.

In *R v Morris* 2018 ONSC 5186 where an "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto Ontario" (authored by professors Akwasi Owusu-Bempah and Carl James) was submitted in addition to a "Personal History Report of Kevin Morris" (authored by social worker Camisha Sibblis), it was noted not only that judges should take judicial notice of issues such as racism and discrimination in the Black community but that they should welcome reports of this nature that give a "detailed and useful" account of who they are sentencing. Justice Nakatsuru found the personal report to "…provide personal, social, cultural and historical context for the sentencing."

Following is the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto Ontario" that was submitted to the Court in *R. v. Morris*. The report and its sources, when used in conjunction with IRCA's, serve as an excellent resource for defence lawyers who wish to advocate strenuously on behalf of their clients, particularly at the time of sentencing.

Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario

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1. Introduction

We have been asked by counsel for Mr. Morris to provide evidence and analysis of research relating to the existence and impact of Anti-Black racism in Canadian society generally and in the Toronto region in particular. The aim of this report is to assist the Court with understanding the conditions under which many Black people reside, receive education and employment, experience crime and the criminal justice system, and suffer from various forms of discrimination. When read in combination with Ms. Sibblis' analysis of Mr. Morris' life experiences, this report may also assist the Court in gaining a nuanced understanding of the social conditions and context that may have contributed to his involvement in the offence for which he is being sentenced. We have been apprised by counsel for Mr. Morris, Gail D. Smith, of the underlying facts related to Mr. Morris' finding of guilt. We have considered these facts in order to focus our contextual and social analysis.

2. Our Analysis in Brief

The over-representation of young Black men in the criminal justice system is increasingly acknowledged by scholars and policy-makers alike as an important social issue. Over the past several decades in Ontario, various task forces and commissions have drawn attention to the social factors known to increase involvement in crime and have identified evidence of systemic discrimination in key social institutions – from child welfare and education – to the operation of the justice system itself.

The present circumstances of Black Canadians have deep historical roots. The institution of slavery and of legalized segregation in Canada formed the basis for Black Canadians' initial relationship with the state and its people. While slavery and segregation served to underpin early economic and political structures, the ideas and assumptions on which they were based shaped the nature of social relations. As evidenced by public opinion polls, some of these beliefs and ideas are still present in the minds of Canadians – particularly those associating Black people with crime and violence. Indeed, racially prejudicial attitudes remain commonplace among Canadians. The continued existence of various forms of institutional racism that affect the lives

of Black Canadians is also underscored by the anti-racism initiates recently launched by the City of Toronto and the Government of Ontario.

For this reason, understanding – and redressing – criminal justice decisions lies in the social context where young Black men suffer racism, discrimination, and marginalization. It is impossible to understand the offending behaviour of young Black Canadians and their overrepresentation in the criminal justice system, without a broader consideration of the Black experience in Canada, past and present.

3. Anti-Black Racism in Ontario

HISTORICAL RECORD:
Colonialism and slavery structured Black Canadians initial relationships with the state and its institutions. This legacy continues to impact upon the lives of Black people in Canada, Ontario and Toronto.

People of African descent have a long history in Canada and have played an integral part in the formation of the nation. The first documented person of African descent in Canada, Mathieu Da Costa, served as a translator to French and Dutch explorers as early as 1609 (Winks, 1997). Black people were subsequently brought to Canada as slaves in a practice that lasted from the early 17th century until it was abolished in 1834 (Ibid). Many Blacks also arrived in Canada, and particularly Ontario, through the Underground Railroad, as fugitive slaves from the United States (Maynard, 2017). Most of Ontario's Black settlements were located in the Southern parts of the province in and around the Windsor, Chatham, London, St. Catherines and Hamilton areas. Others formed small groupings in Toronto and outside of Barrie, Owen Sound and Guelph. These closely concentrated Black communities served as a buffer against prejudice and discrimination from the White population. The historical record suggests that Black people in Canada were generally treated with hostility and disdain.

The fact that at least six of the first sixteen legislators of Upper Canada held slaves, provides insight into how early Canadian settlers viewed the Black population. As the institution of chattel slavery was predicated on the idea that the slaves were not human beings, it is reasonable to suggest that the initial experience of Black people in Canada was one of second class citizenship. Indeed, after slavery was abolished, Blacks experienced segregation (both legal and de facto) in education, employment, housing and other spheres of social life (Henry and Tator, 2005)[1]. These early experiences served to put Canada's Black population at a severe economic and political disadvantage, while simultaneously privileging White Canadians (Wortley and Owusu-Bempah, 2011). This history has also set the stage for the experience of more recent Black immigrants by creating a framework of anti-Black racism that continues to express itself across the various facets of Canadian society.

Canada, like many other Western nations, continues to carry the heavy burden imposed by a legacy of colonialism. As Morgan (2016) notes, a key feature of the experience of Black

[1] It should also be acknowledged that this reality is a feature of the distant past; the legislation that allowed for segregated schools in Ontario remained on the books until 1964 (Henry & Tator, 2005).

Canadians has been the simultaneous erasure of the contributions that Black people have made to this country along with the discrimination they have faced while making these contributions. The participation of Black Canadians in military service, politics, educational reform, and entrepreneurship goes largely unmentioned in the media and is almost completely omitted from school curricula. At the same time, the full extent of the discrimination experienced by Black people – from slavery and segregation to the interpersonal violence experienced by the victims of hate crimes today – remains under-reported (Henry & Tator, 2005; Maynard, 2017. Morgan (2016) is correct in emphasizing that the erasure of Black accomplishments alongside the failure to acknowledge Canada's colonial legacy contributes greatly to the perpetuation of anti-Black racism. Without a clear historical contextualization of Black disadvantage, the under-achievement of Black students, Blacks' over-representation among the unemployed, and their increased presence within correctional facilities is easily explained by reference to stereotypical assumptions about Black work ethic, the nature of Black families, and Blacks' supposed innate propensity for crime and violence (James, forthcoming; Owusu-Bempah, 2017).

Nonetheless, the continued presence of various forms of racism[2] and discrimination in Canadian society has both been extensively documented by scholars and acknowledged by government commissions and task forces dating back several decades. In Ontario, clear evidence of government concern about anti-Black racism dates back to the 1980s and is evidenced most recently with the formation a provincial Anti-Racism Directorate in 2016, which has anti-Black racism as one of its main foci. Likewise the 2016 Toronto Action Plan to Confront Anti-Black Racism provides evidence of similar concern in the province's largest municipality and home to the greatest number of Black Canadians. The recent establishment of these anti-racism initiatives in Ontario reinforces the fact that Black people in Canada, regardless of place of birth, or length of time in the country, continue to face unique challenges that influence their experiences and life chances. The following is a summary list of Ontario government anti-racism initiatives:

- ***Provincial Advisory Committee on Race and Ethnocultural Relations*** (1987)
- ***Anti-Racism Secretariat*** (1992)
- ***Stephen Lewis Report on Race Relations in Ontario*** (1992)
- ***Amendments to the Education Act*** (1992)
- ***Commission on Systemic Racism in the Ontario Criminal Justice System*** (1995)
- ***The Review of the Roots of Youth Violence*** (2008)
- ***Ontario's Equity and Inclusive Education Strategy*** (2009)
- ***Accepting Schools Act*** (2012)
- ***Anti-Racism Directorate*** (2016)
- ***Toronto Action Plan to Confront Anti-Black Racism*** (2016)

The myriad initiatives, accompanying reports and lengthy lists of recommendations mean little, however, if they have limited influence on the actions of key decision makers. To help contextualize the experiences of young Black men in the criminal justice system, and to outline the facts that inform our opinion, we outline the nature and extent of the discrimination,

[2] For example, the results of a 2007 public opinion poll showed 47% of Canadian respondents (outside of Quebec) reported being at least slightly racist. The figure for respondents in Quebec was 59% (Leger, 2007 cited in Patriquin, 2007).

marginalization and exclusion which they experience across various institutions and areas of social life in Ontario today. We begin by looking at what it feels like to be a young Black man in this context.

4. Black Masculinities

RESEARCHERS HAVE FOUND:
Youth subcultures tend to reinforce masculine characteristics associated with violence, dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality.

It is generally accepted that Canadian society is built on the values of liberal individualism – namely, that individuals act out of their own free will and that their success or failure is because of the choices they have made or the risks they have taken. In this context, whatever is achieved is portrayed as more related to an individual's own efforts than to the social, economic or political context in which they exist as racialized, marginalized or minoritized individuals. Boys and men who fail to meet these expectations are said to perform "subordinate" forms masculinity. Indeed, scholars submit that there is a link between social marginalization and boys' and men's violent behavior (Groes-Green, 2009; Messerschmidt, 2000).

According to Messerschmidt (2000), in addition to competitive individualism and aggressiveness, men generally perceive violence as an appropriate reference for constructing their masculinity and as a means of mediating their relationships with other people. To them, violence – which over time becomes normalized – is thought of as a "masculine resource" that serves in their affirmation and shields their vulnerabilities. In some cases and in some contexts, men's orientation to aggression and violence as forms of their masculinity are connected to their responsibilities to provide for (i.e. being "bread-winner") and "protect" their families (see Groes-Green, 2009; Hope, 2010). Connell and Messerschmidt (2005) also write of "protest masculinity" which they define as "a pattern of masculinity constructed in local working-class settings, sometimes among ethnically marginalized men, which embodies the claim to power typical of regional hegemonic masculinities in Western countries, but which lacks the economic resources and institutional authority that underpins the regional and global patterns" (pp. 847–848).

As Connell (2005) points out, youth subcultures also tend to reinforce masculine characteristics associated with violence, dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable or positive means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality (Goff et al., 2012). Whereas many White men are afforded the opportunity to affirm their masculinity by socially acceptable means, a decent-paying job in the legitimate labour market, for example, these avenues are blocked for many Black men, particularly those living on the margins of our society. As Majors and Billson (1992) suggest:

> Toughness, violence, and disregard for death and danger become the hallmark of survival in a world that does not respond to reasonable efforts to belong and achieve [to be a good man]. The frustration that inevitably wells up from believing in a role that one cannot fulfill effectively spills over into other ways of proving masculinity: being cool, being tough, and sinking deeper and deeper into the masking behaviors that remove the sting of failure (Majors & Billson, 1992: 34).

Available data indicate that serious violence is concentrated within Toronto's Black communities. Gartner and Thompson (2004: 33), for example show that between 1992 and 2003, the homicide rate for Black Torontonians (10.1 murders per 100,000) was more than four times greater than the city average (2.4 murders per 100,000). Further analysis demonstrates that young Black men are particularly vulnerable. Indeed, whereas Black males account for only 4 percent of Toronto's population, in 2007, they represented nearly 40% of the Toronto's homicide victims. Thus, Black males had a homicide victimization rate of approximately 28.2 per 100,000, compared to only 2.4 per 100,000 Toronto's population as a whole (Wortley 2008 in Owusu-Bempah and Wortley, 2014: 294). Likewise, survey data demonstrate that Black youth in Toronto report higher levels of violent offending and violent victimization than youth from other racial groups. For example, 53% of Black students who participated in the 2000 Toronto Youth Crime and Victimization Survey indicated that they had been involved in three or more fights in their lifetime, compared to 39% of white students, 32% of Asian, and 28% of South Asian students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 296).[3]

The centrality of danger and violence in securing masculinity among Black urban poor men is captured well in the work of Anderson (1999). Anderson suggests that exerting violence and aggression, or at least exhibiting the potential for violence and aggression, is key to gaining respect within structurally disadvantaged communities. Violence may also be seen as an accepted method of dispute resolution for individuals who subscribe to "street" oriented subcultural norms, and view the police and criminal justice system as an oppressive institution, unable or unwilling to serve as a meaningful resource. Both the marginalization of Black men, and the criminalization that results from it, influence how they come to view themselves, and as a result, how they navigate the world in light of the opportunities (or lack thereof) afforded to them.

In the case of Black youth, numerous scholars have written on how schooling and other social institutions fail to provide them with the support and education needed for success and effective participation in society (Dei & Kempf 2013; James 2012a; 2009; Tecle & James 2014). A web of negative stereotypes, which operate to disadvantage Black children, are sustained by the very institutions whose purpose is to foster healthy development from childhood into adulthood – and

[3] It is important to note, however, that Black youth are not over-represented in all types of criminal offending. Data gleaned from the same survey show that White students report much more involvement with illicit drugs than Black youth. Indeed, 45% of White students reported that they had used cannabis at some time in their life (compared with 39% of Black students), 6% had used cocaine or crack (compared to only 2% of Black students), and 13% had used other illegal drugs (compared to only 3% of black students). Likewise, 17% of White students indicated that they had sold illicit drugs at some time in their life, compared to only 15% of Black students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 294). These findings are notable because Black people are generally over-represented in arrests and convictions for drug possession and trafficking.

all in the context of a “liberal” society which celebrates individual merit and achievement. We look at those institutions in the next two sections, starting with child welfare followed by education.

5. The Experiences of Black Children and Youth within the Child Welfare System

KEY FACTS:

- Black Canadians comprise 8.5% of the population of Toronto; their young represent 40.8% of children in care.
- Children in care are more likely to come into contact with the youth justice system than they are to graduate from high school.

Racism and poverty have been credited with fuelling the disproportionate representation of Black Canadian children in Ontario’s welfare system (Fallon et al., 2015). Although Black Canadians comprise only 8.5% of the population of Toronto, their young represent 40.8% of children in care, according to data released by the Children’s Aid Society of Toronto (OACAS, 2016: 4).

Concerns about Black Canadians’ experiences with Ontario’s child welfare system have been raised by service users, advocates, and community partners and the media for decades (OACAS, 2016; OHRC, 2018). These concerns revolve around increased levels of surveillance that target Black families and result from widely-held, yet often unconscious, beliefs that Black families are unfit and pathological (Maynard, 2017). Not only are Black children and youth over-represented within the welfare system in Ontario, but service users report that they are treated differently with comparison to White children and youth, experiencing more negative outcomes and less access to required services.

The social circumstances of Black Canadians play a key role in influencing their experiences within this system. King et al. (2017) analyzed data from Ontario’s child welfare agencies, finding that Black children were more likely to be investigated than White children, though he found little evidence to suggest that differences in substantiating cases, in transferring families to ongoing services, or in placing children in out-of-home care were based on race alone. However, he reported that severe economic hardship, combined with assessments about the quality of the parent-child relationship, contributed substantially to the decision to put the child in care.

As in the case with Indigenous peoples, it could be argued that assessments about parent-child relationships are based on White-middle class norms about family and parenting that are culturally biased against Black families. The practice of extended families caring for children, something common outside of the Western world, for example, may clash with Western notions of the nuclear family and ideas about who should have primary responsibility for raising children. These differences are compounded by the economic hardships facing many Black people in Toronto which result in parents working long hours to support their families, while children are left in the care of grandparents, aunts, uncles and siblings.

Given concern about Black over-representation in the child welfare system, the Children’s Aid Society of Toronto recently held a series of community consultations with the city’s Black

communities. Participants included parents who had involvement with the organization, adults who were in care as children, social service staff, and members of organizations that partner with child welfare agencies (CAS Toronto, 2015). A resounding theme of these consultations was the high degree of fear and mistrust of the system. Parents and caregivers said that they were not being 'listened' to by service providers and that children in care were not being heard. While participants acknowledged the need for child protection services to keep children safe from abuse, they also stressed the need for improved transparency and a greater range of service options for Black families. Significantly, there was a widespread perception of collusion between the major institutional systems that support Black children – namely, child welfare, education, and criminal justice.

The over-representation of African Canadian children and youth within the child welfare system in Ontario and their experiences of discrimination within this system present a number of areas of concern. The removal of Black children from their parents disrupts Black families, thus weakening the ties of kinship that are important for the emotional and social development of children and youth (Owusu-Bempah and Howitt, 1997). As contact with the child welfare system is a predictor of later offending, disproportionate levels of contact with the system, combined with the absence of culturally appropriate practices, increases the criminogenic effect of care for African Canadians (Jonson-Reid and Barth, 2000; Owusu-Bempah, 2007; 2010). Furthermore, the high rates of contact with the system and the removal of Black children from their parents also reinforces negative stereotypes about the fragility of Black families and further pathologizes African Canadian communities.

In sum, experience with the child welfare system acts as a catalyst for criminal offending and is a burden disproportionately inflicted upon Black Torontonians. Their increased exposure to one state institution, child welfare, increases their chance of exposure to another, the criminal justice system. The failure of Ontario's education system to adequately address the needs of Black students also plays a role in their increased criminalization. We turn to this important institution below.

6. The Experiences of Black Children and Youth in Education

KEY FACTS (based on 2006 –2011 data from the Toronto District School Board):

- Almost half of the Black student population is streamed into non-university tract programs.
- Black students are more than twice as likely to be suspended and almost twice as likely to be expelled compared with White students and students from other racialized groups.
- Black students are twice as likely to drop out of school in comparison to White students and students from other racialized groups.
- Black students graduate below the provincial graduation rate.

The relationship between educational failure and criminalization is well-established (Groot & van den Brink, 2010; Lochner & Moretti, 2004). Poor academic performance, absence from school, and failure to graduate all increase the likelihood of offending.

As is the case with child welfare, concern about Black academic (under) achievement has been present in Ontario for several decades. In 1987, a Provincial Advisory Committee on Race and Ethnocultural Relations was formed following a provincial conference on race and ethnocultural relations. The Committee prepared a Working Paper in 1988 entitled "The Development of a Policy on Race and Ethnocultural Equity" (Ministry of Education, 1988). Shortly thereafter, in the wake of the "Yonge Street Riot," NDP Premier Bob Rae commissioned Stephen Lewis to investigate the state of race relations in Ontario.

The 1992 Stephen Lewis Report, as it has come to be known, highlighted a lack of progress being made to improve educational outcomes for Black students. Lewis outlined the concerns of Black students drawn from consultations held in Toronto and the surrounding areas. These concerns included: a lack of racial diversity among teachers; an absence of Black people and Black history in the curriculum; the tolerance of racist incidents in schools; the harsher discipline of Black students; the streaming of Black students into courses below their ability; and Black students being discouraged from attending university. Similar findings by several other government-sponsored initiatives led to the NDP's amendments to the Education Act in 1992. These amendments called on school boards to develop and implement anti-racism and ethnocultural equity policies that would promote the identification and elimination of systemic inequities and barriers to equitable education for students and encourage equitable education practices for all staff (James & Turner, 2017).

The positive sentiment derived from these suggestions was short lived, however, following the election of conservative Premier Mike Harris in 1995. Harris campaigned on an anti-employment equity platform and a promise of increased discipline in schools. In 2000, a Code of Conduct for Ontario schools was released, followed soon after by the amendments to the Education Act, granting legal force to the Code of Conduct giving principals and teachers more authority to suspend and expel students. The Act made expulsions and suspensions mandatory for serious infractions and set out a zero tolerance policy for inappropriate behaviour. This approach to school discipline was criticized for suspending students for minor incidents and for being especially harsh on Black students (Puxley, 2007). In 2007, the OHRC and the Ministry of Education finalized a settlement to end the provincial zero tolerance policy and replace it with a progressive discipline approach to dealing with inappropriate school behaviours. Despite seemingly positive changes to the Education Act, including the implementation of an Equity and Inclusive Education Strategy in 2009, Black students continue to face poor educational prospects.

James and Turner (2017) analyzed data from a 2006–2011 cohort of Black students in the Toronto District School Board (TDSB) to examine their educational outcomes. Given the general youthfulness of the Black population, Black Canadians represent a larger proportion of students in the TDSB's high school population than they do in the general population. Whereas Black people represent 8.5% of the population of Toronto, they represent 12% of students in the 2006–2011 TDSB cohort documented in the James and Turner report highlighted below.

The streaming of Black students into non-university tract programs in schools has been an ongoing concern for students, parents, educators, community activists and some politicians. This

concern centers on the perception that the streaming of Black students into non-university tract programs is the result of stereotypes asserting that Black people are less intelligent, less academically inclined (under-achievers), and thus more suited to vocational or college based programs (James, 2012: 482-484). As James and Turner demonstrate, in comparison to White and other racialized students, Black students in the TDSB are underrepresented in the Academic program of study and over-represented in the Essentials program. In the 2006–2011 cohort, 53% of Black students, 81% of White, and 80% of other racialized students were in the Academic program of study. On the other hand, Black students (39%) were over twice as likely White (16%) students and students from other racialized backgrounds (18%) to be enrolled in the Applied program. Black students were also three times as likely to be enrolled in the Essentials program (9% versus 3% of White and other racialized students) (James and Turner, 2017: 30).

Suspension and expulsion rates are also an important indicator of academic success as they reflect time spent outside of the educational system, thus impacting upon on student's attachment to their schools, peers, and teachers. Exclusion from school is widely recognized as a driver for wider social exclusion and is highly correlated with unemployment and involvement in crime. As Martin Narey (2001), Director General of HM Prison Service in the U.K. notes: "The 13,000 young people excluded from school each year might as well be given a date by which to join the prison service some time later down the line" (cited in McMurtry & Curling, 2008: 56).

Suspensions and expulsions may be particularly detrimental if they are perceived by students to be unjust, which in the case of Black youth, they often are (Ruck & Wortley, 2002: 190). Indeed, as Black students are often stereotyped as "trouble makers" and often subject to increased surveillance and school disciplinary action that align with this stereotype (James, 2012: 480-482). In the 2006–2011 TDSB cohort, Black students were more than twice as likely as White and other racialized students to have been suspended at least once during the academic year. Upon completion, 42% of all Black students had been suspended at least once, compared with only 18% of White students and 18% of other racialized students. Similar disparities exist with respect to expulsions. The TDSB data show that of the 213 students who were expelled between 2011-2012 and 2015-2016, almost half (48%) were Black (James and Turner, 2017: 36).

Finally, the data indicates that Black students' levels of academic success, measured in terms of graduation rates, is far below that of their peers. Among the 2006–2011 cohort, 84% of White students had graduated from high school at the end of 5 years, compared to 87% of other racialized students. By contrast, only 69% of Black students had graduated from high school over the same five-year period. Likewise, Black students were twice as likely (11%) as White and other racialized students (both 5%) to be returning to high school the following year when they should have graduated and twice as likely to have dropped out (20%) compared to White (11%) and other racialized students (9%) (James &Turner, 2017: 31).

The negative consequences of Anti-Black racism in schooling generally and of zero-tolerance policies in particular, cannot be understated. Indeed, in their report on the Roots of Youth Violence, McMurtry and Curling (2008) argue that such policies have contributed to the school-to-prison pipeline, or the funneling of underachieving and excluded Black students into the criminal justice system. If Black students are not afforded the same opportunities for academic

success as many of their peers, their life chances ultimately suffer. Poor educational outcomes for Black students ultimately have a negative impact on their employment prospects and earning potential. These problems not only affect individual Black Canadians, but by extension, also their families and communities.

7. Black Employment and Poverty

KEY FACTS:

- The income gap for visible minorities, including Black Canadians, is growing.
- One-quarter of Black Canadian women live below the poverty line (compared with only 6% for White Canadians).
- Black children are living in poverty at the unprecedented rate of 33% for those of Caribbean heritage, 47% of those from continental Africa (only 18% for White children).

The comparatively low levels of academic achievement, combined with structural and institutional forms of discrimination converge to produce inequalities in Canada's employment sector. Based on the poor educational outcomes for Black students presented in the section above, it is unsurprising that Black youth are particularly vulnerable to unemployment. In Toronto, for example, the unemployment rate in 2014 for Black youth aged 15 –24 was 30% compared with 20% of youth from other racial backgrounds (CivicAction, 2014).

High rates of Black unemployment are not a new phenomenon. Evidence suggests that Black job seekers are excluded from the labour market, in part, due to the discriminatory actions of employers. In early 1980s Henry and Ginzberg (1985) conducted a series of studies to examine the impact of race and foreignness (as indicated by name or accent) on the likelihood of being offered a job. In one study, Black and White actors were sent to interviews assuming the role of the same interviewee (the resumes were the same and the actors played the role of the same fictional job candidate). Ultimately, Henry and Ginzberg determined that Black applicants experienced discrimination in one-quarter of job contacts which could not have happened by chance alone.

More recent research has produced remarkably similar results. Douthwright (2017) created four fictional female job applicants; two White and two Black applicants submitted their resumes to entry-level retail jobs. In line with previous American research, Douthwright found that even the White applicant with a criminal record received more call-backs than the Black applicant with no criminal record (see Pager, 2003). Of the 64 applications submitted by the White applicant with no criminal record, 20 call-backs were received, whereas the White applicant with a criminal record received 12. By comparison, the Black applicant with no criminal record received only seven call-backs and the Black applicant with a criminal record received just one (Douthwright, 2017).

Employment discrimination also affects income levels for Black and other racialized Canadians. In fact, data from the 2016 census shows that the income gap for visible minorities actually increased between 2006 and 2016, with members of visible minority groups earning on average

26% less than non-visible minorities (Monsebraaten, 2017). Hou and Coulombe (2010) analyzed data from the 2006 census to examine the earning gaps between Canadian-born visible minorities and non-visible minorities working similar jobs in Canada's public and private sectors. Their research shows that while income was similar for members of visible minority groups in comparison to Whites working in the public sector, the data from the private sector was significantly different. Visible minority men, and Black women in particular, earn significantly less than comparable Whites (comparable in terms of educational attainment and years of professional experience, for example) working similar jobs in private industry. Hou and Coulombe attribute the income differences to differences of equality of opportunity. Whereas the public sector is subject to employment equity regulations, the private sector faces less pressure to have equitable practices and policies.

Predictably, higher levels of unemployment and lower levels of income increase rates of poverty among Black Canadians. Whereas 6% of White Canadian women live below the poverty line, the figure is 25% for Black women in Canada. As a result, Black children are living in poverty at the alarming rate of 33% for those of Caribbean heritage and 47% of those from continental Africa (UNHR, 2016). The rate for White children is 18%. In Toronto Specially, African Canadians accounted for 19% of people living in poverty, while comprising just 8.4% of the population (National Council of Welfare, N.D)[4].

In addition to their individualized experiences with poverty, Black Canadians are also over-represented in Toronto neighbourhoods most afflicted by poverty and other forms of disadvantage.[5] Compounding the effects of lower household incomes, these neighbourhoods are underserved by public transit and contain a lower concentration of essential services. As a result, Black people in Toronto have poorer access to recreational and community centres, libraries, good schools, community health hubs and hospitals (Hulchanski, 2010). These are the very services that serve to create strong communities and to protect young people from the allures of crime, gang membership and the violence that accompanies it (McMurtry and Curling, 2008: 31). Accordingly, in the absence of important social services and in the presence of increased poverty, crime and victimization remain higher in these communities. For example, rates of shootings and homicides are higher in these neighbourhoods than the city average, and the victims of homicide younger than for Toronto as a whole (Hulchanski, 2010: 23). As noted above, it is young Black men who are most adversely affected by this violence. In response, these neighbourhoods are also subject to a hard-enforcement style of policing aimed at targeting its perpetrators (Owusu-Bempah, 2014).

8. Black Canadians' Perceptions of and Experiences with the Criminal Justice System

KEY FACTS:

- Over 80% of Black Canadians in Toronto feel that police treat Black people worse than White people.

[4] See Table 10, Visible minority groups, 2006: Percent distribution of persons living in poverty.

[5] As David Hulchanski (2010) points out in his *Three Cities* report, household income in the neighbourhoods in which Black people are most likely to live has decreased by 20% over the past three decades.

- Half of the Black student population in Toronto report being been stopped and questioned by the police on two or more occasions in the previous two years (compared with 23% of White students).
- Black people are over-represented in police "contact cards" for all areas of Toronto, regardless of neighbourhood crime rate or racial composition.
- Black accused are more likely to be detained before trial than White offenders.
- Incarceration is becoming increasingly concentrated among Black Canadians.

The historical record suggests that Black Canadians have had a long and tenuous history with the criminal justice system. Walker (2010) describes the discrimination faced by Black defendants in Ontario's courts during the 18th and 19th centuries. Similarly, Mosher (1998) documents how police used public order offenses in the early 20th century as a means of controlling Toronto's Black population. The historical and contemporary treatment of Black people in the justice system is has its genesis in Canada's experience with colonialism and slavery. During this period, Black people were systematically dehumanized and depicted as animalistic, aggressive, violent, and dangerous (Fishman, 2006; Owusu-Bempah, 2017). Following the abolition of slavery, the association of Blackness with violence specifically, and criminality in general, was used as a means as of social control and to justify restrictive immigration practices intended to restrict Black entry into Canada (Maynard, 2017).

Unfortunately, these perceptions have not completely subsided over time. As Roberts (2001: 103) points out, there remains a tendency in Canada to "racialize" crime; that is, to develop associations between criminality and racial or ethnic origin. Indeed, a significant proportion of the Canadian public continues to believe that racialized Canadians are involved in a greater proportion of offending than official criminal justice records suggest (Rankin & Powell, 2008). A survey conducted in Ontario in 1995, for example, found that nearly half of respondents believed that there was an inherent relationship between race and criminality. Of the respondents with this view, two-thirds selected "West Indians" or "Blacks" as being the most responsible for crime (Henry et al., 1996: 472).

The continued criminalization of Black people is sustained in part by the manner in which they are depicted in various forms of popular media (Welch, 2007). Wortley (2002), for example, conducted a content analysis of stories appearing in Toronto newspapers over a two-month period in 1998. He found that almost half of all stories featuring Black people dealt with issues relating to crime and violence, compared to only 14% of stories featuring Whites. His analysis identified major racial differences in the news narratives that sought to explain criminal behaviour. While crime involving White people was almost always explained as the product of individual pathology, Black criminality was typically characterized as a group phenomenon (see also Henry & Tator, 2000; Mosher, 1998).

Contrasting with popular perceptions of Black criminality are public perceptions of criminal injustice. As part of its research, the Commission on Systemic Racism in the Ontario Criminal Justice System asked justice practitioners and members of the public about their perceptions of bias and discrimination within the system. The Commission's findings show that a significant proportion of both judges and lawyers felt that Black Canadians were treated differently in court than White Canadians in court than White Canadians (Commission, 1995). Members of the

public were also asked about bias in both policing and the criminal court system. The survey found that over half of Black, White, and Chinese respondents from Toronto believed that the police treat Black people differently than White people. Similarly, over half of Black respondents and one-third of both White and Chinese respondents felt that Black people are treated differently the courts.

This study was replicated in 2007, 15 years after the initial study was conducted. What may be of surprise, in light of the myriad "race relations" initiatives that had been implemented over the previous decade, is that the more recent study found that perceptions of bias actually increased among Black and White respondents. For example, in 1994, 76% of Black respondents felt that the police treated Black people worse or much worse than Whites. By 2007 this figure had risen to 81%. Similarly, in 1994, 48% of Black respondents believed that a Black person would get a longer sentence than a White person charged with the same crime. In 2007 this figure had risen to 58% (Wortley & Owusu-Bempah, 2009: 465).

Citizens' perceptions of criminal injustice constitute an important social issue. Not only are the police and court system reliant on the citizenry to act as witnesses and co-operate as victims, but mounting evidence also suggests that negative views of the system contribute to criminal offending (Tyler, 1988; Tyler, 2003; Tyler & Fagan, 2008). People who view the system as unjust are less likely to believe they should abide by that system's rules (Tyler, 2003). This is particularly salient in the current context. As Black people are more likely than members of other racial groups to perceive the justice system as discriminatory, they are also more likely to participate in what might be thought of as "system-generated offending behaviour."

Likewise, evidence suggests that Black youth engage in violence as a means of "self-help" resulting from the belief that the police cannot, or will not, provide them with adequate protection (Wilkinson, Beaty and Lurry, 2009). Indeed, Wilkinson et al. found that gun carrying among Black youth in their sample resulted out of a fear of victimization and a feeling that the police could not act as capable guardians (2009: 29-31). The perception that they must take the law into their own hands not only adds to the cycle of violence in disadvantaged neighbourhoods, but also increases the risk of criminalization for Black youth when they do encounter the police. Below we examine evidence of Black over-representation in three aspects of the delivery of the criminal justice in Ontario. These practices have troubling consequences for incarceration rates of young Black Canadian men.

1. Police Stop and Search Practices

Survey research conducted over the past 20 years consistently demonstrates that Black Canadians are more likely than members of other racial groups to be stopped, searched, and questioned by the police. For example, a 1994 survey of Toronto residents found that almost one-third of Black male respondents had been stopped and questioned by the police on two or more occasions in the previous two years, compared with only 12% of White and 7% of Asian males (see Wortley & Tanner, 2003: 371). Further analyses reveal that these racial differences in police contact are not explained by racial differences in social class, education, or other important demographic variables. Indeed, two factors that appear to shield White males from police contact, age and social class, do not provide Blacks with the same protection. For

example, White people with higher levels of income and education are less likely to be stopped by the police than are White people with lower incomes and levels of education. On the other hand, Black people with higher levels of income and education are actually more likely to be stopped than Black people with lower incomes and levels of education (see discussion in Wortley & Tanner, 2003: 371).

A second Toronto survey involving youth paints a similar picture. Wortley and Tanner (2005: 586) asked Toronto high school students about their recent experiences with the police. Their survey found that over 50% of the Black students reported being been stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of White, 11% of Asian, and 8% of South Asian students. Similarly, over 40% of Black students said that they had been physically searched by the police in the previous two years, compared to only 17% of their White and 11% of their Asian counterparts.

A further analysis of this data demonstrates that racial differences in being stopped and searched by the police could not be explained by racial differences in criminal activity, gang membership, drug and alcohol use, or public leisure activities (Wortley & Tanner 2005). More recently, a 2007 survey of Toronto adults found that Black residents were three times more likely to be stopped and searched by the police in the previous two years and that this racial disparity could not be explained by racial differences in criminality, drug and alcohol use, driving habits, use of public spaces, poverty, or residence within a high-crime community (Wortley & Owusu-Bempah 2011).

Another source of police information that has gained an immense amount of public attention in recent years are the "contact card" or "street check" data collected by police officers in the course of their duties. These forms of data are not collected by police in every civilian encounter, but rather those for which the officer wants to record information about a stop for intelligence purposes. In addition to details about the stop, contact card and streets checks also typically garner demographic information about the civilian, such as their age, race, and gender. As such, it can be argued that the practice of 'carding' provides insight into police surveillance practices that typically target the individuals and neighbourhoods subject to increased levels of police scrutiny (Owusu-Bempah & Wortley, 2014).

Data from across Ontario demonstrate that Black people are over-represented in the 'carding' activities of a range of police services. These include Peel (Grewal, 2015), Waterloo (Sharkey, 2016), Hamilton (Bennett, 2015), London (O'Brien, 2016), Ottawa (Yogaretham, 2015), and Toronto (Rankin, 2010b). The *Toronto Star's* analysis of over 1.7 million "contact cards" filled out by the Toronto police between 2003 and 2008 found that Black people comprised almost 25% of those documented by the police, while representing only 8.4% of the population. Interestingly, the data also indicates that Black people are over-represented in police "contact cards" for all areas of the city, regardless of neighbourhood crime rate or racial composition (Rankin, 2010a; 2010b).

The targeting of Black Canadians by the police has two main consequences for Black communities in Canada. First, because Black people are exposed to higher levels of police surveillance, they are also much more likely to be caught breaking the law than are White people

who engage in in the same forms of law violating behaviour. The Toronto high school survey discussed above, for example, found that 65% of the Black drug dealers[6] said that they had been arrested in their lifetime, compared with just 35% of the White drug dealers (Wortley &Tanner, 2005: 586). Similarly, data recently published by the *Toronto Star* showed that between 2003 and 2013, Black people accounted for 25.5% of people arrested for cannabis possession by the Toronto Police Service while accounting for 8.4% of Toronto's population. Key here is that cannabis arrests increased in tandem with the practice of police 'carding' in Toronto over this period (Rankin and Contenta, 2017). As rates of 'carding' increased, so too did the number of cannabis possession arrests laid by the Toronto police. Therefore, race-based targeting may help explain why Black people are over-represented in arrests for cannabis possession even though empirical evidence suggests that rates of cannabis use are similar across racial groups (Hamilton et al., 2018).

A second important consequence of differential police stop and search practices is that they contribute to perceptions of criminal and social injustice. Indeed, evidence suggests that Black people who are frequently stopped and questioned by the police perceive much higher levels of bias and discrimination in the Canadian criminal justice system than do Black people who are not frequently stopped (Wortley and Owusu-Bempah, 2011). As such, these practices may signal to Black people, that irrespective of individual behaviour, being Black means being considered one of the "usual suspects" (Ibid).

2. *Pre-trial Decision-Making*

As gatekeepers of the criminal justice system the police influence who is officially processed by that system. Here, racial disparities at the front end in terms of stop and search, and other areas of decision making, can have serious consequences. An analysis of Toronto Police data on drug arrests carried out by the *Toronto Star* showed that Black people were not only over-represented in drug possession charges, but were also less likely to be released by the police at the scene than White people. The data indicated that 23. 6% of those arrested on one count of simple drug possession were Black (compared with 8.1% of the population) and 63.8% were White (compared with 62.7% of the population). While 76.5% of White accused were released at the scene on drug possession charges, the same was true for only 61.8% of Black accused (Rankin et al., 2002a;b).

Pre-trial detention rates also varied between the two groups, as 15.5% of Black accused were held until their trial compared to 7.3% of Whites. These findings held constant, even after controlling for other relevant factors (Rankin et al., 2002a;b). A study conducted by Kellough and Wortley (2002) provides further evidence of racial disparity in pre-trial decision-making. This study tracked over 1,800 criminal cases from two Toronto bail courts during a six-month period in 1994. The findings indicate that 36% of Black accused were detained before trial compared to 23% of accused from other racial backgrounds. Again, race remained a significant factor even after controlling for relevant factors such as flight risk and danger to the public (Kellough & Wortley, 2002: 195-196).

[6] Defined as youth who reported selling drugs on 10 or more occasions in the previous 12 months.

Data recently released by the Ontario Ministry of Community Safety and Correctional Services shows that Black accused are also detained longer before trial than White accused (Mehler-Paperny, 2017). It is important to note that the denial of bail has serious consequences for the accused. First, the denial of bail might be used as a way to coerce guilty pleas from individuals who are reluctant to be held in detention centres for extended periods of time. Second, individuals who have been denied bail receive longer custodial sentences than individuals who are found guilty but were not held in remand before their trial (Sacks & Ackerman, 2014: 69).

3. Incarceration

Despite a decline in the overall inmate population, the number of Black offenders confined in Canadian federal correctional institutions increased by 75% in the decade leading up to 2012. Whereas Black Canadians represent just 2.9% of the overall Canadian population, they accounted for 9.3% of the total federal prison population (Office of the Correctional Investigator, 2013a). Of concern is both the increasing representation of Black Canadians in federal custody, and also their treatment within these institutions (OCI, 2013a; b; 2014; 2015; 2016; 2017). Based on consultations with Black inmates and a review of correctional data, the Office of the Correctional Investigator (OCI) produced a detailed report that documented the inequalities faced by Black inmates (OCI, 2013a).[7]

The OCI found that Black inmates consistently reported that institutional rules were applied differently to them when compared with Whites and inmates from other racial groups. Indeed, the OCI determined that between FY 2007/08 and 2011/12, the number of Black inmates facing disciplinary charges increased by 59%, whereas the overall number of disciplinary charges laid over the same period dropped by 7%. Of note, over this period, Black inmates were consistently over-represented in discretionary charge categories (those requiring judgement on the part of correctional officers), whereas they were consistently under-represented in less discretionary charge categories (such as possession of stolen property, theft and damage of property) (OCI, 2013a: 22).

Furthermore, between 2009 and 2013, despite being classified as having lower risk/needs scores, Black inmates were more likely to be placed in maximum security (OCI, 2013a: 21). In addition to being sent to higher security facilities, despite being classified on average as lower risk, Black inmates are less likely than their counterparts to have their custody score lowered so that they could be transferred to medium or minimum security prisons. This suggests that at some point between risk classification and prison placement, Black inmates are classified as higher risk, deserving of maximum security, and at no point does it appear that this assessment reversed. The OCI has also found that Black inmates are over-represented in admissions to segregation and disproportionately involved in use of force incidents. Whereas Black inmates accounted for 9.3% of the total inmate population in FY 2011/12 they accounted for 11.7% of inmates placed in involuntary segregation (OCI, 2013a: 23). In FY 2012/13 Black inmates were involved in 13% of use of force incidents.

The bulk of evidence from the OCI report suggests that Black inmates were often not treated with dignity and respect by CSC staff. Evidence also suggests that such (mis)treatment was tied

[7] The Office of the Correctional Investigator acts as the ombudsperson for federal prisoners.

to aspects of the inmates' culture (e.g. language, dress, etc.) and the places from which they were drawn (i.e. where Black inmates lived prior to incarceration). Black inmates provided examples of over-hearing CSC staff mocking the way they spoke or trying to speak with a Jamaican accent, for example, to their colleagues. One inmate reported a correctional officer asking him "What is wrong with your tongue, don't talk to me like a hoodlum" (OCI, 2013a: 19).

Black inmates also reported numerous examples of stereotyping and that judgments about their character and lifestyle were also common. Most of the Black men described being labeled a 'gang member', a 'trouble maker, a 'drug dealer', and/or a 'womanizer' (OCI, 2013a: 17). Furthermore, among Black inmates "The gang member/affiliation stereotype" was of "particular concern" (Ibid). During the focus groups, Black inmates stated that correctional staff associated Black inmates' home postal code with gang membership. This meant that depending on home address of the inmate, Black inmates were associated with gangs from that area. Consequently, Black inmates reported that the gang label hindered their ability to obtain access to CORCAN jobs[8], thereby leaving them working jobs that provided little valuable experience (Ibid). Indeed, while the overall prison unemployment rate in federal correctional facilities was 1.5% in 2012/2013, the unemployment rate for Black inmates was much higher at 7%. Therefore, Black inmates were disproportionately restricted from receiving hands-on training in employable skills that would aid their re-entry into society (OCI, 2013a: 20).

Black overrepresentation in corrections is also apparent at the provincial level. In 2010, Black adults accounted for 17.7% of admissions to provincial custody while making up 3.9% of the overall population (Owusu-Bempah & Wortley, 2014). Similarly, in 2011-2012, Black youth accounted for almost one-quarter (24.1%) of admissions to custody in Ontario while comprising only 3% of the province's youth population at the time (Rankin & Winsa, 2013). Notably, the incarceration rates for young men have steadily declined since the introduction of the Youth Criminal Justice Act in 2003; however, Black male youth have not benefitted from this decline. In fact, evidence from both the federal and provincial correctional systems indicate that incarceration is becoming increasingly concentrated among certain racialized groups, and in specific geographical areas, and that Black Canadians have been disproportionately affected by these trends. This is troubling in light of what is known about the negative consequences of concentrated incarceration.

For individuals, incarceration significantly reduces later employment rates and income levels (Freeman, 1992). Incarceration also has a significant negative influence on social networks, social relationships, and long-term life chances, thus impacting one's ability to contribute to family and community (Clear, 2008; Roberts, 2004). The families of those incarcerated also suffer financial and emotional costs related to separation, the loss of income, and the need to support an imprisoned family member (Braman, 2002; Wildeman et al., 2012).

There is evidence to suggest that the arrest of parents disrupts marital relationships, separates children from their parents, and can result in the permanent dissolution of these relationships (Christian, 2004). Research has also shown that children with parents in prison suffer serious

[8] "CORCAN is a special operating agency within the Correctional Service of Canada (CSC) that offers employment training and employability skills to offenders in federal correctional institutions, to support rehabilitation and help lower rates of re-offending." (CSC, 2016).

psychological consequences, including depression, anxiety, feelings of rejection, shame, anger, and guilt (Browning et al, 2001). These children are also more likely to experience school failure, under-employment, and illegal drug use (Clear, 2008). Importantly, studies have shown parental incarceration to be a risk factor for juvenile delinquency, further exacerbating crime problems in affected communities.

The impact of concentrated incarceration clearly extends from the family unit into the community. As going to prison has a permanent impact on employment and earning potential, it also damages the labour prospects of young people in a community by decreasing the pool of individuals who can act as mentors and social contacts (Sabol & Lynch, 2004). A reduction in the number of people engaged in the labour market not only depletes supplies of human capital, but also affects the local economy because individuals have less money to spend at local establishments (Sullivan, 1989; Venkatesh, 1997). Importantly, concentrated incarceration distorts social norms, leads to the breakdown of informal social control, and therefore undermines the building blocks of social order which are essential for community safety (Clear, 2002).

In sum, concentrated incarceration can further exacerbate existing social problems, fostering a cycle of inequality within communities and across generations. The fact that incarceration is becoming increasingly concentrated amongst Black Canadians should be of a concern, precisely because it reproduces the very conditions that contribute to incarceration in the first place.

9. Expert Opinion

As documented above, Black Canadians present experiences are rooted in our country's history of colonialism, slavery and segregation. These systems, the latter of which existed well into the 20th century in Ontario, were premised on the idea that Black people are inherently inferior. These systems also served to structure the nature of early social relations in Canada, while at the same time shaping the economic and political landscape. While White Canadians were provided opportunity to access good schools, good jobs and representation in political office, Black Canadians were largely relegated to the margins of Canadian society.

These early experiences of Black Canadians has informed the experiences of those that have come after them. Stereotypical notions about Black intellectual inferiority, the pathological nature of Black families and of Blacks' supposed innate propensity for crime, all rooted in this early period, continue to influence how Black people are treated today. The data documented above demonstrate that Black children are disproportionately removed from their families, due in part, to discrimination in child welfare assessments. Black children are deemed to be less academically inclined and thus streamed into non-university tract programs. They are also subject to harsher discipline in schools which reduces their likelihood of graduation. In the employment sector, Black people face discrimination in hiring, and at times, earn less money for similar work performed by White Canadians, resulting in increased rates of unemployment and poverty. The increased representation of Black people in impoverished neighbourhoods means that they have less access to good schools, community centres and health facilities. They are also

exposed to the harsher forms of policing practiced in marginalized neighbourhoods in response to problems of crime and violence.

Importantly, Blacks' negative treatment by these institutions, and the disparate outcomes experienced within them, are cyclical and compounding. Indeed, increased exposure to the child welfare system reduces the chances of academic success, which reduces employability, thus increasing levels of poverty. These circumstances are passed from generation to generation.

The data documented above also clearly demonstrate that Black Canadians, and young Black men in particular, keenly feel the discrimination they experience at the hands of the criminal justice system. Young Black Canadians are not only over-represented in stop, search and carding practices of local police, but they serve longer periods of time in pre-trial detention, resulting in longer periods of incarceration than are others charged with the same or similar crimes. Not surprisingly, as Owusu-Bempah (2014) has found, Black male youth who perceive discrimination in policing also feel the same way about both the educational and employment sectors. Further, as Khenti (2013) notes, their experiences, personal and vicarious, with the criminal justice system contribute to the perception that they live "socially unjust lives." The conclusion is inescapable – that young Black Canadians who view the system as unjust are less likely to believe they should abide by that system's rules.

It is our opinion that the social circumstances of Black Canadians in general, and of Black male Torontonians in particular, should be viewed as criminogenic. Elevated levels of offending in the types of crime that typically come to the attention of the police (street crimes as opposed to white-collar and corporate crimes), combined with discrimination in the justice system itself have resulted in the gross over-representation of Black Canadians in our provincial and federal correctional systems. Whereas no one individual should be completely absolved of their own responsibility when it comes to offending behaviour, the social realities that have produced or contributed to such behaviour can be acknowledged, and serve to guide judicial decision making.

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Appendix A

Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario

2018 ONSC 5186 (CanLII)

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1. Introduction

We have been asked by counsel for Mr. Morris to provide evidence and analysis of research relating to the existence and impact of Anti-Black racism in Canadian society generally and in the Toronto region in particular. The aim of this report is to assist the Court with understanding the conditions under which many Black people reside, receive education and employment, experience crime and the criminal justice system, and suffer from various forms of discrimination. When read in combination with Ms. Sibblis' analysis of Mr. Morris' life experiences, this report may also assist the Court in gaining a nuanced understanding of the social conditions and context that may have contributed to his involvement in the offence for which he is being sentenced. We have been apprised by counsel for Mr. Morris, Gail D. Smith, of the underlying facts related to Mr. Morris' finding of guilt. We have considered these facts in order to focus our contextual and social analysis.

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2. Our Analysis in Brief

The over-representation of young Black men in the criminal justice system is increasingly acknowledged by scholars and policy-makers alike as an important social issue. Over the past several decades in Ontario, various task forces and commissions have drawn attention to the social factors known to increase involvement in crime and have identified evidence of systemic discrimination in key social institutions – from child welfare and education – to the operation of the justice system itself.

The present circumstances of Black Canadians have deep historical roots. The institution of slavery and of legalized segregation in Canada formed the basis for Black Canadians' initial relationship with the state and its people. While slavery and segregation served to underpin early economic and political structures, the ideas and assumptions on which they were based shaped the nature of social relations. As evidenced by public opinion polls, some of these beliefs and ideas are still present in the minds of Canadians – particularly those associating Black people with crime and violence. Indeed, racially prejudicial attitudes remain commonplace among Canadians. The continued existence of various forms of institutional racism that affect the lives of Black Canadians is also underscored by the anti-racism initiates recently launched by the City of Toronto and the Government of Ontario.

For this reason, understanding – and redressing – criminal justice decisions lies in the social context where young Black men suffer racism, discrimination, and marginalization. It is impossible to understand the offending behaviour of young Black Canadians and their overrepresentation in the criminal justice system, without a broader consideration of the Black experience in Canada, past and present.

3. Anti-Black Racism in Ontario

HISTORICAL RECORD:

> Colonialism and slavery structured Black Canadians initial relationships with the state and its institutions. This legacy continues to impact upon the lives of Black people in Canada, Ontario and Toronto.

People of African descent have a long history in Canada and have played an integral part in the formation of the nation. The first documented person of African descent in Canada, Mathieu Da Costa, served as a translator to French and Dutch explorers as early as 1609 (Winks, 1997). Black people were subsequently brought to Canada as slaves in a practice that lasted from the early 17th century until it was abolished in 1834 (Ibid). Many Blacks also arrived in Canada, and particularly Ontario, through the Underground Railroad, as fugitive slaves from the United States (Maynard, 2017). Most of Ontario's Black settlements were located in the Southern parts of the

province in and around the Windsor, Chatham, London, St. Catherines and Hamilton areas. Others formed small groupings in Toronto and outside of Barrie, Owen Sound and Guelph. These closely concentrated Black communities served as a buffer against prejudice and discrimination from the White population. The historical record suggests that Black people in Canada were generally treated with hostility and disdain.

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The fact that at least six of the first sixteen legislators of Upper Canada held slaves, provides insight into how early Canadian settlers viewed the Black population. As the institution of chattel slavery was predicated on the idea that the slaves were not human beings, it is reasonable to suggest that the initial experience of Black people in Canada was one of second class citizenship. Indeed, after slavery was abolished, Blacks experienced segregation (both legal and de facto) in education, employment, housing and other spheres of social life (Henry and Tator, 2005)[1]. These early experiences served to put Canada's Black population at a severe economic and political disadvantage, while simultaneously privileging White Canadians (Wortley and Owusu-Bempah, 2011). This history has also set the stage for the experience of more recent Black immigrants by creating a framework of anti-Black racism that continues to express itself across the various facets of Canadian society.

Canada, like many other Western nations, continues to carry the heavy burden imposed by a legacy of colonialism. As Morgan (2016) notes, a key feature of the experience of Black Canadians has been the simultaneous erasure of the contributions that Black people have made to this country along with the discrimination they have faced while making these contributions. The participation of Black Canadians in military service, politics, educational reform, and entrepreneurship goes largely unmentioned in the media and is almost completely omitted from school curricula. At the same time, the full extent of the discrimination experienced by Black people – from slavery and segregation to the interpersonal violence experienced by the victims of hate crimes today – remains under-reported (Henry & Tator, 2005; Maynard, 2017. Morgan (2016) is correct in emphasizing that the erasure of Black accomplishments alongside the failure to acknowledge Canada's colonial legacy contributes greatly to the perpetuation of anti-Black racism. Without a clear historical contextualization of Black disadvantage, the under-achievement of Black students, Blacks' over-representation among the unemployed, and their increased presence within correctional facilities is easily explained by reference to stereotypical assumptions about Black work ethic, the nature of Black families, and Blacks' supposed innate propensity for crime and violence (James, forthcoming; Owusu-Bempah, 2017).

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[1] It should also be acknowledged that this reality is a feature of the distant past; the legislation that allowed for segregated schools in Ontario remained on the books until 1964 (Henry & Tator, 2005).

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Nonetheless, the continued presence of various forms of racism[2] and discrimination in Canadian society has both been extensively documented by scholars and acknowledged by government commissions and task forces dating back several decades. In Ontario, clear evidence of government concern about anti-Black racism dates back to the 1980s and is evidenced most recently with the formation a provincial Anti-Racism Directorate in 2016, which has anti-Black racism as one of its main foci. Likewise the 2016 Toronto Action Plan to Confront Anti-Black Racism provides evidence of similar concern in the province's largest municipality and home to the greatest number of Black Canadians. The recent establishment of these anti-racism initiatives in Ontario reinforces the fact that Black people in Canada, regardless of place of birth, or length of time in the country, continue to face unique challenges that influence their experiences and life chances. The following is a summary list of Ontario government anti-racism initiatives:

- ***Provincial Advisory Committee on Race and Ethnocultural Relations*** (1987)
- ***Anti-Racism Secretariat*** (1992)
- ***Stephen Lewis Report on Race Relations in Ontario*** (1992)
- ***Amendments to the Education Act*** (1992)
- ***Commission on Systemic Racism in the Ontario Criminal Justice System*** (1995)
- ***The Review of the Roots of Youth Violence*** (2008)
- ***Ontario's Equity and Inclusive Education Strategy*** (2009)
- ***Accepting Schools Act*** (2012)
- ***Anti-Racism Directorate*** (2016)
- ***Toronto Action Plan to Confront Anti-Black Racism*** (2016)

The myriad initiatives, accompanying reports and lengthy lists of recommendations mean little, however, if they have limited influence on the actions of key decision makers. To help contextualize the experiences of young Black men in the criminal justice system, and to outline the facts that inform our opinion, we outline the nature and extent of the discrimination, marginalization and exclusion which they experience across various institutions and areas of social life in Ontario today. We begin by looking at what it feels like to be a young Black man in this context.

4. Black Masculinities

RESEARCHERS HAVE FOUND:

Youth subcultures tend to reinforce masculine characteristics associated with violence,

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[2] For example, the results of a 2007 public opinion poll showed 47% of Canadian respondents (outside of Quebec) reported being at least slightly racist. The figure for respondents in Quebec was 59% (Leger, 2007 cited in Patriquin, 2007).

> dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality.

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It is generally accepted that Canadian society is built on the values of liberal individualism – namely, that individuals act out of their own free will and that their success or failure is because of the choices they have made or the risks they have taken. In this context, whatever is achieved is portrayed as more related to an individual's own efforts than to the social, economic or political context in which they exist as racialized, marginalized or minoritized individuals. Boys and men who fail to meet these expectations are said to perform "subordinate" forms masculinity. Indeed, scholars submit that there is a link between social marginalization and boys' and men's violent behavior (Groes-Green, 2009; Messerschmidt, 2000).

According to Messerschmidt (2000), in addition to competitive individualism and aggressiveness, men generally perceive violence as an appropriate reference for constructing their masculinity and as a means of mediating their relationships with other people. To them, violence – which over time becomes normalized – is thought of as a "masculine resource" that serves in their affirmation and shields their vulnerabilities. In some cases and in some contexts, men's orientation to aggression and violence as forms of their masculinity are connected to their responsibilities to provide for (i.e. being "bread-winner") and "protect" their families (see Groes-Green, 2009; Hope, 2010). Connell and Messerschmidt (2005) also write of "protest masculinity" which they define as "a pattern of masculinity constructed in local working-class settings, sometimes among ethnically marginalized men, which embodies the claim to power typical of regional hegemonic masculinities in Western countries, but which lacks the economic resources and institutional authority that underpins the regional and global patterns" (pp. 847–848).

As Connell (2005) points out, youth subcultures also tend to reinforce masculine characteristics associated with violence, dominance, and homophobia. These traits or characteristics may be overemphasized by Black males for whom acceptable or positive means of displaying masculinity are blocked, and for whom experiencing racism is a daily reality (Goff et al., 2012). Whereas many White men are afforded the opportunity to affirm their masculinity by socially acceptable means, a decent-paying job in the legitimate labour market, for example, these avenues are blocked for many Black men, particularly those living on the margins of our society. As Majors and Billson (1992) suggest:

> Toughness, violence, and disregard for death and danger become the hallmark of survival in a world that does not respond to reasonable efforts to belong and achieve [to be a good man]. The frustration that inevitably wells up from believing in a role that one cannot fulfill effectively spills over into other ways of proving masculinity: being cool, being tough, and sinking deeper and deeper into

> the masking behaviors that remove the sting of failure (Majors & Billson, 1992: 34).

Available data indicate that serious violence is concentrated within Toronto's Black communities. Gartner and Thompson (2004: 33), for example show that between 1992 and 2003, the homicide rate for Black Torontonians (10.1 murders per 100,000) was more than four times greater than the city average (2.4 murders per 100,000). Further analysis demonstrates that young Black men are particularly vulnerable. Indeed, whereas Black males account for only 4 percent of Toronto's population, in 2007, they represented nearly 40% of the Toronto's homicide victims. Thus, Black males had a homicide victimization rate of approximately 28.2 per 100,000, compared to only 2.4 per 100,000 Toronto's population as a whole (Wortley 2008 in Owusu-Bempah and Wortley, 2014: 294). Likewise, survey data demonstrate that Black youth in Toronto report higher levels of violent offending and violent victimization than youth from other racial groups. For example, 53% of Black students who participated in the 2000 Toronto Youth Crime and Victimization Survey indicated that they had been involved in three or more fights in their lifetime, compared to 39% of white students, 32% of Asian, and 28% of South Asian students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 296).[3]

The centrality of danger and violence in securing masculinity among Black urban poor men is captured well in the work of Anderson (1999). Anderson suggests that exerting violence and aggression, or at least exhibiting the potential for violence and aggression, is key to gaining respect within structurally disadvantaged communities. Violence may also be seen as an accepted method of dispute resolution for individuals who subscribe to "street" oriented subcultural norms, and view the police and criminal justice system as an oppressive institution, unable or unwilling to serve as a meaningful resource. Both the marginalization of Black men, and the criminalization that results from it, influence how they come to view themselves, and as a result, how they navigate the world in light of the opportunities (or lack thereof) afforded to them.

In the case of Black youth, numerous scholars have written on how schooling and other social institutions fail to provide them with the support and education needed for success and effective participation in society (Dei & Kempf 2013; James 2012a; 2009; Tecle & James 2014). A web of negative stereotypes, which operate to disadvantage Black children, are sustained by the very

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[3] It is important to note, however, that Black youth are not over-represented in all types of criminal offending. Data gleaned from the same survey show that White students report much more involvement with illicit drugs than Black youth. Indeed, 45% of White students reported that they had used cannabis at some time in their life (compared with 39% of Black students), 6% had used cocaine or crack (compared to only 2% of Black students), and 13% had used other illegal drugs (compared to only 3% of black students). Likewise, 17% of White students indicated that they had sold illicit drugs at some time in their life, compared to only 15% of Black students (Tanner and Wortley, 2002 in Owusu-Bempah and Wortley, 2014: 294). These findings are notable because Black people are generally over-represented in arrests and convictions for drug possession and trafficking.

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institutions whose purpose is to foster healthy development from childhood into adulthood – and all in the context of a "liberal" society which celebrates individual merit and achievement. We look at those institutions in the next two sections, starting with child welfare followed by education.

5. The Experiences of Black Children and Youth within the Child Welfare System

KEY FACTS:

- Black Canadians comprise 8.5% of the population of Toronto; their young represent 40.8% of children in care.
- Children in care are more likely to come into contact with the youth justice system than they are to graduate from high school.

Racism and poverty have been credited with fuelling the disproportionate representation of Black Canadian children in Ontario's welfare system (Fallon et al., 2015). Although Black Canadians comprise only 8.5% of the population of Toronto, their young represent 40.8% of children in care, according to data released by the Children's Aid Society of Toronto (OACAS, 2016: 4).

Concerns about Black Canadians' experiences with Ontario's child welfare system have been raised by service users, advocates, and community partners and the media for decades (OACAS, 2016; OHRC, 2018). These concerns revolve around increased levels of surveillance that target Black families and result from widely-held, yet often unconscious, beliefs that Black families are unfit and pathological (Maynard, 2017). Not only are Black children and youth over-represented within the welfare system in Ontario, but service users report that they are treated differently with comparison to White children and youth, experiencing more negative outcomes and less access to required services.

The social circumstances of Black Canadians play a key role in influencing their experiences within this system. King et al. (2017) analyzed data from Ontario's child welfare agencies, finding that Black children were more likely to be investigated than White children, though he found little evidence to suggest that differences in substantiating cases, in transferring families to ongoing services, or in placing children in out-of-home care were based on race alone. However, he reported that severe economic hardship, combined with assessments about the quality of the parent-child relationship, contributed substantially to the decision to put the child in care.

As in the case with Indigenous peoples, it could be argued that assessments about parent-child relationships are based on White-middle class norms about family and parenting that are culturally biased against Black families. The practice of extended families caring for children, something common outside of the Western world, for example, may clash with Western notions of the nuclear family and ideas about who should have primary responsibility for raising children. These differences are compounded by the economic hardships facing many Black

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people in Toronto which result in parents working long hours to support their families, while children are left in the care of grandparents, aunts, uncles and siblings.

Given concern about Black over-representation in the child welfare system, the Children's Aid Society of Toronto recently held a series of community consultations with the city's Black communities. Participants included parents who had involvement with the organization, adults who were in care as children, social service staff, and members of organizations that partner with child welfare agencies (CAS Toronto, 2015). A resounding theme of these consultations was the high degree of fear and mistrust of the system. Parents and caregivers said that they were not being 'listened' to by service providers and that children in care were not being heard. While participants acknowledged the need for child protection services to keep children safe from abuse, they also stressed the need for improved transparency and a greater range of service options for Black families. Significantly, there was a widespread perception of collusion between the major institutional systems that support Black children – namely, child welfare, education, and criminal justice.

The over-representation of African Canadian children and youth within the child welfare system in Ontario and their experiences of discrimination within this system present a number of areas of concern. The removal of Black children from their parents disrupts Black families, thus weakening the ties of kinship that are important for the emotional and social development of children and youth (Owusu-Bempah and Howitt, 1997). As contact with the child welfare system is a predictor of later offending, disproportionate levels of contact with the system, combined with the absence of culturally appropriate practices, increases the criminogenic effect of care for African Canadians (Jonson-Reid and Barth, 2000; Owusu-Bempah, 2007; 2010). Furthermore, the high rates of contact with the system and the removal of Black children from their parents also reinforces negative stereotypes about the fragility of Black families and further pathologizes African Canadian communities.

In sum, experience with the child welfare system acts as a catalyst for criminal offending and is a burden disproportionately inflicted upon Black Torontonians. Their increased exposure to one state institution, child welfare, increases their chance of exposure to another, the criminal justice system. The failure of Ontario's education system to adequately address the needs of Black students also plays a role in their increased criminalization. We turn to this important institution below.

6. The Experiences of Black Children and Youth in Education

KEY FACTS (based on 2006 –2011 data from the Toronto District School Board):

- Almost half of the Black student population is streamed into non-university tract programs.

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- Black students are more than twice as likely to be suspended and almost twice as likely to be expelled compared with White students and students from other racialized groups.
- Black students are twice as likely to drop out of school in comparison to White students and students from other racialized groups.
- Black students graduate below the provincial graduation rate.

The relationship between educational failure and criminalization is well-established (Groot & van den Brink, 2010; Lochner & Moretti, 2004). Poor academic performance, absence from school, and failure to graduate all increase the likelihood of offending.

As is the case with child welfare, concern about Black academic (under) achievement has been present in Ontario for several decades. In 1987, a Provincial Advisory Committee on Race and Ethnocultural Relations was formed following a provincial conference on race and ethnocultural relations. The Committee prepared a Working Paper in 1988 entitled "The Development of a Policy on Race and Ethnocultural Equity" (Ministry of Education, 1988). Shortly thereafter, in the wake of the "Yonge Street Riot," NDP Premier Bob Rae commissioned Stephen Lewis to investigate the state of race relations in Ontario.

The 1992 Stephen Lewis Report, as it has come to be known, highlighted a lack of progress being made to improve educational outcomes for Black students. Lewis outlined the concerns of Black students drawn from consultations held in Toronto and the surrounding areas. These concerns included: a lack of racial diversity among teachers; an absence of Black people and Black history in the curriculum; the tolerance of racist incidents in schools; the harsher discipline of Black students; the streaming of Black students into courses below their ability; and Black students being discouraged from attending university. Similar findings by several other government-sponsored initiatives led to the NDP's amendments to the Education Act in 1992. These amendments called on school boards to develop and implement anti-racism and ethnocultural equity policies that would promote the identification and elimination of systemic inequities and barriers to equitable education for students and encourage equitable education practices for all staff (James & Turner, 2017).

The positive sentiment derived from these suggestions was short lived, however, following the election of conservative Premier Mike Harris in 1995. Harris campaigned on an anti-employment equity platform and a promise of increased discipline in schools. In 2000, a Code of Conduct for Ontario schools was released, followed soon after by the amendments to the Education Act, granting legal force to the Code of Conduct giving principals and teachers more authority to suspend and expel students. The Act made expulsions and suspensions mandatory for serious infractions and set out a zero tolerance policy for inappropriate behaviour. This approach to school discipline was criticized for suspending students for minor incidents and for being especially harsh on Black students (Puxley, 2007). In 2007, the OHRC and the Ministry of Education finalized a settlement to end the provincial zero tolerance policy and replace it with a progressive discipline approach to dealing with inappropriate school behaviours. Despite

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seemingly positive changes to the Education Act, including the implementation of an Equity and Inclusive Education Strategy in 2009, Black students continue to face poor educational prospects.

James and Turner (2017) analyzed data from a 2006–2011 cohort of Black students in the Toronto District School Board (TDSB) to examine their educational outcomes. Given the general youthfulness of the Black population, Black Canadians represent a larger proportion of students in the TDSB's high school population than they do in the general population. Whereas Black people represent 8.5% of the population of Toronto, they represent 12% of students in the 2006–2011 TDSB cohort documented in the James and Turner report highlighted below.

The streaming of Black students into non-university tract programs in schools has been an ongoing concern for students, parents, educators, community activists and some politicians. This concern centers on the perception that the streaming of Black students into non-university tract programs is the result of stereotypes asserting that Black people are less intelligent, less academically inclined (under-achievers), and thus more suited to vocational or college based programs (James, 2012: 482-484). As James and Turner demonstrate, in comparison to White and other racialized students, Black students in the TDSB are underrepresented in the Academic program of study and over-represented in the Essentials program. In the 2006–2011 cohort, 53% of Black students, 81% of White, and 80% of other racialized students were in the Academic program of study. On the other hand, Black students (39%) were over twice as likely White (16%) students and students from other racialized backgrounds (18%) to be enrolled in the Applied program. Black students were also three times as likely to be enrolled in the Essentials program (9% versus 3% of White and other racialized students) (James and Turner, 2017: 30).

Suspension and expulsion rates are also an important indicator of academic success as they reflect time spent outside of the educational system, thus impacting upon on student's attachment to their schools, peers, and teachers. Exclusion from school is widely recognized as a driver for wider social exclusion and is highly correlated with unemployment and involvement in crime. As Martin Narey (2001), Director General of HM Prison Service in the U.K. notes: "The 13,000 young people excluded from school each year might as well be given a date by which to join the prison service some time later down the line" (cited in McMurtry & Curling, 2008: 56).

Suspensions and expulsions may be particularly detrimental if they are perceived by students to be unjust, which in the case of Black youth, they often are (Ruck & Wortley, 2002: 190). Indeed, as Black students are often stereotyped as "trouble makers" and often subject to increased surveillance and school disciplinary action that align with this stereotype (James, 2012: 480-482). In the 2006–2011 TDSB cohort, Black students were more than twice as likely as White and other racialized students to have been suspended at least once during the academic year. Upon completion, 42% of all Black students had been suspended at least once, compared with only 18% of White students and 18% of other racialized students. Similar disparities exist with respect to expulsions. The TDSB data show that of the 213 students who were expelled between 2011-2012 and 2015-2016, almost half (48%) were Black (James and Turner, 2017: 36).

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Finally, the data indicates that Black students' levels of academic success, measured in terms of graduation rates, is far below that of their peers. Among the 2006–2011 cohort, 84% of White students had graduated from high school at the end of 5 years, compared to 87% of other racialized students. By contrast, only 69% of Black students had graduated from high school over the same five-year period. Likewise, Black students were twice as likely (11%) as White and other racialized students (both 5%) to be returning to high school the following year when they should have graduated and twice as likely to have dropped out (20%) compared to White (11%) and other racialized students (9%) (James &Turner, 2017: 31).

The negative consequences of Anti-Black racism in schooling generally and of zero-tolerance policies in particular, cannot be understated. Indeed, in their report on the Roots of Youth Violence, McMurtry and Curling (2008) argue that such policies have contributed to the school-to-prison pipeline, or the funneling of underachieving and excluded Black students into the criminal justice system. If Black students are not afforded the same opportunities for academic success as many of their peers, their life chances ultimately suffer. Poor educational outcomes for Black students ultimately have a negative impact on their employment prospects and earning potential. These problems not only affect individual Black Canadians, but by extension, also their families and communities.

7. Black Employment and Poverty

KEY FACTS:

- The income gap for visible minorities, including Black Canadians, is growing.
- One-quarter of Black Canadian women live below the poverty line (compared with only 6% for White Canadians).
- Black children are living in poverty at the unprecedented rate of 33% for those of Caribbean heritage, 47% of those from continental Africa (only 18% for White children).

The comparatively low levels of academic achievement, combined with structural and institutional forms of discrimination converge to produce inequalities in Canada's employment sector. Based on the poor educational outcomes for Black students presented in the section above, it is unsurprising that Black youth are particularly vulnerable to unemployment. In Toronto, for example, the unemployment rate in 2014 for Black youth aged 15 –24 was 30% compared with 20% of youth from other racial backgrounds (CivicAction, 2014).

High rates of Black unemployment are not a new phenomenon. Evidence suggests that Black job seekers are excluded from the labour market, in part, due to the discriminatory actions of employers. In early 1980s Henry and Ginzberg (1985) conducted a series of studies to examine

the impact of race and foreignness (as indicated by name or accent) on the likelihood of being offered a job. In one study, Black and White actors were sent to interviews assuming the role of the same interviewee (the resumes were the same and the actors played the role of the same fictional job candidate). Ultimately, Henry and Ginzberg determined that Black applicants experienced discrimination in one-quarter of job contacts which could not have happened by chance alone.

More recent research has produced remarkably similar results. Douthwright (2017) created four fictional female job applicants; two White and two Black applicants submitted their resumes to entry-level retail jobs. In line with previous American research, Douthwright found that even the White applicant with a criminal record received more call-backs than the Black applicant with no criminal record (see Pager, 2003). Of the 64 applications submitted by the White applicant with no criminal record, 20 call-backs were received, whereas the White applicant with a criminal record received 12. By comparison, the Black applicant with no criminal record received only seven call-backs and the Black applicant with a criminal record received just one (Douthwright, 2017).

Employment discrimination also affects income levels for Black and other racialized Canadians. In fact, data from the 2016 census shows that the income gap for visible minorities actually increased between 2006 and 2016, with members of visible minority groups earning on average 26% less than non-visible minorities (Monsebraaten, 2017). Hou and Coulombe (2010) analyzed data from the 2006 census to examine the earning gaps between Canadian-born visible minorities and non-visible minorities working similar jobs in Canada's public and private sectors. Their research shows that while income was similar for members of visible minority groups in comparison to Whites working in the public sector, the data from the private sector was significantly different. Visible minority men, and Black women in particular, earn significantly less than comparable Whites (comparable in terms of educational attainment and years of professional experience, for example) working similar jobs in private industry. Hou and Coulombe attribute the income differences to differences of equality of opportunity. Whereas the public sector is subject to employment equity regulations, the private sector faces less pressure to have equitable practices and policies.

Predictably, higher levels of unemployment and lower levels of income increase rates of poverty among Black Canadians. Whereas 6% of White Canadian women live below the poverty line, the figure is 25% for Black women in Canada. As a result, Black children are living in poverty at the alarming rate of 33% for those of Caribbean heritage and 47% of those from continental Africa (UNHR, 2016). The rate for White children is 18%. In Toronto Specially, African Canadians

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accounted for 19% of people living in poverty, while comprising just 8.4% of the population (National Council of Welfare, N.D)[4].

In addition to their individualized experiences with poverty, Black Canadians are also over-represented in Toronto neighbourhoods most afflicted by poverty and other forms of disadvantage.[5] Compounding the effects of lower household incomes, these neighbourhoods are underserved by public transit and contain a lower concentration of essential services. As a result, Black people in Toronto have poorer access to recreational and community centres, libraries, good schools, community health hubs and hospitals (Hulchanski, 2010). These are the very services that serve to create strong communities and to protect young people from the allures of crime, gang membership and the violence that accompanies it (McMurtry and Curling, 2008: 31). Accordingly, in the absence of important social services and in the presence of increased poverty, crime and victimization remain higher in these communities. For example, rates of shootings and homicides are higher in these neighbourhoods than the city average, and the victims of homicide younger than for Toronto as a whole (Hulchanski, 2010: 23). As noted above, it is young Black men who are most adversely affected by this violence. In response, these neighbourhoods are also subject to a hard-enforcement style of policing aimed at targeting its perpetrators (Owusu-Bempah, 2014).

8. Black Canadians' Perceptions of and Experiences with the Criminal Justice System

KEY FACTS:

- Over 80% of Black Canadians in Toronto feel that police treat Black people worse than White people.
- Half of the Black student population in Toronto report being been stopped and questioned by the police on two or more occasions in the previous two years (compared with 23% of White students).
- Black people are over-represented in police "contact cards" for all areas of Toronto, regardless of neighbourhood crime rate or racial composition.
- Black accused are more likely to be detained before trial than White offenders.
- Incarceration is becoming increasingly concentrated among Black Canadians.

The historical record suggests that Black Canadians have had a long and tenuous history with the criminal justice system. Walker (2010) describes the discrimination faced by Black defendants in Ontario's courts during the 18th and 19th centuries. Similarly, Mosher (1998) documents how

[4] See Table 10, Visible minority groups, 2006: Percent distribution of persons living in poverty.
[5] As David Hulchanski (2010) points out in his *Three Cities* report, household income in the neighbourhoods in which Black people are most likely to live has decreased by 20% over the past three decades.

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police used public order offenses in the early 20th century as a means of controlling Toronto's Black population. The historical and contemporary treatment of Black people in the justice system is has its genesis in Canada's experience with colonialism and slavery. During this period, Black people were systematically dehumanized and depicted as animalistic, aggressive, violent, and dangerous (Fishman, 2006; Owusu-Bempah, 2017). Following the abolition of slavery, the association of Blackness with violence specifically, and criminality in general, was used as a means as of social control and to justify restrictive immigration practices intended to restrict Black entry into Canada (Maynard, 2017).

Unfortunately, these perceptions have not completely subsided over time. As Roberts (2001: 103) points out, there remains a tendency in Canada to "racialize" crime; that is, to develop associations between criminality and racial or ethnic origin. Indeed, a significant proportion of the Canadian public continues to believe that racialized Canadians are involved in a greater proportion of offending than official criminal justice records suggest (Rankin & Powell, 2008). A survey conducted in Ontario in 1995, for example, found that nearly half of respondents believed that there was an inherent relationship between race and criminality. Of the respondents with this view, two-thirds selected "West Indians" or "Blacks" as being the most responsible for crime (Henry et al., 1996: 472).

The continued criminalization of Black people is sustained in part by the manner in which they are depicted in various forms of popular media (Welch, 2007). Wortley (2002), for example, conducted a content analysis of stories appearing in Toronto newspapers over a two-month period in 1998. He found that almost half of all stories featuring Black people dealt with issues relating to crime and violence, compared to only 14% of stories featuring Whites. His analysis identified major racial differences in the news narratives that sought to explain criminal behaviour. While crime involving White people was almost always explained as the product of individual pathology, Black criminality was typically characterized as a group phenomenon (see also Henry & Tator, 2000; Mosher, 1998).

Contrasting with popular perceptions of Black criminality are public perceptions of criminal injustice. As part of its research, the Commission on Systemic Racism in the Ontario Criminal Justice System asked justice practitioners and members of the public about their perceptions of bias and discrimination within the system. The Commission's findings show that a significant proportion of both judges and lawyers felt that Black Canadians were treated differently in court than White Canadians in court than White Canadians (Commission, 1995). Members of the public were also asked about bias in both policing and the criminal court system. The survey found that over half of Black, White, and Chinese respondents from Toronto believed that the police treat Black people differently than White people. Similarly, over half of Black respondents and one-third of both White and Chinese respondents felt that Black people are treated differently the courts.

This study was replicated in 2007, 15 years after the initial study was conducted. What may be of surprise, in light of the myriad "race relations" initiatives that had been implemented over the previous decade, is that the more recent study found that perceptions of bias actually increased

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among Black and White respondents. For example, in 1994, 76% of Black respondents felt that the police treated Black people worse or much worse than Whites. By 2007 this figure had risen to 81%. Similarly, in 1994, 48% of Black respondents believed that a Black person would get a longer sentence than a White person charged with the same crime. In 2007 this figure had risen to 58% (Wortley & Owusu-Bempah, 2009: 465).

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Citizens' perceptions of criminal injustice constitute an important social issue. Not only are the police and court system reliant on the citizenry to act as witnesses and co-operate as victims, but mounting evidence also suggests that negative views of the system contribute to criminal offending (Tyler, 1988; Tyler, 2003; Tyler & Fagan, 2008). People who view the system as unjust are less likely to believe they should abide by that system's rules (Tyler, 2003). This is particularly salient in the current context. As Black people are more likely than members of other racial groups to perceive the justice system as discriminatory, they are also more likely to participate in what might be thought of as "system-generated offending behaviour."

Likewise, evidence suggests that Black youth engage in violence as a means of "self-help" resulting from the belief that the police cannot, or will not, provide them with adequate protection (Wilkinson, Beaty and Lurry, 2009). Indeed, Wilkinson et al. found that gun carrying among Black youth in their sample resulted out of a fear of victimization and a feeling that the police could not act as capable guardians (2009: 29-31). The perception that they must take the law into their own hands not only adds to the cycle of violence in disadvantaged neighbourhoods, but also increases the risk of criminalization for Black youth when they do encounter the police. Below we examine evidence of Black over-representation in three aspects of the delivery of the criminal justice in Ontario. These practices have troubling consequences for incarceration rates of young Black Canadian men.

1. *Police Stop and Search Practices*

Survey research conducted over the past 20 years consistently demonstrates that Black Canadians are more likely than members of other racial groups to be stopped, searched, and questioned by the police. For example, a 1994 survey of Toronto residents found that almost one-third of Black male respondents had been stopped and questioned by the police on two or more occasions in the previous two years, compared with only 12% of White and 7% of Asian males (see Wortley & Tanner, 2003: 371). Further analyses reveal that these racial differences in police contact are not explained by racial differences in social class, education, or other important demographic variables. Indeed, two factors that appear to shield White males from police contact, age and social class, do not provide Blacks with the same protection. For example, White people with higher levels of income and education are less likely to be stopped by the police than are White people with lower incomes and levels of education. On the other hand, Black people with higher levels of income and education are actually more likely to be stopped than Black people with lower incomes and levels of education (see discussion in Wortley & Tanner, 2003: 371).

A second Toronto survey involving youth paints a similar picture. Wortley and Tanner (2005: 586) asked Toronto high school students about their recent experiences with the police. Their survey found that over 50% of the Black students reported being been stopped and questioned by the police on two or more occasions in the previous two years, compared to only 23% of White, 11% of Asian, and 8% of South Asian students. Similarly, over 40% of Black students said that they had been physically searched by the police in the previous two years, compared to only 17% of their White and 11% of their Asian counterparts.

A further analysis of this data demonstrates that racial differences in being stopped and searched by the police could not be explained by racial differences in criminal activity, gang membership, drug and alcohol use, or public leisure activities (Wortley & Tanner 2005). More recently, a 2007 survey of Toronto adults found that Black residents were three times more likely to be stopped and searched by the police in the previous two years and that this racial disparity could not be explained by racial differences in criminality, drug and alcohol use, driving habits, use of public spaces, poverty, or residence within a high-crime community (Wortley & Owusu-Bempah 2011).

Another source of police information that has gained an immense amount of public attention in recent years are the "contact card" or "street check" data collected by police officers in the course of their duties. These forms of data are not collected by police in every civilian encounter, but rather those for which the officer wants to record information about a stop for intelligence purposes. In addition to details about the stop, contact card and streets checks also typically garner demographic information about the civilian, such as their age, race, and gender. As such, it can be argued that the practice of 'carding' provides insight into police surveillance practices that typically target the individuals and neighbourhoods subject to increased levels of police scrutiny (Owusu-Bempah & Wortley, 2014).

Data from across Ontario demonstrate that Black people are over-represented in the 'carding' activities of a range of police services. These include Peel (Grewal, 2015), Waterloo (Sharkey, 2016), Hamilton (Bennett, 2015), London (O'Brien, 2016), Ottawa (Yogaretham, 2015), and Toronto (Rankin, 2010b). The *Toronto Star's* analysis of over 1.7 million "contact cards" filled out by the Toronto police between 2003 and 2008 found that Black people comprised almost 25% of those documented by the police, while representing only 8.4% of the population. Interestingly, the data also indicates that Black people are over-represented in police "contact cards" for all areas of the city, regardless of neighbourhood crime rate or racial composition (Rankin, 2010a; 2010b).

The targeting of Black Canadians by the police has two main consequences for Black communities in Canada. First, because Black people are exposed to higher levels of police surveillance, they are also much more likely to be caught breaking the law than are White people

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who engage in in the same forms of law violating behaviour. The Toronto high school survey discussed above, for example, found that 65% of the Black drug dealers[6] said that they had been arrested in their lifetime, compared with just 35% of the White drug dealers (Wortley &Tanner, 2005: 586). Similarly, data recently published by the *Toronto Star* showed that between 2003 and 2013, Black people accounted for 25.5% of people arrested for cannabis possession by the Toronto Police Service while accounting for 8.4% of Toronto's population. Key here is that cannabis arrests increased in tandem with the practice of police 'carding' in Toronto over this period (Rankin and Contenta, 2017). As rates of 'carding' increased, so too did the number of cannabis possession arrests laid by the Toronto police. Therefore, race-based targeting may help explain why Black people are over-represented in arrests for cannabis possession even though empirical evidence suggests that rates of cannabis use are similar across racial groups (Hamilton et al., 2018).

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A second important consequence of differential police stop and search practices is that they contribute to perceptions of criminal and social injustice. Indeed, evidence suggests that Black people who are frequently stopped and questioned by the police perceive much higher levels of bias and discrimination in the Canadian criminal justice system than do Black people who are not frequently stopped (Wortley and Owusu-Bempah, 2011). As such, these practices may signal to Black people, that irrespective of individual behaviour, being Black means being considered one of the "usual suspects" (Ibid).

2. *Pre-trial Decision-Making*

As gatekeepers of the criminal justice system the police influence who is officially processed by that system. Here, racial disparities at the front end in terms of stop and search, and other areas of decision making, can have serious consequences. An analysis of Toronto Police data on drug arrests carried out by the *Toronto Star* showed that Black people were not only over-represented in drug possession charges, but were also less likely to be released by the police at the scene than White people. The data indicated that 23. 6% of those arrested on one count of simple drug possession were Black (compared with 8.1% of the population) and 63.8% were White (compared with 62.7% of the population). While 76.5% of White accused were released at the scene on drug possession charges, the same was true for only 61.8% of Black accused (Rankin et al., 2002a;b).

Pre-trial detention rates also varied between the two groups, as 15.5% of Black accused were held until their trial compared to 7.3% of Whites. These findings held constant, even after controlling for other relevant factors (Rankin et al., 2002a;b). A study conducted by Kellough and Wortley (2002) provides further evidence of racial disparity in pre-trial decision-making. This study tracked over 1,800 criminal cases from two Toronto bail courts during a six-month

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[6] Defined as youth who reported selling drugs on 10 or more occasions in the previous 12 months.

period in 1994. The findings indicate that 36% of Black accused were detained before trial compared to 23% of accused from other racial backgrounds. Again, race remained a significant factor even after controlling for relevant factors such as flight risk and danger to the public (Kellough & Wortley, 2002: 195-196).

Data recently released by the Ontario Ministry of Community Safety and Correctional Services shows that Black accused are also detained longer before trial than White accused (Mehler-Paperny, 2017). It is important to note that the denial of bail has serious consequences for the accused. First, the denial of bail might be used as a way to coerce guilty pleas from individuals who are reluctant to be held in detention centres for extended periods of time. Second, individuals who have been denied bail receive longer custodial sentences than individuals who are found guilty but were not held in remand before their trial (Sacks & Ackerman, 2014: 69).

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3. *Incarceration*

Despite a decline in the overall inmate population, the number of Black offenders confined in Canadian federal correctional institutions increased by 75% in the decade leading up to 2012. Whereas Black Canadians represent just 2.9% of the overall Canadian population, they accounted for 9.3% of the total federal prison population (Office of the Correctional Investigator, 2013a). Of concern is both the increasing representation of Black Canadians in federal custody, and also their treatment within these institutions (OCI, 2013a; b; 2014; 2015; 2016; 2017). Based on consultations with Black inmates and a review of correctional data, the Office of the Correctional Investigator (OCI) produced a detailed report that documented the inequalities faced by Black inmates (OCI, 2013a).[7]

The OCI found that Black inmates consistently reported that institutional rules were applied differently to them when compared with Whites and inmates from other racial groups. Indeed, the OCI determined that between FY 2007/08 and 2011/12, the number of Black inmates facing disciplinary charges increased by 59%, whereas the overall number of disciplinary charges laid over the same period dropped by 7%. Of note, over this period, Black inmates were consistently over-represented in discretionary charge categories (those requiring judgement on the part of correctional officers), whereas they were consistently under-represented in less discretionary charge categories (such as possession of stolen property, theft and damage of property) (OCI, 2013a: 22).

Furthermore, between 2009 and 2013, despite being classified as having lower risk/needs scores, Black inmates were more likely to be placed in maximum security (OCI, 2013a: 21). In addition to being sent to higher security facilities, despite being classified on average as lower risk, Black

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[7] The Office of the Correctional Investigator acts as the ombudsperson for federal prisoners.

inmates are less likely than their counterparts to have their custody score lowered so that they could be transferred to medium or minimum security prisons. This suggests that at some point between risk classification and prison placement, Black inmates are classified as higher risk, deserving of maximum security, and at no point does it appear that this assessment reversed. The OCI has also found that Black inmates are over-represented in admissions to segregation and disproportionately involved in use of force incidents. Whereas Black inmates accounted for 9.3% of the total inmate population in FY 2011/12 they accounted for 11.7% of inmates placed in involuntary segregation (OCI, 2013a: 23). In FY 2012/13 Black inmates were involved in 13% of use of force incidents.

The bulk of evidence from the OCI report suggests that Black inmates were often not treated with dignity and respect by CSC staff. Evidence also suggests that such (mis)treatment was tied to aspects of the inmates' culture (e.g. language, dress, etc.) and the places from which they were drawn (i.e. where Black inmates lived prior to incarceration). Black inmates provided examples of over-hearing CSC staff mocking the way they spoke or trying to speak with a Jamaican accent, for example, to their colleagues. One inmate reported a correctional officer asking him "What is wrong with your tongue, don't talk to me like a hoodlum" (OCI, 2013a: 19).

Black inmates also reported numerous examples of stereotyping and that judgments about their character and lifestyle were also common. Most of the Black men described being labeled a 'gang member', a 'trouble maker, a 'drug dealer', and/or a 'womanizer' (OCI, 2013a: 17). Furthermore, among Black inmates "The gang member/affiliation stereotype" was of "particular concern" (Ibid). During the focus groups, Black inmates stated that correctional staff associated Black inmates' home postal code with gang membership. This meant that depending on home address of the inmate, Black inmates were associated with gangs from that area. Consequently, Black inmates reported that the gang label hindered their ability to obtain access to CORCAN jobs[8], thereby leaving them working jobs that provided little valuable experience (Ibid). Indeed, while the overall prison unemployment rate in federal correctional facilities was 1.5% in 2012/2013, the unemployment rate for Black inmates was much higher at 7%. Therefore, Black inmates were disproportionately restricted from receiving hands-on training in employable skills that would aid their re-entry into society (OCI, 2013a: 20).

Black overrepresentation in corrections is also apparent at the provincial level. In 2010, Black adults accounted for 17.7% of admissions to provincial custody while making up 3.9% of the overall population (Owusu-Bempah & Wortley, 2014). Similarly, in 2011-2012, Black youth accounted for almost one-quarter (24.1%) of admissions to custody in Ontario while comprising only 3% of the province's youth population at the time (Rankin & Winsa, 2013). Notably, the incarceration rates for young men have steadily declined since the introduction of the Youth

[8] "CORCAN is a special operating agency within the Correctional Service of Canada (CSC) that offers employment training and employability skills to offenders in federal correctional institutions, to support rehabilitation and help lower rates of re-offending." (CSC, 2016).

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Criminal Justice Act in 2003; however, Black male youth have not benefitted from this decline. In fact, evidence from both the federal and provincial correctional systems indicate that incarceration is becoming increasingly concentrated among certain racialized groups, and in specific geographical areas, and that Black Canadians have been disproportionately affected by these trends. This is troubling in light of what is known about the negative consequences of concentrated incarceration.

For individuals, incarceration significantly reduces later employment rates and income levels (Freeman, 1992). Incarceration also has a significant negative influence on social networks, social relationships, and long-term life chances, thus impacting one's ability to contribute to family and community (Clear, 2008; Roberts, 2004). The families of those incarcerated also suffer financial and emotional costs related to separation, the loss of income, and the need to support an imprisoned family member (Braman, 2002; Wildeman et al., 2012).

There is evidence to suggest that the arrest of parents disrupts marital relationships, separates children from their parents, and can result in the permanent dissolution of these relationships (Christian, 2004). Research has also shown that children with parents in prison suffer serious psychological consequences, including depression, anxiety, feelings of rejection, shame, anger, and guilt (Browning et al, 2001). These children are also more likely to experience school failure, under-employment, and illegal drug use (Clear, 2008). Importantly, studies have shown parental incarceration to be a risk factor for juvenile delinquency, further exacerbating crime problems in affected communities.

The impact of concentrated incarceration clearly extends from the family unit into the community. As going to prison has a permanent impact on employment and earning potential, it also damages the labour prospects of young people in a community by decreasing the pool of individuals who can act as mentors and social contacts (Sabol & Lynch, 2004). A reduction in the number of people engaged in the labour market not only depletes supplies of human capital, but also affects the local economy because individuals have less money to spend at local establishments (Sullivan, 1989; Venkatesh, 1997). Importantly, concentrated incarceration distorts social norms, leads to the breakdown of informal social control, and therefore undermines the building blocks of social order which are essential for community safety (Clear, 2002).

In sum, concentrated incarceration can further exacerbate existing social problems, fostering a cycle of inequality within communities and across generations. The fact that incarceration is becoming increasingly concentrated amongst Black Canadians should be of a concern, precisely because it reproduces the very conditions that contribute to incarceration in the first place.

9. Expert Opinion

As documented above, Black Canadians present experiences are rooted in our country's history of colonialism, slavery and segregation. These systems, the latter of which existed well into the 20th century in Ontario, were premised on the idea that Black people are inherently inferior.

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These systems also served to structure the nature of early social relations in Canada, while at the same time shaping the economic and political landscape. While White Canadians were provided opportunity to access good schools, good jobs and representation in political office, Black Canadians were largely relegated to the margins of Canadian society.

These early experiences of Black Canadians has informed the experiences of those that have come after them. Stereotypical notions about Black intellectual inferiority, the pathological nature of Black families and of Blacks' supposed innate propensity for crime, all rooted in this early period, continue to influence how Black people are treated today. The data documented above demonstrate that Black children are disproportionately removed from their families, due in part, to discrimination in child welfare assessments. Black children are deemed to be less academically inclined and thus streamed into non-university tract programs. They are also subject to harsher discipline in schools which reduces their likelihood of graduation. In the employment sector, Black people face discrimination in hiring, and at times, earn less money for similar work performed by White Canadians, resulting in increased rates of unemployment and poverty. The increased representation of Black people in impoverished neighbourhoods means that they have less access to good schools, community centres and health facilities. They are also exposed to the harsher forms of policing practiced in marginalized neighbourhoods in response to problems of crime and violence.

Importantly, Blacks' negative treatment by these institutions, and the disparate outcomes experienced within them, are cyclical and compounding. Indeed, increased exposure to the child welfare system reduces the chances of academic success, which reduces employability, thus increasing levels of poverty. These circumstances are passed from generation to generation.

The data documented above also clearly demonstrate that Black Canadians, and young Black men in particular, keenly feel the discrimination they experience at the hands of the criminal justice system. Young Black Canadians are not only over-represented in stop, search and carding practices of local police, but they serve longer periods of time in pre-trial detention, resulting in longer periods of incarceration than are others charged with the same or similar crimes. Not surprisingly, as Owusu-Bempah (2014) has found, Black male youth who perceive discrimination in policing also feel the same way about both the educational and employment sectors. Further, as Khenti (2013) notes, their experiences, personal and vicarious, with the criminal justice system contribute to the perception that they live "socially unjust lives." The conclusion is inescapable – that young Black Canadians who view the system as unjust are less likely to believe they should abide by that system's rules.

It is our opinion that the social circumstances of Black Canadians in general, and of Black male Torontonians in particular, should be viewed as criminogenic. Elevated levels of offending in the types of crime that typically come to the attention of the police (street crimes as opposed to white-collar and corporate crimes), combined with discrimination in the justice system itself have resulted in the gross over-representation of Black Canadians in our provincial and federal correctional systems. Whereas no one individual should be completely absolved of their own

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responsibility when it comes to offending behaviour, the social realities that have produced or contributed to such behaviour can be acknowledged, and serve to guide judicial decision making.

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Key Considerations When Representing Aboriginal Clients

HELPFUL CASE LAW AND RESOURCES

JUDICIAL NOTICE

1. *R. v. Oakoak,* 2011 NUCA 4 (CanLII), *at para. 26.*
2. *R. v. Gladue,* [1999] 1 SCR 688 (CanLII), *at para. 92-93.*

CAUSAL CONNECTION AND SENTENCING

1. *R v. F.H.L.,* 2018 ONCA 83 (CanLII), at paras. 38-39.
2. *R. v. Monckton,* 2017 ONCA 450 (CanLII), at para. 115.
3. *R. v. Radcliffe,* 2017 ONCA 176 (CanLII), leave to appeal refused, [2017] S.C.C.A. No. 274, at para. 54.
4. *R. v. Collins,* 2011 ONCA 182 (CanLII), at paras. 32-33.
5. *R. v. Ipeelee,* 2012 SCC 13 (CanLII), at para. 81.

GLADUE APPLICATION TO BAIL

1. *R v. Hope*, 2016 ONCA 648
2. *R. v. Brant,* [2008] O.J. No. 5375, at para. 21.
3. *R v. Robinson*, 2009 ONCA 205, at para. 13.
4. *United States of America v. Leonard*, 2012 ONCA 622 (CanLII), at para. 60.
5. *R v. McCrady*, 2016 ONSC 1591, at para. 60-65
6. *R v. Spence*, 2015 ONSC 1692
7. *Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada,* 2017 CanLIIDocs 64: https://commentary.canlii.org/w/canlii/2017CanLIIDocs64

OTHER USEFUL RESOURCES

1. *Communicating Effectively with Indigenous Clients:*

   https://www.aboriginallegal.ca/indigenousclients.html

2. *Guide for Lawyers Working with Indigenous Peoples:*

   https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf

3. Truth and Reconciliation Commission of Canada: *www.trc.ca*

Overview of Gladue and 718.2(e) – Five things to remember

1. **The Overrepresentation of Indigenous Persons in jail continues**

Section 718.2(e) was passed along with a wholesale legislative scheme to address perceived shortcomings in our sentencing statutes in 1996 as part of the revisions to Part XXIII of the Criminal Code.

The numbers were bleak. Parliamentary committees found that while making up 2% of Canada's population, but indigenous persons represented 10.6% of persons in prison.

In 2009, the Globe and Mail interviewed two Toronto judges on the continuing problem of overrepresentation.[1]

> "We had to get the numbers down because they were ridiculous, but 10 years later, my God, we are even deeper in the jungle. This is really the horror." – Judge Mel Green.

> "We are not really getting to the root of any of this stuff. I am really disappointed in the numbers". -Judge Patrick Sheppard

That was 10 years ago. The latest numbers are not encouraging, nearly identical to the 1996 rates. For reference, 2015 Truth and Reconciliation Commission confirms this.[2]

2. **718.2(e) is not just a principle of sentencing, it has quasi-Constitutional Status**

> "Section 718.2(*e*) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force."[3]

While all principles of sentencing must be placed alongside 718.2(e), no other provision, anywhere in the *Criminal Code*, sentencing or otherwise, uses the phrase "particular attention".

Further, s. 35 of the Constitution defines the class of persons protected by their Indigenous status and judicial consideration of that provision emphasizes the need for remedial intervention and the community's role. In the face of the overwhelming evidence of overrepresentation and predictable evidence of recidivism, the amendments to Part XXIII of the Criminal Code

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[1] Makin, Kirk, Courts falling short on effort to keep natives out of jail, The Globe and Mail, December 27, 2009.
[2] Truth and Reconciliation Commission of Canada, Canada's Residential Schools: The Legacy, vol 5 (Montreal: McGill-Queen's University Press, 2015) at Recommendations 25–42 [TRC, Vol 5].
[3] *Gladue*, paragraph 34, 93

that gave us the *Gladue* regime.   In the context of criminal justice, corrections, and rehabilitation, this was entirely consistent with the court's s. 35 decision in *Sparrow*.

> Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. *The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation*. [emphasis added] [4]

In the context of criminal justice, corrections and rehabilitation, the above quotation takes on a significant relevance. Aboriginal peoples are justified in fearing the heavy hand of the state, in other words incarceration, that comes about as a result of "government objectives", in other words legislating the way that sentencing courts ought to conduct themselves whether it be under the *Gladue* regime or until the post-bill regime.   The above paragraph goes on, however, to emphasize the importance of recognition and affirmation.   As between the two, only the *Gladue* regime, mandating a search for alternatives to incarceration and input from the community, can be said to both "recognize" and "affirm" these aboriginal rights.

3. **There is no burden on the defence to establish *Gladue* macro-factors (Colonialism, displacement,)**

> "…… I do not consider that in not seeking a Pre-Sentence Report, counsel failed to comply with the responsibilities referred to in Gladue ... As I have already mentioned, the Supreme Court recognized in Gladue that courts can take **judicial notice of the fact that**, in aboriginal cultures, priority is generally given to a restorative approach to conflict. Extensive delays in having matters dealt with is very much at odds with a restorative approach. This is even more true in small, isolated communities, where people have little choice but to carry on with their lives in relatively close proximity, whether the criminal justice process has reached completion or not.[5]"

4. **There is no burden on the defence to establish *Gladue* micro-factors (unique background factors)**

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[4] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at page 37

[5] *R. v. Oakoak*, 2011 NUCA 4 (CanLII), par. 26, <http://canlii.ca/t/fmgwt#par26>; see also *Gladue* at para. 92-7

"There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence...."[6]

5. **There is, at a minimum, an ethical burden on defence to know your client and their unique background**

Gladue itself directs counsel to furnish the court with background information on the accused (para 92-7). [7] Support and advocacy groups are available to assist with the preparation of "Gladue Reports" that some courts have viewed as virtually mandatory (while others have specifically declined from saying so, see *Oakoak,* infra)

While the language specifically mentions *unique and background factors that brought the accused before the court,* it is also incumbent on counsel to set out the factors that may make prison a) less appropriate, or b) harsher on *this* offender by virtue of their unique factors.

J. Scott Cowan

Scott Cowan carries on a mixed trial and appellate practice in Ontario, Nunavut, and Northwest Territories. Scott received his LL.B. from the University of Saskatchewan in 2000 and completed his articles with Greenspan, Henein & White in 2001.

In 2012, Scott completed his Masters of Law in Criminal Law and Procedure at Osgoode Hall Law School. He has served as an Adjunct Professor in Criminal Procedure and Youth Justice at the Faculty of Law - University of Western Ontario.

Since 2010 he has been conducting circuit court, trials, and appeals all over Northern Canada with over 70 trips North of 60, holding court in 25 remote communities from Fort Liard to Qikitarjuaq and north to Resolute Bay.

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[6] *R. v. Collins*, 2011 ONCA 182 (CanLII), 277 O.A.C. 88, at paras. 32-33: *R. v. Ipeelee* 2012 SCC 13 at para. 81

[7] Such as Aboriginal Legal Services - http://www.aboriginallegal.ca/gladue-request-form.html

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Litigating Search Warrants in the Shadow of Step Six

Litigating Search Warrants in the Shadow of Step Six

Kerry Benzakein, Crown Counsel, PPSC

Lynda Morgan, Crown Counsel, MAG

Nathan Gorham, Defence Counsel, Gorham Vandebeek LLP

PART I: MECHANICS OF A STEP 6 APPLICATION

Introduction: What is "Step 6"?

R v. *Garofoli* [1990] S.C.J. 115, at para. 79:

6. If, however, the editing renders the authorization insupportable, then the Crown may apply to ***have the trial judge consider so much of the excised material as is necessary to support the authorization.*** *The trial judge should accede to such a request only if satisfied that the accused is* ***sufficiently aware of the nature of the excised material to challenge it in argument or by evidence.*** *In this regard,* ***a judicial summary*** *of the excised material should be provided if it will fulfill that function.*

[emphasis added]

PRE-HEARING:
VETTING AND DRAFT JUDICIAL SUMMARY

THE ORIGINAL DOCUMENT

KERRY'S DOUBLE CHOCOLATE COOKIES

1. Melt 8 oz of semi-sweet chocolate for 3 minutes;

2. Sift together 1 cup flour and ¼ cup cocoa and 1 tsp baking powder;

3. Cream 5 tbsps unsalted butter using electric mixer at high speed for 4 to 5 minutes or until very light and fluffy;

4. Add ¾ cup light brown sugar and ¼ cup granulated sugar – beat an additional two minutes;

5. Lightly beat 2 eggs and add to mixture one at a time;

6. Add 1 tsp vanilla extract and 1 tsp espresso powder – beat to incorporate;

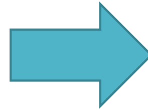
7. Add chocolate, beat another 30 seconds, and incorporate the dry ingredients. Shape into balls;

8. Bake in a 350◦ oven for 10 minutes. ***The cookies should be very soft and appear undercooked.***

Remove the privileged information

<u>KERRY'S DOUBLE CHOCOLATE COOKIES</u>

1. Melt 8 oz of semi-sweet chocolate for 3 minutes;
2. Sift together 1 cup flour and ¼ cup cocoa and 1 tsp baking powder;
3. Cream 5 tbsps unsalted butter using electric mixer at high speed for 4 to 5 minutes or until very light and fluffy;
4. Add ¾ cup light brown sugar and ¼ cup granulated sugar – beat an additional two minutes;
5. Lightly beat 2 eggs and add to mixture one at a time;
6. Add 1 tsp vanilla extract and 1 tsp espresso powder – beat to incorporate;
7. Add chocolate, beat another 30 seconds, and incorporate the dry ingredients. Shape into balls;
8. Bake in a 350◦ oven for 10 minutes. *The cookies should be very soft and appear undercooked.*



<u>KERRY'S DOUBLE CHOCOLATE COOKIES</u>

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6. Add 1 tsp vanilla extract and – beat to incorporate;
7. Add chocolate, beat another 30 seconds, and incorporate the dry ingredients. Shape into balls;
8. Bake in a 350◦ oven for 10 minutes. *undercooked.*

Create a "Crown Summary"

KERRY'S DOUBLE CHOCOLATE COOKIES

1. Melt 8 oz of semi-sweet chocolate for 3 minutes;

2. Sift together 1 cup flour and ¼ cup cocoa and 1 tsp baking powder;

3. Cream 5 tbsps unsalted butter using electric mixer at high speed for 4 to 5 minutes or until very light and fluffy;

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7. Add chocolate, beat another 30 seconds, and incorporate the dry ingredients. Shape into balls;

8. Bake in a 350◦ oven for 10 minutes. *The cookies should be very soft and appear undercooked.*

PARAGRAPH	SUMMARY
1	Precise quantity
2	Specific ingredient
5	Instruction regarding the manner of incorporation
6	Name and quantity of ingredient
8	Particular information about desired consistency

THE HEARING

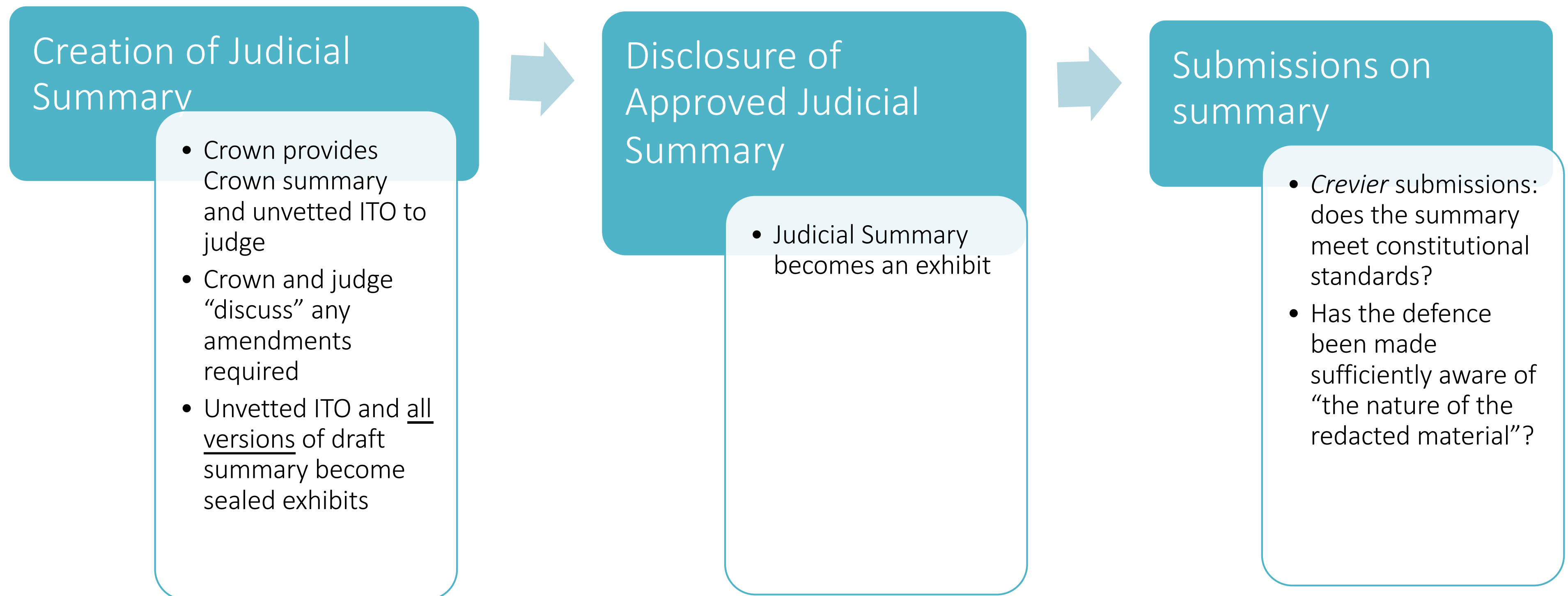
The First 5 Steps of *Garofoli*

Before moving to the Sixth step – ie the summary of redacted portions which will allow the Crown to rely on materials "behind the black" – consider the first five steps and whether you should attempt to litigate any part of them:

Steps 1, 2 and 3 → The nature of the editing – has the Crown redacted more than is necessary to protect privilege?

Step 5 → Can the authorization be justified on the basis of the ITO as redacted?

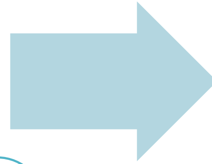
Step 6: “a judicial summary of the excised material should be provided”



Revisiting the cross-examination of the affiant and sub-facial attacks

Apply to Cross-Examine the Affiant or sub-affiants

- Redacted ITO has now been supplemented by the Judicial Summary
- Any previous ruling on cross-examination should be revisited (*Crevier* at para. 86)



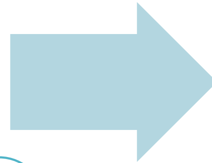
Defence evidence

- Cross-examination of the affiant, if leave granted;
- Tender of defence evidence, if any

Excision and Amplification

Excision

- Deletion of information found to be incorrect or misleading;
- Deletion of information obtained by illegal means



Amplification

- Crown may apply to correct inadvertent or technical errors in the ITO

FINAL ITO FOR REVIEW OF SUFFICIENCY

After all of these steps, you are left with your final ITO:

Redacted ITO + Judicial Summary – Excised Material = **ITO for review**

PART II:
DISCUSSION OF COMMON ISSUES IN STEP 6 LITIGATION

MAKING THE MOST OF YOUR TIME

Step Six Litigation is time-consuming. Consider whether you can streamline the proceedings and spare court time and resources for what matters most.

- Discussions with the Crown to narrow issues:
  - Identify the particular redactions and why they were made;
  - Early disclosure of Crown's draft judicial summary;
  - Early provision of unvetted ITO to trial/applications judge;
  - Negotiated areas of cross-examination;
  - Will the Crown be arguing for a ruling at Step 5?

LITIGATING THE ASSERTION OF PRIVILEGE

- Challenging the extent of the redactions made by the Crown:
  - Have multiple versions of the ITO been disclosed?
  - What evidence can/should be called to undermine the necessity of the particular redactions?
- Has the crown properly asserted privilege? Is the "confidential source" really a CI?

ETHICAL ISSUES IN STEP 6 LITIGATION

- Determining the CI’s identity and the use that can be made of that knowledge

- How to call that evidence when you aren’t in the circle of privilege

Questions?

STEP 6: SOME PRACTICAL CONSIDERATIONS

Written by Lynda E. Morgan[1]

Introduction

When I was in law school, I lived in the same apartment block as my cousin and his girlfriend. During chilly winter nights, and in our generally impoverished state, we would round up a bottle of vodka and play multiple rounds of the board game the Settlers of Catan. Put together relatively vague rules, three competitive law students and liberal amounts of alcohol, and I'm sure you can anticipate how the game played out over the course of the evening. During one particularly heated game, two of the players (I won't name names) showed each other cards in their hands, while the third sat at the table. That's right- two parties shared secret information to their own advantage and refused to let the third see, all the while requiring that the third person to continue to play the game as if she was on even footing. I'm pretty sure the game was nearly tossed down the garbage chute that evening.

While I always enjoy a trip down memory lane, there is a point to this story that is more broadly applicable. To some, "step 6" litigation is akin to the scenario I outlined immediately above, where the Crown and judge share secret information while defence is left on the other side of the table with her vodka and own hand of cards. To others, this analogy is ridiculous because (1) no one should be drinking vodka in court; (2) the defence is afforded sufficient information to understand what is "below the black"; and (3) there are no confidential informants in the Settler of Catan.

Whatever your position, below I outline the basics of step 6, and then move on to consider some practical pointers that may assist you in navigating the process.

A. WHAT IS STEP 6?

Generally, the Crown will disclose any *Informations to Obtain* ("ITO") in a redacted form, the extent of which varies depending on the case and source(s) of information. There may be various justifications for the redactions, including the removal of personal identifiers of non-targets. In many instances, the bulk of the redactions will be made to protect privilege. Where defence counsel seeks to challenge the validity of the judicial authorization, by way of either a facial or sub-facial challenge, by necessity, she will lack visibility to the entirety of the information upon which the issuing justice relied.

In *R. v. Garofoli,* [1990] 2 S.C.R. 1421 ("*Garofoli*"), the Supreme Court of Canada outlined the steps to be followed in reviewing an ITO when the Crown objects to disclosure of part of the information contained therein, as follows:

1. Upon opening of the packet, if the Crown objects to disclosure of any of the material, an application should be made by the Crown suggesting the nature of the matters to be edited and the basis therefor. Only Crown counsel will have the affidavit at this point.

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[1] The views expressed in this paper are those of the author alone, and do not necessarily reflect the views of the Ministry of the Attorney General.

2. The trial judge should then edit the affidavit as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit, a form of judicial summary as to the general nature of the deletions should be provided.

3. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.

4. After the determination has been made in (3), the packet material should be provided to the accused.

5. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.

6. If, however, the editing renders the authorization insupportable, **then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization**. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence. [Emphasis added.]

In *R. v. Crevier,* 2015 ONCA 619 ("*Crevier*"), the Court of Appeal for Ontario considered the intersection between the accused's right to full answer and defence and step six, noting, *inter alia,* that:

- To challenge the validity of a warrant, the accused has more than just the judicial summary and redacted ITO. He also has *Stinchcombe* disclosure, and he may have third party disclosure materials. In other instances, the accused may have cross-examined the affiant and/or led his own evidence;[2]

- The *Garofoli* hearing is a pretrial hearing respecting the validity of a tool used to gather evidence. It is not a trial on the merits;[3]

- The fact that an informer provided inaccurate or false information to police will be relevant only to the extent the affiant knew or should have known it was false;[4]

[2] *Crevier,* at para. 63
[3] *Crevier,* at para. 64
[4] *Crevier,* at para. 65

- Details respecting the *Debot* factors relevant to a particular confidential informant will often risk identifying the informer, and will be redacted, "even though they are potentially the most persuasive portions of the ITO".[5]

The *Crevier* Court emphasized at paras. 70-72 that:

> …[t]o give effect to the right to make full answer and defence at step six, the accused must be able to mount an effective challenge of an ITO and, in particular, challenge in argument or by evidence whether the *Debot* criteria of compellability, credibility and corroboration have been met. At the same time, informer privilege must be protected. It could be argued that it is impossible for an accused to meaningfully challenge whether the three *Debot* factors were met if the accused does not have access to the redacted information.
>
> Step six of *Garofoli*, however, clearly contemplates this situation. **In step six, some information provided by or concerning the informer is not revealed to the accused but is nonetheless available to the judge in assessing the validity of the warrant.** The only caveat is that the accused must be "sufficiently aware of the nature of the excised material to challenge it in argument or by evidence."
>
> Two aspects of this caveat are worth highlighting. **One is that the accused need be aware of only the *nature* of the redacted details, not the details themselves**. The other is that the accused's awareness, gained through the judicial summary and other available information, **must be sufficient to allow the accused to mount a challenge of the redacted details both in argument *and by evidence***. In my view, this means an accused's attack on an ITO and the validity of a search warrant can be made on either a facial or sub-facial basis, or both. In other words, the accused must, through the judicial summary, cross-examination of the affiant, or the leading of evidence, be in a position to mount both a facial and sub-facial attack on the warrant, including a challenge to those parts of the ITO that are redacted but relied on by the trial judge. [Emphasis added.]

Therefore, nothing entitles the defence, as of right, to view the entirety of the unredacted ITO in order to litigate the validity of a judicial authorization. In this case, the Court of Appeal for Ontario upheld the somewhat uneasy balance first enunciated in *Garofoli* between the accused's *Charter* protected right to full answer and defence and the sanctity of privilege.

In *R. v. Reid,* 2016 ONCA 524; leave to appeal refused, [2016] S.C.C.A. No. 432, defence counsel sought to challenge the constitutional validity of step 6, for the first time of appeal, on the basis that it offended section 7 of the *Charter.* The Court of Appeal for Ontario declined to consider the argument for several reasons, which included consideration of the fact that, "to the extent that the proposed argument is grounded on a claim that the right to make full answer and defence trumps confidential informer privilege, such a claim is unsustainable…s. 7 does *not* require a particular type of process but one that is fair in light of the nature of proceedings and the interests at stake…"[6]

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[5] *Crevier,* at para. 68
[6] *Reid,* at para. 49

B. LITIGATING PRIVILEGE

Where the Crown redacts the contents of an ITO, counsel is entitled to know the bases for the redactions. Is the Crown justifying redactions on the basis of investigative privilege? Informant privilege? Public interest privilege? Solicitor-client privilege? The protection of personal identifiers? Without this basic information, counsel is unable to effectively challenge particular redactions.

In some cases, the Court may require or the Crown may choose, to visibly justify the redactions, by providing coded overlay text identifying, at minimum, the reason generally for the redaction. In other instances, counsel may be content with a verbal or written explanation by the Crown. For obvious reasons, any challenge to redactions should be made in advance of the *Garofoli* application.

For the purposes of this paper, I will consider only the litigation of informant privilege, as it is most likely to arise in step six litigation. There are two primary bases upon which to challenge privilege: (1) argue that the Crown has erroneously redacted information that is not, in law, privileged, and seek the un-redacting of at least some of the redacted material by way of a disclosure motion; and (2) argue that the innocence at stake exception to informant privilege applies.

i. Does the Privilege Apply?

It is important to understand the legal definition of informer privilege in order to determine whether to attack the legitimacy of the privilege claim(s) asserted by the Crown. The importance of informer privilege, a class privilege, cannot be understated. As the Supreme Court of Canada observed in *Application to proceed in camera, Re,* 2007 SCC 43 at para. 16, "…[p]olice work, and the criminal justice as a whole, depend to some degree on the work of confidential informers". Informer privilege is intended to protect that informer from possible retribution, and importantly, also signals to other potential informers that their identity will be protected. The parameters of what is protected is broad. In *R. v. Leipert,* [1997] 1 S.C.R. 281, the Supreme Court of Canada noted at para. 18 that:

> Informer privilege prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Courts have acknowledged that the smallest details may be sufficient to reveal identity. In *R v Garofoli*, [1990] 2 SCR 1421 at p 1460, Sopinka J suggested that trial judges, when editing a wiretap packet, consider:
>
> > ...whether the identities of the confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name […][7]

In *R. v. Named Person B.,* 2013 SCC 9, at para. 18, Abella J. set out the legal test to determine whether an individual is a confidential informant as follows:

[7] See also *R. v. Durham Regional Crime Stoppers Inc.*, [2017] 2 S.C.R. 157.

> The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, **would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected?** [Emphasis added.]

The Crown must be able to establish, at minimum, an implicit promise of confidentiality to the source. In *R. v. Cook,* 2014 ONCA 170, the Court of Appeal for Ontario considered whether the author of an unsolicited anonymous email to police was entitled to the protection of informer privilege. At paragraph 18, Benotto J.A. found that factual scenario was insufficient to satisfy the legal test, writing that,

> …**there was no conduct on the part of the police, express or implied, that could have led the author to believe that his or her identity would be protected. The police merely received an unsolicited anonymous email**. The test for informer privilege is not satisfied on the facts of this case. (This unlike a "crime stoppers" communication which is founded on a promise of anonymity. [Emphasis added.]

Further, informer privilege does not apply where the person providing information is a "police agent" or "agent provocateur". In *R. v. Babes,* [2000] O.J. No. 2963 (C.A.), the Court of Appeal for Ontario succinctly distinguished between an informer and agent at paragraph 10 as follows:

> [i]n general terms, the distinction between an informer and an agent is that an informer merely furnishes information to the police and an agent acts on the direction of the police and goes "into the field" to participate in the illegal transaction in some way. The identify of an informer is protected by a strong privilege and, accordingly, is not disclosable, subject to the innocence at stake exception. The identity of an agent is disclosable.

Without access to the information beneath the redactions, how is defence counsel in a position to challenge the legal basis for the redaction(s)? In the lead up to the *Garofoli,* defence may have amassed a significant arsenal of information that can assist in challenging and assessing the validity of privilege claims. Source documents can provide fertile ground to challenge, on a factual basis, whether a particular person is properly cloaked in informant privilege. Where the affiant has relied on information emailed to him or her by the source, carefully review that correspondence to determine whether any contents contradict the privilege claim. Consider, for example, the import of locating an email where the law enforcement recipient of the so-called "confidential information" explicitly advised the source (who had signed the email in his own name) that he could not be granted confidentiality or protection. While it is unlikely that you will routinely locate evidence that so directly contradicts the Crown's assertion of privilege, it does highlight the importance of knowing your evidentiary record before arguing the *Garofoli*.[8]

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[8] Consider also how this information may assist both in lifting existing redactions, but also in arguing during the *Garofoli* that the affiant actively misled the issuing justice by misrepresenting the nature of at least one of the sources of information.

ii. Arguing Innocence at Stake

In the absence of a successful application to pierce privilege, the group of people entitled to access information covered by informer privilege is small, and includes only the confidential informer, the police, the Crown and the court.[9] Defence counsel are "outside the circle" and cannot have access to the privilege content until a judge determines either that the privilege does not exist, or that an exception applies.[10]

In *R. v. McClure,* 2001 SCC 14 ("*McClure*"), the Supreme Court of Canada set out the procedure to be followed to pierce solicitor-client privilege (with the same test applying to informer privilege). The Court made clear that the "privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction."[11]

As a threshold matter, the accused must establish that the privileged information he is seeking is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way.[12] Provided that threshold can be satisfied, the Court must then consider the two-stage test as follows:

> …[a]t the first stage, the accused seeking production of a solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his guilt.
>
> If the trial judge is satisfied that such an evidentiary basis exists, then she should proceed to stage two. At that stage, the trial judge must examine the solicitor-client file to determine where, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused. It is evident that the test in the first stage (could raise a reasonable doubt) is different than that of the second stage (likely to raise a reasonable doubt). If the second stage of the test is met, then the trial judge should order the production but only of that portion of the solicitor-client file that is necessary to raise the defence claimed.
>
> *McClure,* at paras 50-51

The *McClure* application is generally made the end of the Crown's case, so that, if successful, privilege is pierced only when strictly necessary.

C. STEP 6 LITIGATION

i. Additional Considerations in Advance of the step 6

There are numerous steps to be completed and considered prior to embarking on step 6 litigation. In particular, defence counsel should ensure that it has sufficient extrinsic material in order to appreciate the broader context of the ITO and to focus on areas of particular interest.

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[9] *R. v. Brassington,* 2018 SCC 37 at para. 41
[10] *R. v. Basi,* 2009 SCC 52, at para. 44; *R. v. Brassington,* 2018 SCC 37 at para. 46
[11] *McClure,* at para. 47
[12] *McClure,* at para. 48

Ensure that the *Stinchcombe* disclosure has been provided, and that you have all relevant ITOs, search orders, source documents, police notes, surveillance reports, intercepted communications etc. Be prepared to compare these independent records and documents to the contents of the ITO. Where defence and the Crown disagree on the completeness of disclosure that has been provided, consider whether a disclosure motion might be appropriate, either in advance of or in conjunction with your *Garofoli* motion.

Beyond *Stinchcombe* disclosure, consider what other materials you may wish to obtain, and whether a third-party records application is appropriate. Keep in mind the test is harder to satisfy in that context. In *World Bank Group v. Wallace,* 2016 SCC 15, the Supreme Court of Canada considered, *inter alia,* the relevant threshold applicable to a third-party records application in the context of a *Garofoli* motion. Therein, the Court held that:

> …where an accused asserts that third party documents are relevant to a *Garofoli* application, **he or she must show a reasonable likelihood that the records sought will be of probative value to the issues on the application**.[13] The fact that the documents may show errors or omissions in the affidavit will not be sufficient to undermine the authorization. They must also support an inference that the affiant knew or ought to have known of the errors or omissions.[14]

ii. Step 6 Mechanics

It is important in the conduct of this litigation that the applicant not lose sight of the test to be applied in the *Garofoli* hearing: whether there was any basis upon which the authorizing judge could be satisfied that the relevant pre-conditions to issuing an authorization of warrant existed.[15] Keep this in mind to avoid overly complicating the process and litigating issues which detract from the main issue. A focused approach is generally the most persuasive.

At a very basic level, the process is as follows. Defence counsel files the necessary materials on the *Garofoli* motion, challenging the facial and/or sub-facial validity of the ITO in support of the judicial authorization. Counsel may also seek leave to cross-examine the affiant.[16] The Crown, in most instances, will respond by filing a cross-application to resort to step 6. As a corollary of this, some Crowns will send to the application judge a copy of the unredacted ITO in advance of the hearing. From the Crown's perspective, this allows for a more efficient use of court resources, as enables your judge to enter court fully apprised of the relevant information. If this is not done, and should the matter proceed to step 6, your judge may require an adjournment to allow him or her to review the unredacted ITO, which may lead to scheduling difficulties and delay. Some defence counsel oppose this practice on the basis that it allows the judge to view the unredacted content *before* the matter reaches step 6, which may unwittingly influence the judge into upholding the validity of the warrant on the basis of the redacted ITO. Whatever your position, ensuring that

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[13] In *R. v. Pires, R. v. Lising,* 2005 SCC 66 at para. 65, the Supreme Court confirmed that "…[t]he material issue for consideration on the *voir dire* is whether, at the time of granting the authorization, there existed reasonable grounds to believe that: (a) an offence was or will be committed and (b) information concerning the offence will be obtained by the proposed interception.

[14] *World Bank,* at para. 124. See also *R v. Alizadeh,* 2013 ONSC 5417.

[15] See *R. v. Crevier,* at para. 64; *R. v. Sadikov,* 2014 ONCA 72 at para. 86; *R. v. Pires; R. v. Lising,* 2005 SCC 66 at para. 30.

[16] Cross-examination of the affiant should occur in advance of any step 6 procedure.

there are open lines of communication between Crown and defence will enable you to determine the best procedure in your case. For instance, if the Crown will inevitably need to resort to step 6, consider carefully the purpose of resisting the Crown's plan to send the unredacted ITO to the application judge in advance. Also consider how this position may be viewed by the judge when he or she is handed a 400 page unredacted ITO to review and absorb the morning of the application.

In any event, whether the Crown seeks to uphold the validity of the judicial authorization on the basis of the redacted ITO and only resorts to step 6 where necessary, or if the Crown moves directly to step 6, from a practical perspective, assume that is where we now find ourselves. What happens next? As detailed above, the Crown is required to ensure that that the accused be made aware of the nature of the redacted details. Where confidential informants are used, the summary should include information addressing the three *Debot* factors.[17] While the contents of the summary inevitably vary from case to case, the Court of Appeal proposed that the trial judge consider the inclusion of the following information:

- The source of the informer's information (first-hand, hearsay, and if hearsay, the source of that hearsay)
- The informer's relationship with/to the accused and how they first came into contact
- The length of time the informer has known the accused and the frequency of contact between them
- Whether the informer has previously provided information to police
- Whether previous information provided (if any) has led to arrests, seizures, or convictions
- Whether past information provided by the informer has ever been proven unreliable or false
- Whether the informer has a criminal record and, if yes, whether the unredacted ITO includes details of the convictions or charges or whether a copy of the criminal record was appended
- Whether the informer has convictions for offences of dishonesty or against the administration of justice
- The informer's motivation for speaking to police, including whether consideration was sought or arranged
- Whether the informer was instructed on the penalties for giving false information
- Whether descriptions provided by the informer match the accused or the target location
- The degree of detail of the information that the informer provided to police
- The recency or timing of the information that the informer provided to police
- Any discrepancies between the information of one informer and another
- Any aspects of the informer's information that are contradicted by police investigation or otherwise detract from its credibility
- Any errors or inaccuracies that exist in the ITO, and their nature (e.g. typographical errors).

In *Crevier,* the Court of Appeal noted that in practice, the Crown generally prepares a judicial summary for approval by the trial judge. Some Crowns may choose to disclose a draft judicial summary simultaneous to the disclosure of the redacted ITO. Others may wait until defence counsel has indicated it is their intention to challenge the ITO, and the Crown decides to bring a cross-application for resort to step 6 to sustain the validity of the warrant or authorization. It may be that through advance discussion and coordination as between Crown and defence, the number

[17] *Crevier* at para. 84

of redactions in issue and sufficiency of the proposed judicial summary can be narrowed. Your trial judge will likely be appreciative of any streamlining that can be done in advance of her input.

In assessing the adequacy of the proposed summary, the trial judge is to consider whether it discloses as much information as possible to enable the accused to challenge the ITO both facially and sub-facially, while also ensuring the protecting of informer privilege.[18] There are two ways in which this oversight may be effected. First, the trial judge may choose to go *in camera* with the Crown to make inquiries as to why particular information has been redacted, or why the summary is phrased in a particular way. This allows for freer conversation between judge and Crown. However, by necessity, the accused is excluded from part of his trial. Further, this approach runs the risk that a transcription error could result in the inadvertent release of privileged content. Many Crowns are therefore more comfortable proceeding in open court, and communicating with the judge in careful language and/or using notes to which the accused is not entitled access. This ensures that the accused is present (at least physically) and avoids the potential transcription error identified immediately above. Any notes that are passed should be kept in a sealed envelope to ensure the record is complete in the event of an appeal.[19]

Once the judicial summary is complete and approved by the trial judge, defence counsel is therefore deemed to have sufficient information at his/her disposal to litigate the judicial authorization. Information that cannot be sufficiently summarized is excised and cannot be considered by the trial judge in his or her determination as to whether to uphold the court order.[20]

iii. Streamlining Process: Some Tips

In some cases, the Crown's ability to sustain the validity of the warrant or authorization on the basis of the redacted warrant alone may be close to the line. One jurist may find that the warrant can be sustained, while another may decline to make that finding and proceed to step six. Proceeding without resort to step six could result in prejudice to the Crown in the event of a subsequent appeal. Without the benefit of resort to the unvetted ITO and associated judicial summary, the Court of Appeal could find that an otherwise sustainable warrant was invalid. In most cases, therefore, the Crown will invite the Court to consider the validity of the warrant in two stages: (1) on the basis of the redacted ITO only; and (2) on the basis of the unvetted ITO with judicial summary. Requesting that the Crown choose between one of the approaches is not necessarily an effective way to streamline process.

Steps that may assist in streamlining process are as follows:

- File your materials on time;
- Ensure you have all necessary disclosure before the day of argument. If multiple judicial orders were obtained, do you have all of the ITOs? Do you have all of the appendices?

---

[18] *Crevier* at para. 83

[19] For a recent case on efforts to challenge the sufficiency of the judicial summary, see R. v. Bruno, [2019] O.J. No. 3793

[20] In cases with numerous judicial authorizations, counsel should keep in mind that any information found to have been obtained without a warrant is automatically excised from a subsequent ITO (see *R. v. Jaser,* 2014 ONSC 6052, at para. 17.)

- Don’t waste your time on unnecessary, irrelevant or weak arguments. Be precise. You may get a better result by raising two strong arguments rather than watering them down by arguing eight other weak points.
- Be on time;
- Communicate with the Crown. Is the Crown prepared to reconsider any of its vetting before the *Garofoli* is going to be argued?; and
- Determine the appropriate schedule for your matter, based on the specifics of your case, well in advance of the hearing.

D. CONCLUSION

The name “step 6” conjures up a vision of some onerous and complex process In reality, it is a relatively simple and principled litigation step that may result in some frustration from both Crown and defence. Coordination between Crown and defence to narrow issues and focus on what is truly in issue will be of benefit to all parties.

CRIMINAL LAWYERS' ASSOCIATION

47th ANNUAL

FALL CONFERENCE

NOVEMBER 15-16, 2019

Dealing Effectively with Concurrent Criminal and Regulatory Proceedings

DEALING EFFECTIVELY WITH CONCURRENT CRIMINAL AND PROFESSIONAL DISCIPLINE PROCEEDINGS

CLA FALL CONFERENCE
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OVERVIEW

i. Reporting Obligation

ii. Cooperation and the Right to Silence

iii. Undertakings and Use of Disclosure (Crown and Regulatory)

REPORTING OBLIGATIONS

REPORTING OBLIGATIONS
More Common than Before: One Example

New RHPA reporting requirements (May 1, 2018): Member must:

- File written report with college notifying of outstanding charges, and corresponding conditions of release, including for unresolved charges laid before May 1, 2018.
- As soon as possible.

College must publish information about:

- Members' outstanding charges under the *Criminal Code* or the *Controlled Drugs and Substances Act*
- Members' conditions of release and any variations.

IMPORTANT: Reports should not contain info subject to a publication ban: See *Criminal Code* ss. 278.95(1) and 278.9 (specific to certain sexual offence proceedings); ss. 486.4 and 486.5 (general); s. 517(relating to bail hearings); ss. 539 and 542 (re preliminary hearings); ss. 631(6) and 648 (re jury trials); ss. 672.51 and 672.501 (re NCR / Review Board proceedings).

REPORTING OBLIGATIONS

WHICH GOES FIRST?

Two considerations:

1. **Defendant may have to cooperate with the discipline case while the criminal case is ongoing: the 'right to silence' problem**

2. **Fruits of the regulatory investigation may be usable by the defendant in the future criminal case: the undertaking and use problem**

COOPERATION AND THE RIGHT TO SILENCE

COOPERATION AND THE RIGHT TO SILENCE

As criminal defendant, D:

- Has no disclosure obligation
- Often chooses not to testify
- May defend by attempting to raise a doubt by testing the Crown case

As a member of a professional college, D:

- Has a general duty to cooperate:
  Artinian v. College of Physicians & Surgeons (Ontario) (1990), 73 OR (2d) 704 (Div. Ct.); *Law Society (Saskatchewan) v. Robertson Stromberg,* (1995), 122 DLR (4th) 433 (Sask. C.A.); *Adams v. Law Society (Alberta)* (2000), 82 Alta. L.R (3d) 219 (Alta. C.A.); *Wise v. Law Society of Upper Canada,* 2010 ONSC 1937

- May have a statute-specific duty to cooperate:
  e.g., RHPA s. 76, *Professional Engineers Act,* s. 33(2); *Law Society Act,* s. 49(3), (8), (13)

COOPERATION AND THE RIGHT TO SILENCE

Protecting against compelled incriminating information

Sections 7 and 13 of the *Charter* protect D against the use of *compelled* testimony and information to incriminate D

- *R. v. Nedelcu,* 2012 SCC 59; *R. v. White,* [1999] 2 S.C.R. 417

BUT does the regulatory duty to cooperate always = legal compulsion? Or does it just put professional and strategic pressure on D to produce information? *E.g.:*

- Answering questions without a summons: *Jain v. College of Physicians and Surgeons of Ontario*, 2012 ONCPSD 30; *Ontario (College of Physicians and Surgeons of Ontario) v. Mrozek,* 2018 ONCPSD 17

- Compelled observation of practice by regulator: *Gore v. College of Physicians and Surgeons of Ontario*, 2009 ONCA 546

Cooperation and the Right to Silence

The distinction between tactical and legal compulsion is consistent with the definition of a compellable witness as “one who may be forced by means of a subpoena to give evidence…under the threat of contempt proceedings”

[…]

Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the [pre-trial stages of the criminal case] does not offend the principle against self-incrimination or the right to a fair trial.”

R. v. Darrach, 2000 SCC 46 at paras. 48-50

COOPERATION AND THE RIGHT TO SILENCE

Assume anything D shares with the regulator can be shared with Crown and police

- Many governing statutes have confidentiality provisions which prohibit regulators from disclosing investigative materials
  - E.g., s. 36(1) of the RHPA; s. 49.12 of the *Law Society Act*

- BUT Colleges may produce information subject to a summons

- AND statutory confidentiality and inadmissibility provisions generally do not apply to criminal proceedings. *E.g.,*
  - *RHPA* s. 36(1) permits disclosure to police to aid a criminal investigation
  - S. 36(3) prohibits records from being used in civil proceedings, but affords no such protection in criminal proceedings. See *R. v. Nanka-Bruce,* 2006 CarswellOnt 1139 (S.C.J.) at paras. 316-320

- Regulators should still consider seeking a consent, summons or warrant, or directions before disclosing information, even to the police

Cooperation and the Right to Silence

Downsides of providing <u>non-incriminating</u> information

> *"There's no such thing as a good pre-trial statement."*
>
> *-- Every criminal lawyer*

Sections 7 and 13 of the *Charter* only stop the Crown from using compelled information *to incriminate,* <u>not to impeach</u>

- *R. v. Nedelcu,* 2012 SCC 59

Ramos et al v. IRPD, 2013 ONSC 4395, para. 46, lists ways in which non-incriminating info produced to regulator can prejudice a criminal case:

- Crown may gain information from D's statement to regulator that it could use to cross-examine D and other defence witnesses, thereby undermining their credibility

- Crown may gain information from D's statement to regulator that it could use to prepare Crown witnesses, resulting in potential witness tainting and undermining any order excluding witnesses

Cooperation and the Right to Silence

Negotiating protection against the regulator's demands for and use of information

Does the governing statute give investigators the power to issue a summons under the *Public Inquiries Act?* If so, ask the investigator to issue one.

- YES: *RHPA, Police Services Act, Professional Engineers Act*
- NO: *Law Society Act*

Will the regulator agree to restrict its use of the information? See, *e.g.,* the IRPD's offer in *Ramos*, at para. 47:

> …the IPRD "will not unilaterally provide this information to the Crown counsel" and the IPRD "will not consent to its release in the absence of an *O'Connor* application and a judicial order directing its release" and will oppose any court applications to compel [its] release...

Will the regulator agree to an adjournment or temporary stay until the conclusion of the criminal proceedings?

UNDERTAKINGS AND THE USE OF DISCLOSURE

Undertakings and Use of Regulatory Disclosure

HYPOTHETICAL

D is a professional charged with sexually assaulting his patient/client. The client writes a detailed complaint to D's regulator. Regulator provides a copy to D and asks him to respond. D is not asked to sign a case-specific undertaking, and there is no statutory rule expressly limiting the use of regulatory material in a criminal case. D's criminal case proceeds to trial. The complainant-client testifies. She gives an account that is materially inconsistent with what she said to the College in her complaint.

1. Can D use the complaint letter (a) as a good faith basis for cross-examination questions, (b) to refresh the complainant's memory, (c) to impeach her and prove the prior inconsistent statement?

2. Does D need to seek direction from the regulator or the criminal court before doing so?

Undertakings and Use of Regulatory Disclosure

Q: Can D use regulatory disclosure to defend the criminal case?
A: It's complicated, but probably?

- Deemed undertaking rule (30.1.01) does not apply
- BUT common law implied undertaking may prohibit parties to an admin proceeding from using regulatory disclosure for ulterior purposes: *Tanner et al v. Clark et al* (2003), 63 OR (3d) 508 (C.A.)
- AND governing statute – or other statutes – may have a provision that serve as a sort-of deemed undertaking rule
  - *E.g., RHPA* s. 36; *Chartered Accountants Act* s. 61*; LSA* s. 49.12
- Regulator may seek a case-specific undertaking
- D should review undertaking with counsel and, if possible, negotiate exceptions to preserve the right to full answer and defence (*e.g.*, use of regulatory material to impeach a Crown witness).

UNDERTAKINGS AND USE OF REGULATORY DISCLOSURE

Guiding case: *S.C. v. N.S.*, 2017 ONSC 5577 (Div. Ct.)

- A party who seeks to rely on the impeachment exception to the deemed undertaking rule, and use discovery material to cross-examine a criminal complainant [aka plaintiff] need not obtain the civil court's permission before doing so: paras 25-29

- It is the criminal court judge who should decide whether and to what extent D can use civil discovery material to defend the criminal case: paras. 29, 35-39

- It is not an improper "use" of civil discovery material for D's civil counsel to share P's discovery productions with D's criminal counsel: "Once the Discovery Evidence was delivered by the respondent to the appellant, he was entitled to share it with any of his legal advisors…In order to effectively obtain legal advice, a client must be able to provide counsel with any and all relevant material": para. 40

UNDERTAKINGS AND USE OF CROWN DISCLOSURE

Hypothetical Scenario

Remember your mortgage fraud client facing the interlocutory suspension application? In their motion materials, the Law Society included the ITO of the officer in charge which was used to support a search of your client's home wherein various devices which were used in the creation of fraudulent documents were seized. The ITO contains much damaging information about your client.

Undertakings and Use of Crown Disclosure

1. Can the Law Society use the ITO?

2. Can your client use other items from the disclosure to attempt to undermine the value of the ITO?

Parties wishing to rely on materials from the Crown brief must follow *P. (D.) v. Wagg* by obtaining (i) consent of AG and police, or (ii) a court order.

***P.(D.) v. Wagg* 2004 CanLII 39048 (ON CA) ¶ 53 – 54:**

"The Crown brief is not the property of the Crown. It is the property of the public, to be used to ensure that justice is done. As society has an interest in seeing that justice is done in civil cases as well as criminal cases, production of relevant materials from the Crown brief should be as broad as possible."

UNDERTAKINGS AND USE OF CROWN DISCLOSURE

While the criminal case is ongoing

- It is hard(er) to get information from the Crown brief
  - Regulator must follow *P. (D.) v. Wagg,* [2004] OJ No. 2053 (C.A.), by obtaining (i) consent of AG and police, or (ii) a court order.
  - Crown and police may successfully resist providing the Crown brief, even in response to a summons: *College of Physicians and Surgeons of Ontario v. Peel Regional Police,* 2009 CanLII 55315
  - D cannot provide her copy of the Crown brief: she is bound by an implied undertaking to use it *only* to make full answer and defence in the criminal matter: *R. v. Mosaddad,* 2017 ONSC 5520

- It is hard(er) to get information from witnesses
  - The police or Crown, or counsel, may have cautioned witnesses not to speak to one another in advance of the criminal case.
  - Witnesses may be reluctant to focus on more than one proceeding at a time. A regulatory investigation may be distracting

- There are no shortcuts. Everything must be proven from scratch

UNDERTAKINGS AND USE OF CROWN DISCLOSURE

After the criminal case is over

- It is easier to get information
  - Exhibits and transcripts can be obtained from the exhibits clerk or obtained by a court order
  - Colleges can use their investigative powers and FOI requests to gain access to all or part of the Crown brief

- There is more information to get: sworn testimony and trial exhibits

- The court's findings may narrow and ease the investigation
  - A finding of guilt relating to the same facts is admissible and likely determinative of professional discipline charges.
  - Even after an acquittal, the factual findings made in the criminal trial may still prove professional misconduct. For example, consent may be a defence to sexual assault, but not to sexual abuse by a professional of her client
  - Vulnerable witnesses may not need to repeat their evidence

UNDERTAKINGS AND USE OF CROWN DISCLOSURE

The Crown or police may successfully resist providing the Crown brief, even in response to a summons.

CPSO v. Peel Regional Police 2009 CanLII 55315 (ON SCDC) ¶ 76 – 77:

- Same considerations apply to administrative proceedings as apply to civil proceedings regarding use of Crown disclosure
- The specific process mandated by *Wagg* may not apply to administrative tribunals
- However, if the Attorney General objects to the disclosure of a Crown brief, this is a lawful excuse for failing to comply with a summons

Conclusion

Reporting Requirements

If your criminal client is a professional turn your mind to her reporting requirements vis-à-vis her regulatory body and put your advice in writing. Review the governing statute and seek advice from a lawyer with expertise in the area of professional discipline.

Cooperation and the Right to Silence

Your professional client has a positive obligation to cooperate with her regulatory body. Make sure you understand the nature of the obligations, and be able to provide advice on the difference between compelled information and a strategic decision. Consult with from a lawyer who has expertise in the area of professional discipline from a lawyer with expertise in the area of professional discipline.

Undertakings and Disclosure

Regulatory and Crown disclosure generally cannot be used without prior consent from the Crown or regulator or a court or tribunal order. Understand *P.D. v. Wagg,* and *S.C. v. N.S.*

THANK YOU FOR LISTENING!

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Keynote: No Kill Bill C-75 – Now What?

Bill C75 – The good, the bad and the ugly

(the newest installment of criminal justice reform to increase efficiency and expediency)

Michael Lacy
Brauti Thorning LLP

The <u>GOOD</u>

- Amendments to the YCJA providing for greater discretion
- **Judicial referral hearings for Administration of Justice Offences**
- Codifying *R. v. Antic* bail principles
- Additional safeguards when accepting guilty plea
- Greater case management powers including greater flexibility for change of venue
- “Routine Police Evidence” provisions scrapped
- Trial can continue judge alone on consent when jurors drop below 10
- Permitting persons convicted of offences for which they were sentenced for up to 2 years to serve as jurors and those persons who have been pardoned

The BAD

- Hybridization of more offences and greater maximum of 2 years less a day for all summary conviction offences

- Reverse onus bail provisions for domestic offences where a prior record for the same

- Greater case management powers

The <u>UGLY</u>

- Elimination of preliminary inquiries other than those offences for which the maximum period of imprisonment is less than 2 years

- Elimination of peremptory challenges during jury selection process

- Providing judge with power to excuse potential jurors where necessary to “maintain confidence in the administration of justice” in addition to any other reasonable cause

- Judge will be “trier” for purpose of challenge for cause process

What’s the future hold

- Will greater case management power lead to efficiency trumping substantive rights?
- When judges are excusing potential jurors to “maintain confidence in the administration of justice” will reasons have to be given? Can submissions be made? Does this include shaping the “appearance of the jury” to be more representative of the community where trial is being held?
- Will questioning of potential jurors at vetting stage be more extensive than it is now? What types of things can court inquire into in order to exercise discretion judicially?
- Is there room for an evidentiary hearing based on psychological or other evidence explaining why particular types of jurors should be avoided to maintain impartiality or appearance of fairness

Practical/litigation considerations

- With elimination of preliminary inquiries are there other ways to 'discover' Crown's case when disclosure is not complete or sufficient ---- Section 7 applications seeking remedies under s.24(1) including examination of material witness?; applications to preserve third party records (social media accounts, text messages etc.) to Superior court
- Will *Jordan* guidelines be adjusted now that provincial court does not have to accommodate a preliminary inquiry – simply an intake court for most cases
- Longer trials given no preliminary hearings
- More trials in the OCJ given no prelim advantage and greater hybridization
- Ability of law students, articling students and agents to appear – pending action by MAG and/or LSO
- Constitutional issues – reverse onus bail hearings? Trial judge determining challenge for cause?

Bill C-75: What Are we left with and what will the future hold?
A Practical Guide to Deciphering the Justice Reform Bill

Michael Lacy[1]
Scott Dallen[2]

With the conclusion of its third and final Parliamentary reading in December 2018, the besieged Liberal justice reform legislation, Bill C-75, is one Senate vote away from royal assent. Intended to improve judicial efficiency of the Canadian justice system in response to the *R v. Jordan* decision, the Bill takes aim at many of the perceived roadblocks to justice in our courts. It also made numerous cosmetic changes to modernize the *Criminal Code*, including the removal of so-called zombie laws[3] and the use of gender-neutral pronouns.

Bill C-75 quickly came under fire for jeopardizing or curtailing many of the procedural safeguards of the accused under the guise of efficiency[4]. Yet despite months of scrutiny from the Justice Committee, who heard from 95 expert witnesses who critiqued many of its proposed amendments, the Committee recommended only marginal changes to the Bill.

One of the significant changes at committee was the removal of the 'routine police evidence' amendment, which was almost universally decried by the criminal bar, stakeholders, and other critics. This change would have allowed the majority of police evidence to be admitted by affidavit, requiring defence counsel to bring an application to cross-examine the officer. The amendment was criticized for being overly-broad and burdensome on the accused, who would bear the onus of proving the need for *viva voce* testimony. This reform was also unnecessary, as there are already mechanisms in place to dispose of strict evidentiary proof of non-controversial police evidence.

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[1] Partner, Criminal Law Group, Brauti Thorning LLP.
[2] Student-at-law, Brauti Thorning LLP (to be called to the bar in 2019).
[3] Offences that have remained in the *Criminal Code,* despite having been found unconstitutional at common law.
[4] See for example, submissions of the Criminal Lawyers' Association: https://www.criminallawyers.ca/wp-content/uploads/2018/09/CLA-submission-Bill-C75-August-2018.pdf.

The Committee also removed terrorism offences, as well as the offence of advocating genocide, from the list of newly hybridized offences. Those offences will remain as strictly indictable charges.

Other amendments to the Bill were proposed but ultimately rejected by the Justice Committee. These proposed amendments included tempering the elimination of preliminary inquiries[5], restoring peremptory challenges[6], and making changes to legal representation problems posed by the new harmonization of summary conviction offences.[7] Critics of the bill were not limited to defence lawyers or the Criminal Lawyers' Association. The abolishment of the preliminary inquiry for all but those offences for which the maximum penalty was life imprisonment was criticized by Crown groups and by Legal Aid Ontario. Similarly, although there appeared to be consensus for reform to the peremptory challenge provisions of the Criminal Code, almost universally stakeholders agreed that merely abolishing the challenge procedure would not address the systemic and other problems that gave rise to the need for reform. Law Societies across Canada also raised concerns in eliminating the current distinction between summary and super-summary conviction offences as there would be no basis to distinguish when agents or paralegals could appear to represent criminal defendants. But politics, as it often does, won out over logic and reason.

Now that the Committee procedure is complete and the controversial Bill nears the end of its Parliamentary journey, criminal lawyers and justice system participants are left to consider what has come out in the wash. Practitioners, begrudgingly or otherwise, will need to acquaint themselves with the changing legal landscape they will be faced with in a few months' time. At the same time, resourceful lawyers will need to be creative in responding to the legislative reform.

Jury Selection

[5] Amendment submitted by Elizabeth May, Green Party MP.
[6] Amendment submitted by Michael Cooper, Conservative Party MP.
[7] Amendment submitted by …

Arguably the most substantial changes contained in Bill C-75 are the sweeping amendments to how courts select or exclude members of a jury.

The first significant change is the abolition of peremptory challenges. Currently, defence counsel and the Crown each have between 4 and 20 peremptory challenges, depending on the circumstances of the case, to dismiss a juror without providing reasons. Bill C-75, following the lead of other jurisdictions and calls by academics[8], eliminates the notion of the peremptory challenge in its entirety. Parties will no longer be able to exclude jurors without showing grounds for dismissing that juror falling into the narrow categories of challenges for cause.

The justification for this change is the concern that the risk for discriminatory abuse of such challenges is simply too high. The impetus for this change was a knee-jerk response to the acquittal of Gerald Stanley by an all-white Saskatchewan jury.[9] In that case, several indigenous jurors were previously dismissed by defence counsel's use of peremptory challenges. However, the amendment does have a claim to evidence based-policy, as the elimination of peremptory challenges has often been recommended by justice reform pundits, including in an independent review by former Chief Justice Frank Iacobucci,[10] and in a report by the Canadian Judicial Council.[11]

In an effort to replace the peremptory challenge, Clause 269 of Bill C-75 grants additional powers and greater discretion to judges who are now solely tasked with ensuring a competent, impartial and representative jury. The trial judge is now empowered to stand aside any juror where the judge deems it necessary to "maintain confidence in the administration of justice or any other reasonable cause", replacing the current language of "for reasons of personal hardship or any other reasonable cause." This new judicial tool is to be utilized on a case-by-case basis

---

[8] See: *Criminal Justice Act* (UK) 1988 (c 33), s. 118(1);
Burnett, Arthur L., "Abolish Peremptory Challenges: Reform Juries to Promote Impartiality", *Criminal Justice*, 2005, vol. 20, Issue 3, p. 26.

[9] The then Minister of Justice infamously tweeted "We must do better" in the face of the acquittal implicitly suggesting that the verdict was tainted. The fact that this presumes an all white jury would not have followed their oath and/or that a more representative jury would have come to a different result appeared lost on the then Minister of Justice.

[10] Ministry of the Attorney General, Report of the Independent Review Conducted by the Honourable Frank Iacobucci: "First Nations Representation on Ontario Juries".

[11] Canadian Judicial Council: "Report to the Canadian Judicial Council on Jury Selection in Ontario"

with the presiding justice making a determination based on all of the relevant circumstances.[12] This is obviously intended to provide broader discretion to judges to "vet" potential jurors than is currently in place. Given the purpose of the legislative amendment, it will also presumably allow judges to ensure that the jurors that are chosen are "more representative" of the racially diverse community from which the jury is drawn. If the goal is to avoid the "all white jury" in the *Stanley* scenario and prevent the improper use of peremptory challenges (i.e. based on stereotypes or to shape the jury in a way that is deemed more favourable to the accused or the Crown), judges can be expected to exercise their discretion accordingly to "maintain confidence in the administration of justice."

Absent provincial legislative amendments to increase the diversity of the jury pool, resourceful counsel (Crown and defence) should develop arguments, where necessary, in a particular case to ensure that the jury is more racially diverse (for example in downtown Toronto or in Indigenous communities), particularly since maintaining confidence in the administration of justice also includes the appearance of fairness. It is unclear what this will look like given the new provision is silent on the procedure, mechanism or tools that a judge is going to use to accomplish the legislative goal. Presumably, an application can be brought to a trial judge requesting a more robust vetting process of potential jurors over and above the challenge for cause process that is maintained in s.638 of the *Criminal Code*. In the right case, it may be open to argue that having a gender diverse jury or an age-diverse jury is necessary to maintain confidence in the administration of justice. The new legislation also opens the possibility of adducing expert evidence in support of such applications. In cases where one party proposes a more robust vetting process at this stage, the other party may oppose. In those circumstances, what is the evidentiary threshold (if any) to meet the "maintain confidence in the administration of justice threshold." Presumably a trial justice can shape the jury in the manner he or she thinks is necessary to maintain confidence in the administration of justice – but what exactly does that mean? Will the appearance of the jury (colour, weight, race, age, cultural background) now

[12] Department of Justice: "Legislative Background – An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (Bill C-75)": https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html.

become an independent consideration that the trial judge must assess? Time will tell but counsel must think outside of the jury selection process in this new world of determining what is an appropriate juror.

Bill C-75 also makes minor changes to the grounds for challenging a jury member for-cause. It now reads as follows (changes are underlined):[13]

> *(a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;*
>
> *(b) a juror is not impartial;*
>
> *(c) a juror has been convicted of an offence for which they were sentenced to two years or more and for which no pardon or record suspension is in effect;*
>
> *(d) a juror is not a Canadian citizen;*
>
> *(e) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or*
>
> *(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.*

Most notably, the change to ground (c) extends juror eligibility to potential jurors[14] with a criminal record of up to two years, and to those who have had pardons and record suspensions. This change is reflective of the fact that the maximum penalty for summary conviction offences has been increased to two years (see *Harmonization of Summary Conviction Offences* below).

[13] Bill C-75 (Third Reading), clause 271.
[14] Of course, the *Criminal Code* juror eligibility provisions do not exist in isolation. Each Province has their own *Act* governing juror eligibility that may be more restrictive than the *Criminal Code*.

This change maintains the status quo that individuals convicted of summary conviction offence may still serve on a jury.

Clause 272 of the Bill shifts the responsibility for adjudicating the grounds for challenging a juror. Where previously these challenges would be heard by a rotating group of lay "triers", the duty now falls to the trial judge. This change is intended to bolster the efficiency and impartiality, but it represents a meaningful philosophical shift in the area of jury selection. The increased power of a trial judge, a state actor, to shape the composition of a jury is potentially concerning. At the very least, the composition of the jury will very much depend on the view of the presiding justice as to who is an acceptable or not acceptable juror. Presumably, like any substantive judicial determination, the parties will be entitled to make submissions as to who is an acceptable or not-acceptable juror. Additionally, a judge will be required to provide some reasons for his or her decision. This may open the door to appellate review if the judge's exercise of discretion is not reasonable or reasonably supported by the evidence on the challenge. There may also be room to advocate for more extensive or open-ended questioning of potential jurors for cause particularly since the issue of the challenge will be determined by a judge and not lay triers.[15]

Lastly, it is worth noting that the Bill adds a new subsection under s. 644 of the *Criminal Code* permitting a trial to proceed even where the number of jurors has atrophied below 10. On the consent of both parties, the judge may dismiss the jurors and continue to adjudicate the trial as a judge-alone proceeding rather than ordering a mistrial and starting afresh. This would include homicide cases.

Removal of the Preliminary Inquiry

Another significant change under Bill C-75 is the alteration of s. 535 of the *Criminal Code* to eliminate the preliminary hearing for all but the most serious offences (those where the maximum period of imprisonment is life). In an effort to ensure efficiency and "meet" the *Jordan*

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[15] See *R. v. Oland* (citation pending) for an example of more extensive questioning of potential jurors under the current model.

requirements, the federal government opted to eliminate an important procedural safeguard that in fact increased trial efficiencies, acted as a screening tool, allowed issues to be narrowed, and provided an opportunity for the parties to shape the evidentiary record for future pre-trial applications in the Superior Court.

In a familiar refrain, the Justice Department suggests that the expanded disclosure obligations under *R v Stinchcombe,* as well as the availability of out-of-court discovery processes, mitigates the need for a preliminary inquiry in the vast majority of cases.[16] This change will allegedly eliminate 87% of preliminary inquiries, and contribute to greater procedural efficiency. However, the statistics paint a different picture.

In Canada, preliminary inquiries are requested in less than 3% of cases. Where they are requested, it is typically because there is some substantial benefit to the process, including the discovery of *Charter* issues, the fostering of pre-trial resolution, the elimination of charges in multi-count indictments, and the narrowing of trial issues. They also assisted in providing a forum for hearing time-consuming motions, such as third-party records applications. Counsel should be aware that requiring these motions to be held at trial may cause mid-trial delays resulting in loss of court dates.

By restricting the preliminary inquiry to only charges carrying maximum life sentences, Bill C-75 strips an important procedural right from defendants, even where their liberty interests may be similarly impacted. For example, Dangerous Offender and Long-Term Offender regimes have resulted in *de facto* life sentences even where life imprisonment is not technically available under the *Criminal Code*. The result is inconsistent justice policy where offences carrying a potential life sentence, like Robbery and Possession for the Purpose of Trafficking, are entitled to a preliminary inquiry, despite the fact that life sentences are rarely imposed for those offences. Conversely, no preliminary inquiry is available for Aggravated Sexual Assault charges where lengthy sentences of imprisonment are the norm.

[16] [1991] 3 SCR 326.

The Bill also takes further steps to condense preliminary inquiries where they do occur. Section 537(1.01) is amended to expand the preliminary inquiry judge's powers to streamline what issues may be explored and what witnesses may be examined. Parties may also agree to limit the scope of the preliminary inquiry on their own accord by striking an agreement under s. 536.5.

There is no constitutional right to a preliminary inquiry. There is no right to have the evidence "tested" in a lower Court before having the matter go to trial. The practical reality is that any attempt to challenge the constitutionality of eliminating the preliminary inquiry will likely fail. However, there may be opportunities to request "discovery" hearings relying on s.7 of the *Charter* in advance of a trial. The case may arise that the state of the Crown disclosure or police investigation is so lacking that a case can be made that allowing some discovery of the Crown's case in advance of trial is necessary to make full answer and defence and to ensure a fair trial. In such a case, it may be open to counsel to bring an originating *Charter* application to the Superior Court of Justice requesting the same. In rare cases, the Crown and the defence might even agree on a discovery proceeding to be held at an official examiner's office. In other instances, where a material witness refuses to provide a statement to the police or speak to investigators, the Crown might consent to a defence *Charter* application requesting to compel the witness to come to court in advance of trial to answer questions under oath about his or her knowledge about the underlying offence. While the circumstances might be rare, they are not so fanciful as to be dismissed outright. In some circumstances, trial courts may welcome the opportunity to assist the parties before scheduling much-valued trial time, particularly if a discovery process may lead to a resolution of the outstanding charges.

The elimination of the preliminary inquiry for most offences should also cause defence lawyers to carefully assess and advise clients in indictable cases on the forum where they will want to be tried. The absence of the benefit of a preliminary inquiry may cause many accused to benefit to going straight to trial in the Ontario Court of Justice. First, they will be tried within 18 months whereas if they go to Superior Court, they might not be tried for up to 30 months (even without a preliminary inquiry based on the current law). Other than those cases where counsel are confident that they want a jury trial, there is little reason to go to Superior Court.

The reality is that some of the most experienced and respected of criminal law practitioners (Crowns and defence lawyers) are now judges of the Ontario Court of Justice. The quality of appointments in the Ontario Court of Justice rivals any Court in Canada. With no preliminary inquiry benefit being available in the lower Court, in many circumstances it will become the preferred Court.

Hybridization of Indictable Offences

Under the amended *Criminal Code,* any indictable offence with a maximum penalty of 10 years or less will become a hybrid offence. This change affects 136 currently indictable offences:

# of Offences Affected	Maximum Penalty	Examples
40	10 years imprisonment	- Dangerous Driving Causing Injury (s. 249(3)) - Theft Over $5,000 (s. 334(a)) - Possession of Break-in Instruments (s. 351)
55	5 years imprisonment	- Arson (negligence) (s. 436(1)) - Possession for the Purpose of Trafficking in Marijuana (*CDSA* s. 5(1), 5(2))
41	2 years imprisonment	- Possession of Firearm Knowing Possession Unauthorized (s. 92) - Keeping a common bawdy-house (s. 210(1))

With this change, Crown Counsel will have discretion to treat the above charges as summary conviction offences. The reasoning is that enabling these charges to proceed in provincial courts will accelerate the adjudication of matters, and will free up time in the superior courts for more serious matters. However, downloading the superior courts' case load to the equally overburdened provincial court system may cause more problems than it solves. It is uncertain whether provincial courts have the capacity or resources to accommodate the influx of newly-hybridized offences. The change will likely result in more delays until capacity issues can be addressed.

Harmonization of Summary Conviction Offences

Similarly, Bill C-75 harmonizes the maximum penalties for all summary conviction offences. Those offences, which currently carry a maximum 6-month term of imprisonment, will now have maximum sentences of 2 years less a day. The practical effect of this change is that for the vast majority of summary conviction offences, the maximum penalty just skyrocketed fourfold. Critics are concerned that the increase in maximum sentence may connote an intention to increase the severity of the sentencing regime for summary conviction offences. However, assurances have been made by the Department of Justice and in the Parliamentary debates that "this change is not a signal from Parliament that these offences should be punished more seriously".[17] Proportionality will continue to be the governing principle in sentencing for these offences.

There are also access to justice concerns with the new sentencing regime. Without further reform, the increased penalty prohibits paralegals, student clinics, and articling students from representing defendants on summary offences. Agents may only represent clients where the maximum penalty is six months imprisonment. The Bill contemplates that each province can create a regime whereby students and agents can appear for certain types of cases. However, it

[17] Department of Justice: "Legislative Background – An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (Bill C-75)": https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html.

remains unclear how this will play out. Having a student or paralegal appear on an offence that would carry a maximum period of imprisonment of 6 months in jail mirrors the maximum penalties that can now be imposed under the *Provincial Offences Act* and the *Highway Traffic Act*. Will the Province now allow paralegals and students to represent clients on serious charges of sexual assault, assault causing bodily harm, robberies, or other serious charges that involve significant legal issues and increased jeopardy? This will not foster confidence in the administration of justice or assist in ensuring finality in the criminal process.

Lastly, Bill C-75 also increases the limitation period for summary conviction offences from 6 to 12 months. This means that a charge may now be laid up to 12 months from the date of the offence. Here again, the offshoot of this extension will be an increase in case-load in the provincial courts, where cases formerly time-barred will now be adjudicated.

Changes to Domestic Violence Proceedings

Bill C-75 seeks to address the high recidivism rates in cases concerning intimate partner violence by making changes to the bail and sentencing regimes in cases of a domestic nature. A definition of "intimate partner" is also included in the amendments, and includes "a current or former spouse, common-law partner, and dating partner".[18]

The Bill imposes a reverse onus at bail for any accused facing charges of domestic violence if they have previously been convicted of a domestic violence offence. In such a situation, the burden will now lie with the accused to prove on a balance of probabilities that they do not pose a risk on any of the primary, secondary, or tertiary grounds for detention.

The maximum penalty for repeat offenders of domestic violence is also elevated by the new legislation. The new maximums are as follows:[19]

Maximum for First Offence	**Maximum for Subsequent Offence**

[18] Bill C-75 (Third Reading), clause 1(3).
[19] Bill C-75 (Third Reading), clause 294.

Between 2 and 5 years	5 years
Between five and 10 years	10 years
Between 10 and 14 years	14 years
Between 14 years and life	life

The Bill also clarifies the current approach of treating intimate partner violence as an aggravating factor in sentencing. Courts will be required to consider intimate partner violence and prior domestic convictions when determining sentencing.

Judicial Referral Hearings for Administration of Justice Offences

One of the laudable aspects of the bill its changes to the way that administration of justice (**"AOJ"**) offences (failure to appear, breach of probation, breach of bail conditions, etc.) will be dealt with. AOJ offences tie up a significant amount of time and resources. They represent approximately 10% of incidents reported by police, and 40% of adult criminal cases include at least one such offence. Many of these charges result in both pre-trial detention and jail time.[20] The above has been identified as a substantial drain on resources and a contributing factor to the overrepresentation of vulnerable populations in the Canadian justice system.

Bill C-75 details a new procedure for addressing AOJ offences.[21] The new approach aims to increase fairness and efficiency by taking personal circumstances into account before AOJ charges are laid. The procedure allows police or the courts to redirect AOJ charges in circumstances where the breach or failure has not caused harm to any victim. Instead of laying criminal charges, the police or the prosecutor may compel the accused to attend in front a judge at a "judicial referral hearing".

[20] Burczycka, M & C, Munch. (2015). *Trends in offences against the administration of justice*. Statistics Canada, Catalogue no. 85-002-X.

[21] Bill C-75 (Third Reading), clauses 212 and 234.

After reviewing the case, the judicial referral hearing judge has the discretion to 1) do nothing, 2) detain the accused, or 3) release them on new conditions. The judicial referral hearing does not dispose of matters with a finding of guilt or innocence. The fact that an accused is compelled to attend a judicial referral hearing will not be recorded for the purposes of their criminal record. In doing so, the judge has greater discretion to take into account the context of the breach.

Should an accused who has been summonsed fail to appear at their judicial referral hearing, they will not be charged with a failure to appear. However, they may still be charged with an AOJ offence for their original breach.

Case Management

The new legislation also features an expanded role for the judicial case management judge. Currently, a case management judge in an indictable proceeding may not be appointed until after the indictment is filed. Under the new legislation, a case management judge may be appointed at the earliest opportunity, and they are encouraged to take stronger judicial control of the proceedings by hearing procedural, evidentiary, and substantive concerns early on in the process.[22]

The new procedure also empowers case management judges to make a change of venue order where they determine that it would promote a fair and efficient trial and ensure the safety and security of victims or witnesses.[23]

Guilty Pleas

Currently, in order to accept a guilty plea by an accused, a court must be satisfied that:

(a) The accused is making the plea voluntarily;

[22] Bill C-75 (Third Reading), clauses 250 and 251.
[23] Bill C-75 (Third Reading), clauses 267.

(b) The accused understands that a guilty plea is an admission of the essential elements of the offence and the nature of the consequences of the plea; and

(c) The accused understands that the court is not bound by any agreement with the prosecutor.

Bill C-75 adds one additional step to this analysis: the requirement that the court must actively question whether the underlying facts support the charge before it accepts the guilty plea.

Victim Fine Surcharge

Bill C-75 incorporates the changes from Bill C-28 that allow for greater judicial discretion in imposing the victim fine surcharge. Rather than a mandatory surcharge on every count, the new rules permit a trial judge to waive the charge where the offender would face undue hardship. Given that the Supreme Court of Canada held that the current provision is unconstitutional,[24] the federal government is going to have to go back to the drawing board on this amendment. It is unclear whether the amendments that were contemplated in Bill C-75, namely making the victim fine surcharge presumptively payable upon a finding of guilt with an exemption for hardship, will continue to survive.

Youth Criminal Justice Act

The new legislation also includes changes to the Youth Criminal Justice Act. Primarily, these changes are aimed at restoring discretion to prosecutors and judges, rather than dictating mandatory considerations. First, the Bill removes the requirement for prosecutors to consider seeking an adult sentence for serious violent offences by youth. They may still impose such sentences, but they are no longer compelled to consider that option.

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[24] *R v. Boudreault,* 2018 SCC 58.

Second, YCJ judges are no longer required to consider lifting the publication ban for violent offences. The benchmark in such cases is still the rule that the publication of a youth offenders name is contrary to the interests of justice.

Third, the new rules seek to limit judicial resources in the adjudication of AOJ offences for youth. The amendments set out principles for encouraging extrajudicial measures as alternatives to prosecuting breaches and failures. The rules also seek to limit custodial sentences where such offences are prosecuted.

Zombie Laws

As discussed above, Bill C-75 seeks to clean up the *Criminal Code* by removing offences that have long been considered unconstitutional. For example, it officially removes the felony murder provision found at s. 230 of the *Criminal Code*. This provision was found to be unconstitutional in 1990 in *R v Martineau*, but was recently impugned by an Alberta judge who used it to convict Travis Vader of second-degree murder.[25]

Other zombie laws removed from the *Code* include:

(a) Anal intercourse (s. 159)
(b) Loitering (s. 179)
(c) Spreading false news (s. 181)
(d) Procuring a miscarriage (abortion) (s. 287)

Interestingly, Bill C-75 does not remove other zombie laws, including the definition of defamatory libel contained in s. 299(c). This definition was declared unconstitutional in 1998 in *R v Lucas*.[26]

Conclusion

[25] [1990] 2 SCR 633.
[26] [1998] 1 SCR 439.

Change is on the horizon. Complaining about what we had and what is gone will accomplish little. Instead, we must adapt and work within the new regime (whether Crown or Defence) to advance the interests of justice. Opportunities will still exist for those thoughtful and resourceful lawyers who see the new legislative framework as a challenge rather than an obstacle. It is just unfortunate that popular opinion and politics fueled criminal law reform rather than principle.

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What's Yours is Mine: Getting Paid Through Alternative Means

SUPREME COURT OF CANADA

CITATION: R. *v.* Rafilovich, 2019 SCC 51

APPEAL HEARD: January 25, 2019
JUDGMENT RENDERED: November 8, 2019
DOCKET: 37791

BETWEEN:

Yulik Rafilovich
Appellant

and

Her Majesty The Queen
Respondent

\- and -

Attorney General of Ontario,
Canadian Civil Liberties Association,
Criminal Lawyers' Association of Ontario and
British Columbia Civil Liberties Association
Interveners

CORAM : Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 87)	Martin J. (Abella, Karakatsanis, Gascon, Brown and Rowe JJ. concurring)
REASONS DISSENTING IN PART: (paras. 88 to 176)	Moldaver J. (Wagner C.J. and Côté J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. *v.* RAFILOVICH

Yulik Rafilovich *Appellant*

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Indexed as: R. *v.* Rafilovich

2019 SCC 51

File No.: 37791.

2019: January 25; 2019: November 8.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Proceeds of crime — Fine instead of forfeiture — Return of seized property for legal expenses — Property believed to be proceeds of crime seized from accused — Judge ordering that property be returned to accused for payment of reasonable legal expenses for his defence — Accused convicted — Sentencing judge deeming returned property to be proceeds of crime subject to forfeiture — Property used for legal expenses and no longer available for forfeiture — Whether fine instead of forfeiture may be imposed in relation to funds that have been judicially returned for payment of legal expenses for accused's defence — Criminal Code, R.S.C. 1985, c. C-46, ss. 462.34(4)(c)(ii), 462.37(3).

R was arrested for possession of cocaine for the purpose of trafficking. The police seized about $42,000 in cash, found when searching his car and apartments, as potential proceeds of crime under Part XII.2 of the *Criminal Code*. Before trial, R applied under s. 462.34(4)(c)(ii) of the *Criminal Code* for the return of the seized funds to pay for reasonable legal expenses associated with his case. The application was allowed and the funds returned to pay for reasonable legal fees, with conditions. R pled guilty to several offences at trial. The sentencing judge imposed a term of imprisonment and forfeiture of R's interest in an apartment, but declined to impose a fine instead of forfeiture equal to the amount of the returned funds spent by R on his legal fees as requested by the Crown under s. 462.37(3) of the *Criminal Code*. The Crown appealed. The Court of Appeal varied the sentencing order, adding a fine instead of forfeiture of $41,976.39, equal to the amount of the returned funds, and 12 months' imprisonment should R not pay his fine.

Held (Wagner C.J. and Moldaver and Côté JJ. dissenting in part): The appeal should be allowed and the Court of Appeal's order set aside.

Per Abella, Karakatsanis, Gascon, Brown, Rowe and **Martin** JJ.: Generally speaking, sentencing judges should not impose a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal expenses associated with an accused's criminal defence. The statutory discretion to impose a fine instead of forfeiture under s. 462.37(3) of the *Criminal Code* must be exercised in accordance with the purposes of the proceeds of crime regime. This regime as a whole seeks to ensure that crime does not pay or benefit the offender; however, by enacting the legal expenses return provision at s. 462.34(4)(c)(ii) of the *Criminal Code*, Parliament not only foresaw the possibility that seized funds may be needed to mount a defence, but explicitly allowed individuals to spend returned funds for this purpose. The return provision pursues two secondary purposes: providing access to counsel and giving meaningful weight to the presumption of innocence. These secondary objectives ensure fairness to the accused in criminal prosecutions. Clawing back reasonable legal expenses as a fine instead of forfeiture would, in most cases, undermine these purposes. If it turns out that the offender did not have a real financial need or the funds were not used to alleviate that need, it would be appropriate to impose a fine instead of forfeiture, as this would align with Parliament's intent. This might occur where there is wrongdoing in the return of funds application or in the administration of the return order or if the accused experiences an unexpected change in circumstances after the funds have been returned. In the context of this case, ordering a fine undermines

Parliament's intent in enacting the return provision. There is no evidence that R misrepresented his financial position, misused returned funds, or experienced any change in circumstances. Therefore, the sentencing judge's exercise of discretion was appropriate and should not be interfered with.

As the *Criminal Code* does not expressly indicate whether judicially returned funds ought to be subject to a fine instead of forfeiture, the resolution of this issue requires recourse to the rules of statutory interpretation. This analysis is guided by the words that Parliament has chosen to use, the way it intended to achieve its objectives, and the scheme it has put in place. Where the dispute involves multiple legislative objectives and the inter-relationship between two or more statutory provisions, the scheme of the Act and the objectives underlying each of the relevant provisions are particularly significant. Parliament had several objectives in mind when it enacted the proceeds of crime regime. Parliament's primary goal was to ensure that crime does not pay and that it does not benefit the offender. Forfeiture is intended to deprive offenders of the proceeds of their crime. Seizure allows the state to take control of property believed to be proceeds of crime before trial and sentencing, to ensure it remains available for possible forfeiture. The fine instead of forfeiture provision ensures that, if accused persons are able to keep proceeds of crime throughout criminal proceedings, they must in the end pay a fine equivalent to the value of the property that is not available to be forfeited.

The legal expenses return provision shows that Parliament intended that the secondary objectives underpinning it — providing access to counsel and giving meaningful weight to the presumption of innocence — must be balanced against the primary objective of ensuring that crime does not pay. The wording and the elaborate and detailed nature of the return provision indicates that Parliament clearly and deliberately sought to address an accused's need for legal counsel, in the limited and narrow circumstances where the accused has no other assets or means and no other person appears to be the lawful owner of or lawfully entitled to possession of the property. The secondary objectives reflect an underlying intention to promote fairness in criminal prosecutions that runs through the proceeds of crime scheme. They constrain the pursuit of the primary objective. The return provision was intended to respect the principle of fairness in criminal prosecutions, including concepts of fair notice and reliance. It can be expected that accused people will rely on a court order authorized by a specific statutory scheme and those accused persons cannot reasonably know that doing so will lead to additional punishment. Also, accused persons who understand that judicially returned funds will be clawed back later may not apply for the return of funds and represent themselves instead. When an accused person cannot access legal counsel, the presumption of innocence suffers because it is difficult for lay persons to effectively navigate the complexity of criminal cases. Imposing retroactive penalties on accused persons who rely on the presumption of innocence undermines the presumption and the protections it affords.

The judicial return of funds to pay for a lawyer is not the type of benefit that Parliament sought to take away by way of a fine. It is a tightly controlled benefit Parliament expressly intended for a narrow category of accused persons in need. In the instant case, the return provision allowed R, who had no other assets or means to pay for his defence, an opportunity to access seized funds under close judicial scrutiny and tight conditions. It is undeniable that there is less money available to be forfeited to the Crown but a fundamental purpose of the criminal justice system is to provide a fair process to achieve just results, not to extract maximum retribution at any cost. Seized property returned pursuant to a judicial order is not thematically analogous to the reasons listed in s. 462.37(3) of the *Criminal Code* for ordering a fine instead of forfeiture. All of the circumstances listed reflect Parliament's concern that an accused person might hide, dissipate or distribute property that may later be determined to be proceeds of crime. The accused's lawyer is not some unknown person receiving funds by way of an uncontrolled, private transaction. They have been specifically authorized by a judge to be paid in aid of the accused's defence. Further, Parliament has set out its desired statutory requirements for the judicial return of seized funds. Nothing indicates any intention to require the accused to demonstrate, in order to avoid the imposition of a fine instead of forfeiture, that the nature of the proceedings are such that it is essential to have counsel. Accordingly, not imposing a fine instead of forfeiture in relation to funds that have been judicially returned for the payment of reasonable legal expenses associated with an accused's criminal defence will generally be most faithful to Parliament's intent.

Per Wagner C.J. and **Moldaver** and Côté JJ. (dissenting in part): Imposing a fine in lieu of forfeiture where an offender has used proceeds of crime to pay for his or her own defence achieves the forfeiture regime's primary objective of ensuring crime does not pay; and it does not undermine the utility of the legal expenses restoration provision, which facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. There is nothing inconsistent about allowing accused persons, who are presumed innocent, to access seized funds to pay for legal counsel but requiring offenders, who are proven guilty, to pay them back in the event that they are determined to be proceeds of crime. However, there is an important exception to this general rule: where a sentencing judge is satisfied that representation by counsel was essential to the offender's constitutional right to a fair trial, the judge should exercise his or her limited discretion not to impose a fine in lieu of forfeiture. This interpretation gives proper effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel, and more particularly, the constitutional right to state-funded counsel in limited circumstances.

Part XII.2 of the *Criminal Code*, which governs the seizure, restraint, and forfeiture of proceeds of crime, seeks to ensure that crime does not pay. To further this objective, it permits the state to seize and detain property believed on reasonable grounds to be proceeds of crime, thereby preserving it and facilitating the enforcement of any future forfeiture order. At the same time, Parliament recognized that the seizure and detention of property that is reasonably believed, though not yet proven, to be

proceeds of crime may have a significant financial impact on accused persons, including by limiting their ability to access counsel. To address this concern, s. 462.34 of the *Criminal Code* permits accused persons to apply for a restoration order authorizing the release of seized property to pay for various expenses — one being reasonable legal expenses — where they have no other means available and no other person appears to be the lawful owner of or lawfully entitled to possession of the seized property. In creating this provision, Parliament struck a balance between ensuring an effective forfeiture regime and permitting otherwise impecunious accused persons to access funds for certain legitimate purposes. However, a court must, when sentencing an offender for an indictable offence, order the forfeiture of property determined to be proceeds of crime. Alternatively, where a court is satisfied that a forfeiture order should be made in respect of any "property of an offender", but the property cannot be made subject to such an order, the court "may" order a fine in lieu under s. 462.37(3) of the *Criminal Code*.

Offenders who have used proceeds of crime to pay for their own defence derive a benefit from their crime and should generally be required to repay that benefit through a fine in lieu of forfeiture. This follows from a straightforward application of the primary objective of the proceeds of crime regime — namely, ensuring that crime does not pay. The proper interpretation of s. 462.37(3) of the *Criminal Code* reveals that where seized funds are released to an offender and then transferred to a lawyer, both prerequisites to imposing a fine in lieu are met. First, these funds are captured in the broad definition of "property of an offender", which includes property originally in

the possession or under the control of any person. Second, a transfer of released funds to a lawyer cannot be made subject to a forfeiture order. Section 462.37(3) sets out a non-exhaustive list of example circumstances where this criterion is met, one of which is where property has been "transferred to a third party". Parliament could have limited this class of transfers but did not. In the absence of any limiting language, the grammatical and ordinary sense of "transfer" — to move a thing from one place to another — must prevail. A judicially authorized transfer of released funds to a lawyer is therefore a "transfer to a third party". This also fits comfortably within the consistent theme running through the examples listed in s. 462.37(3), which is simply that the property cannot be made subject to a forfeiture order.

There is an exception to the general rule that a fine in lieu should be imposed where an offender has used proceeds of crime to pay for his or her own defence. Where a sentencing judge is satisfied, applying the test set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), that representation by counsel was essential to the offender's constitutional right to a fair trial under ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, the judge should exercise his or her limited discretion not to impose a fine in lieu in respect of the released funds. The language of s. 462.37(3) is permissive and confers a limited discretion not to impose a fine. This limited discretion must be exercised in a manner consistent with the spirit of Part XII.2 as a whole. Part XII.2 seeks to balance the need to ensure an effective forfeiture regime and the constitutionally protected right to counsel. To properly understand this balance, however, it is first necessary to examine what the constitutionally protected right to

counsel does — and does not — entail. Neither s. 10(*b*) nor any other *Charter* right postulates a general right to legal assistance. The right to state-funded legal counsel in criminal proceedings grounded in ss. 7 and 11(*d*) of the *Charter* is limited to circumstances where legal aid has been denied, the accused lacks other means, and representation by counsel is essential to the accused's constitutional right to a fair trial. Thus, where an offender can show that he or she was constitutionally entitled to state-funded legal counsel, it would be inconsistent to order the offender to pay back his or her legal expenses through a fine in lieu. This approach gives proper effect to Parliament's objective of ensuring an effective forfeiture regime while still vindicating the constitutionally protected right to counsel. To go further would not only upset the careful balance struck by Parliament, it would effectively grant a constitutional entitlement where none exists.

Contrary to the majority's approach, the primary objective of the proceeds of crime regime need not be sacrificed to achieve the restoration provision's "secondary purposes" of providing access to counsel, giving meaningful weight to the presumption of innocence, and giving effect to the underlying intention to ensure fairness in criminal prosecutions. Once the respective roles of the restoration provision and the fine in lieu provision are properly understood, it becomes clear that all of the statutory scheme's objectives can be achieved. The restoration provision facilitates access to counsel in a manner that is both fair and consistent with the presumption of innocence. But where a restoration order is followed by a conviction, an "accused" becomes an "offender", and a fine in lieu should be ordered because the primary objective of ensuring that crime

does not pay takes centre stage. While Parliament intended to give accused persons the benefit of having access to seized funds to pay for reasonable legal expenses, it did not intend to give offenders the benefit of never having to pay them back. Had that been Parliament's intent, it could easily have enacted such a provision.

In this instance, the funds transferred to R's lawyer qualified as R's property and were determined to be proceeds of crime. They could not be made subject to a forfeiture order. Consequently, the authority to order a fine in lieu was engaged. In exercising her limited discretion not to invoke this authority, the sentencing judge did not consider whether representation by counsel was essential to R's constitutional right to a fair trial and the record is insufficient to decide this issue. The Court of Appeal's order should therefore be set aside and the case remitted to the sentencing judge for determination.

Rafilovich: Accessing Seized Funds Without Tears

By Gregory Lafontaine

> ...I do not agree with the Crown's contention that lawyers' fees are like hairdressers' fees: that they represent the exercise by an accused of discretion in relation to disposable income. Although Parliament's intention is to strip a convict of the right to exercise that general kind of discretion, it characterized lawyers' fees as a special type of expenditure....
>
> per Veit J. in *R. v. Gagnon* (1993), 80 C.C.C. (3d) 508 (Alta. Q.B.) at p. 512.

Measured by the clock on the wall, Newfoundland is half an hour ahead of the rest of the Atlantic time zone. By virtue of *R. v. Appleby*[1], a 2009 decision of the Newfoundland and Labrador Court of Appeal, when it came to the use of seized funds as legal fees, Canada's youngest province was a jurisprudential decade ahead of the rest of the country.

Until last Friday, when the Supreme Court of Canada released its decision in *R. v. Rafilovich*[2], only the Newfoundland and Labrador Court of Appeal had correctly determined that Parliament had intended that seized funds released by a judicial Order for use as legal fees should, generally, not be the subject of a fine in lieu of forfeiture. Things have changed, and as happens ever so rarely, the change is entirely for the better.

By a six to three majority, the Supreme Court of Canada in *Rafilovich* held that, except in a set of discrete circumstances, a fine in lieu of forfeiture should not be imposed on an individual who, pursuant to Judicial Order, has accessed and used seized funds for legal fees. The three in the minority dissented, but only in part. The result recognized legal fees as a unique and important type of expenditure.

The Individuals Requiring Accessing Seized Funds for Legal Fees

The statutory provision permitting access to seized funds for legal fees impacts a discrete but important class of individuals. The members of this class have had their financial resources placed out of their reach, either by seizure or by restraint Order, pending the conclusion of a related criminal prosecution, and without those resources are unable to secure representation by counsel to defend them against that criminal prosecution.

[1] 2009 NLCA 6
[2] 2019 SCC 51

Section 462.34(4) of the *Criminal Code* reads:

> (4) On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit,
>
> ...
>
> (c) for the purpose of
>
> ...
>
> (ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph ....
>
> ...
>
> if the judge is satisfied that the applicant has no other assets or means available for the purposes set out in this paragraph and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property.

Writing for the majority, Martin J. explained the rationale for the provision, which was a component of a package of proceeds of crime provisions, as a measure to ensure that individuals whose funds had been seized, and thereby placed out of their reach, would have a mechanism to access those funds to permit them to be represented by counsel.

> [2] In 1988, Parliament enacted a comprehensive and distinct legal regime to address proceeds of crime, which now forms Part XII.2 of the Code. The overall goal of this complex and multi-factored regime was to ensure that "crime does not pay", and to deter offenders by depriving them of their ill-gotten gains.
>
> [3] Under this regime, the state may seize property from accused persons where the property is believed, on reasonable and probable grounds, to be proceeds of crime. [Footnote omitted.] The seized property is then held for possible forfeiture to the Crown at a future sentencing hearing (ss. 462.32(1), 462.33(1), 462.33(2) and 462.33(3)). [Footnote omitted.] This initial seizure means that accused persons, who are presumed innocent and have not been found guilty of any crime, may nevertheless have their property taken away and held by the state prior to and throughout trial. If their property had not been seized, these accused persons would have had unfettered access to their property to finance their defence. But, when some or all of their assets have been seized, many accused persons will not be able to afford to hire lawyers to answer the charges against them. Parliament was alive to the serious problems created by such a situation and recognized the need to alleviate them.

> [4] In response, Parliament created a specific procedure within the Code's proceeds of crime regime that allows accused persons to seek the return of some or all of the seized property for certain designated purposes if the accused has "no other assets or means available" (s. 462.34(4)). [Footnote omitted.] Parliament's list of approved purposes expressly includes reasonable legal expenses (s. 462.34(4)(c)(ii)). Under this procedure, which occurs early in a criminal proceeding, an accused applies to a judge to ask for the return of seized property to pay for a lawyer (s. 462.34(1)). Thereafter, two separate hearings are held, evidence is tendered, and the judge determines: (1) whether the accused actually needs any of the seized property to pay for reasonable legal fees (ss. 462.34(4) and 462.34(5)); (2) what amount may be returned; and (3) the appropriate terms related to the return of the funds (s. 462.34(4)). The return of any seized funds is, therefore, done under the authority of a judicial order. Returned funds are normally held in trust by legal counsel, to be used only for the defence of the accused, and such funds are no longer considered to be seized property held by the state.
>
> [Underlining Added.]

Some Key Applicable Principles

- The presumption of innocence is not only important to the characterization of the charged individual, it also means that the funds at issue cannot be viewed as the proceeds of crime. They are, presumptively, perfectly legitimate funds which, but for their being held by the state, would be properly provided by the individual and accepted by the individual's counsel in payment of legal fees.

- It is not a function of the release of the funds for legal fees that the individual should or can properly be characterized as having a state-funded defence. The funds belong to the individual and, upon being released, have been earmarked for use by that individual to pay for his or her legal defence.

- Because the individual is not receiving a state-funded defence, consistent with the right to counsel of choice, the individual is free to retain a lawyer at a mutually agreed hourly rate which is not in any sense tethered to the applicable rate paid by a legal program. The rate, however, must not be unreasonable, which is determined at the time the Order for the release of funds is being made. The applicable legal aid rate is listed as a factor that must be considered in assessing reasonableness, but that is all.

- There is no requirement in the applicable legislation, such as in a *Rowbotham* application, requiring that the individual applying for their release demonstrate that representation by counsel is necessary to ensure the individual receives a fair trial. This is not a state-funded defence. The individual is using his or her own funds. A requirement unique to state-funded defences should not be imported into the applicable legislation.

The Applicable Process for the Return of Seized Funds

Martin J. described the process of seeking the return of seized funds for legal fees as involving two hearings as follows:

> [35] Through the return provision, Parliament created a distinct and special process that allows an accused to reclaim seized property for specific purposes listed in s. 462.34(4), which include reasonable legal expenses. Parliament prescribed a particular application procedure, which involves two hearings before a judge; required applicants to show that they had no other assets or means; prohibited the return of the funds where a third party appeared to be the lawful owner or lawfully entitled to possession of the property; allowed a judge to decide what amount should be returned; ensured that any return is effected by judicial order that can specify amounts, number of counsel, etc.; and provided for a subsequent review of these amounts to ensure they were in fact reasonable.
>
> [36] Often, a proposed budget is submitted to the court *in camera* (as in *R. v. Davidson*, 2016 ONSC 7440, at para. 21 (CanLII)), but where this is not done, the judge may fix the allowable hours and incidental fees (*R. v. Alves*, 2015 ONSC 4489, at paras. 46-51). Further, s. 462.34(5) requires the judge to "take into account the legal aid tariff of the province" and, under s. 462.34(5.2), the legal fees may be taxed (that is, reviewed or audited). The judge's inquiry into the financial situation of the accused "must be more than cursory" and "[a] significant and in-depth review of the facts is required" (*R. v. Borean*, 2007 NBQB 335, 321 N.B.R. (2d) 309, at para. 8). The seized funds will then be returned in accordance with the terms of the judicial order.
>
> [37] The wording of the relevant provisions and the elaborate and detailed nature of the return provision indicates that Parliament clearly and deliberately sought to address an accused's need for legal counsel, but only in limited and narrow circumstances: (1) where the accused has "no other assets or means" and, therefore, access to the funds is truly necessary; and (2) where "no other person appears to be the lawful owner of or lawfully entitled to possession of the property" (s. 462.34(4)). The return provision is thus intended to provide a safety net for those accused persons who are in financial need.

Is there a Requirement of an Application for Legal Aid?

Martin J. expressly declined to determine whether the "no other assets or means" requirement required that the legal aid application process be exhausted before an application pursuant to section 462.34(4) would be available, stating:

> "Footnote 5: There is debate in the jurisprudence about whether an accused must apply for legal aid before obtaining a return order. This issue was not argued on this appeal and I do not intend to resolve it here."

In my view, the requirement that an individual exhaust efforts to secure funding from legal aid is, in large measure, a monumental waste of time and resources. In Ontario, at least, the process can add several months and sometimes as much as a year, to the time elapsed to the completion of the prosecution. There is an initial application process, an appeal to the local area committee and, finally, an appeal to the provincial director. In the end, it is likely a completely empty exercise as, for individuals who have had any meaningful amount of funds seized from them, efforts to secure legal aid seem doomed to failure.

As Martin J., at paragraph [65], noted, "… accused persons often cannot receive legal aid because the seized property is attributed to them and effectively disqualifies them from receiving assistance, even though they cannot actually access their seized property." If the existence of seized funds in a specific amount spells the inevitable doom of any effort to secure legal aid funding, it might be that a statement to that effect from legal aid will serve as an effective proxy for a months' long digression through the legal aid application and appeals processes.

<u>The Forfeiture Stage of the Process</u>

If, at the conclusion of the prosecution, the seized funds are not found to be the proceeds of crime, the individual can be said to have used the seized funds to obtain legal representation by a lawyer of his or her choice at a rate contracted by the individual and the lawyer. The funds were the property of the individual, who had relative autonomy on how to use the funds for legal fees.

However, when at the conclusion of the prosecution, the funds have been found to be the proceeds of crime, the issue arises which was central to the *Rafilovich* case of whether the funds released for legal fees should be the subject of a fine in lieu of forfeiture.

In *Rafilovich*, in the Judgment that was overturned by the Supreme Court of Canada, the Ontario Court of Appeal endorsed a line of cases which held that funds released for legal fees were no different than any other funds which were, for one reason or another, unavailable for forfeiture. Therefore, the dissipation of the funds available for forfeiture by their use for legal fees would, generally, result in the imposition of a fine in lieu of forfeiture. The majority in *Rafilovich* recognized the unfairness visited upon individuals who, if they wanted legal representation, had no choice but to risk these consequences and apply for the release of funds for legal fees.

At paragraphs [59] & [60], Martin J. articulated some components of the unfairness visited upon an individual who risked a fine in lieu of forfeiture by obtaining the release of seized funds for legal fees, as follows:

> [59] Further, imposing a fine on judicially returned funds raises concerns of notice and reliance that are rooted in the principle of fairness to the accused in criminal prosecutions. It can be expected that accused people will rely on a court order authorized by a specific statutory scheme. Those accused persons cannot reasonably know that doing so will lead to additional punishment. Yet "[t]he rule of law requires that laws provide in advance

what can and cannot be done" (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 14; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, at para. 3). The general imposition of a fine instead of forfeiture on judicially-returned funds would not respect principles of fair notice, further undermining Parliament's intent to create a fair procedure that enables access to counsel and ensures the presumption of innocence.

> [60]My colleague minimizes these concerns by stating that while the "choice" to retain counsel in the face of having a fine imposed on the judicially returned funds "may not be an easy one, our criminal justice system does not promise an experience free of difficult choices" (para. 142). With respect, there is a difference between a difficult choice and no real choice at all. The "choice" faced by an accused person in this instance is a Hobson's choice - an apparently free choice in which there is effectively only one option. In this case, that option is to go without legal representation. This Court has cautioned against creating a Hobson's choice like this in the criminal law context (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 40).

Section 462.37(3) lists five ways that the proceeds of crime may have become unavailable for forfeiture, which if established would permit the imposition of a fine in lieu of forfeiture, as follows:

> (3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property
>
> (a) cannot, on the exercise of due diligence, be located;
>
> (b) has been transferred to a third party;
>
> (c) is located outside Canada;
>
> (d) has been substantially diminished in value or rendered worthless; or
>
> (e) has been commingled with other property that cannot be divided without difficulty.

By virtue of the inclusion of the words "in particular", it was held that the list was not exhaustive but would embrace other circumstances, so long as they are similar to the five that were expressly listed. In *Rafilovich*, the Crown took the position that the funds had "been transferred to a third party."

Transfer or No Transfer?

The issue of whether the provision of funds to defence counsel pursuant to a Judicial Order amounted to a "transfer" was addressed in a section of the majority Judgment entitled, not all that surprisingly, "E. The Payment of Reasonable Legal Fees Is Not the Kind of Transfer to a Third Party Contemplated in section 462.37(3)".

> [71] In this case, the Crown's argument focused on the notion that the property judicially returned to the accused for legal expenses had "been transferred to a third party" — Mr. Rafilovich's lawyer — and thus fell within s. 462.37(3)(b). Even if the judicial return of funds to pay legal fees constitutes a "transfer" to a third party, judges retain a discretion to nevertheless decline to order the fine where it would be contrary to the objectives of the return provision. In my view, the judicially authorized payment of reasonable legal fees is not the kind of "transfer" that Parliament intended to capture in this subsection.
>
> [72] The key distinguishing feature here is judicial authorization. The returned funds are never held or transferred by the accused person: they are sent directly from the state – with judicial permission – to a designated person for permitted purposes under strict judicial supervision. The accused's lawyer is not some unknown person receiving the funds by way of an entirely uncontrolled, private transaction, as was the case in *Lavigne*. Rather, they have been specifically authorized by a judge through a return order to be paid at a stipulated hourly rate for specified services in aid of the accused's defence. As the Newfoundland and Labrador Court of Appeal held in *Appleby*, it is inappropriate "to treat the transfer of funds upon the order of a judge, specifically authorized to so order for a purpose and in the limited circumstances expressly authorized by the statute, as being activities of the same character as" funds that are transferred privately to third parties with no judicial oversight (para. 53).
>
> [73] Nor is the judicially-authorized use of property for reasonable legal fees thematically analogous to any of the other listed reasons for ordering a fine instead of forfeiture. All of the circumstances listed in s. 462.37(3) reflect Parliament's concern that an accused person – not a judge – might hide, dissipate or distribute property that may later be determined to be proceeds of crime. …
>
> …
>
> [74] Thus, in my view, the payment of judicially-returned funds to the accused's lawyer is not the kind of "transfer" that Parliament intended to capture with the fine instead of forfeiture provision. Therefore, even if the transfer of funds to a lawyer is technically a transfer to a third party, judges generally should not exercise their discretion to fine an accused for their use of returned funds to pay for their reasonable legal expenses.

As with the discussion of the applicability of the notion of "benefit", it is not made entirely clear whether or not the movement of the client's funds, by virtue of an Order made pursuant to section 462.34(4), from the custody of the State to the defence lawyer's trust account amounts to a transfer within the meaning of section 462.37(3)(b). The discussion ends with the resolution of the issue left unresolved… "…even if the transfer of funds to a lawyer is technically a transfer to a third party…"

In the end, in view of the discussion that informs the exercise of the judicial discretion to impose a fine in lieu of forfeiture, the resolution of the "transfer" issue is unimportant.

The Exercise of Judicial Discretion Not to Impose a Fine in Lieu of Forfeiture

At the beginning of this section, Martin J. reviews the circumstances identified in *Lavigne*[3] pertaining to when the judicial discretion contained in s. 462.37(3) should be exercised not to impose a fine in lieu of forfeiture (*Lavigne*, it should be recalled, was not a case involving the release of funds for legal fees). Martin J. then went on to add another circumstance: "that the accused was authorized by court order to spend returned funds on reasonable legal expenses." Consequently, it would seem very safe to posit that funds released for legal feels will, presumptively, not be made subject to a fine in lieu of forfeiture.

There will be, however, some circumstances, if established by the Crown, that will effectively rebut the presumption and permit the exercise of the discretion to impose a fine. Indicating that it is not an exhaustive list, Martin J., in paragraph 77, provided three examples:

> - some kind of wrongdoing in the return of funds application, such as the misrepresentation of the accused's financial position;
>
> - wrongdoing by the offender in the administration of the return order, such as funds not being applied in the manner contemplated, expenditures for purposes outside the scope of the return order, or fees in excess of judicially-authorized limits; and
>
> - the accused experiences an unexpected change in financial circumstances after the funds have been returned but before sentencing, such that recourse to returned funds is no longer necessary after the accused became aware of the changed circumstances.

It might be fair to characterize the circumstances permitting the imposition of a fine in lieu of forfeiture as only available where the evidence establishes that (1) the Order releasing the funds was fraudulently obtained, (2) the funds were dissipated in a manner falling outside of the terms of the Order (i.e. were used, in whole or in part, for something other than reasonable legal expenses, or (3) the funds were used for legal fees after the client became aware of a change in their circumstances which,

[3] *R. v. Lavigne*, 2006 SCC 10

from the time of the change, undermined the foundational condition for the Order, being the absence of other resources to fund the defence.

Consequently, so far as the transfer issue is concerned, there would be two ways of looking at the implications of the analysis:

> i) that the Order to permit use of the funds for legal fees amounted to a transfer, but only in a technical sense, and which would be cloaked with a presumptive immunity from the subsequent imposition of a fine in lieu of forfeiture, unless the Crown established that there were circumstances in the obtaining or use of the funds that brought it outside the use intended by Parliament in respect of legal fees; or
>
> ii) that the Order does not result in a "transfer", and therefore cannot be subject to a fine in lieu of forfeiture, unless the funds have been obtained and used in a manner inconsistent with that intended by Parliament, in which the Court will find that there has been a transfer.

In the end, this might well be a distinction without a difference. The bottom line of the Judgment in *Rafilovich* will make a real difference.

Many Happy Returns (of Seized Funds)

In the end, the *Rafilovich* case stands for one relatively straightforward yet, for a specific cross-section of clients and for the criminal defence bar, an important principle, which was articulated by Martin J. at paragraph [85] as follows:

> "generally speaking, a fine instead of forfeiture should not be imposed on funds that have been judicially returned for the payment of reasonable legal expenses."

Before *Rafilovich*, the regime that had prevailed in Ontario was dependent on the outcome of the trial. Put in very general terms, if there was an acquittal in relation to the alleged proceeds of crime, there would not be a fine in lieu of forfeiture. On the other hand, if there was a conviction, a fine in lieu of forfeiture was almost inevitable.

Much of the unfairness was in the uncertainty. At the time of the application to use the seized funds as legal fees, the verdict would be unknown. The possibility that the client would end up being fined or, in default, imprisoned for having used the seized funds to pay legal fees had the effect of putting the lawyer in what could fairly be characterized as a conflict of interest. Lawyers have an interest in being paid for their services. Consequently, a practice had developed of sending clients for independent legal advice when deciding whether to apply for seized funds to pay their lawyers. *Rafilovich* has put an end to what was often a very difficult situation for defence counsel.

Some individuals, faced with the uncertainty existing under the former regime, would forgo counsel, rather than risk what was in fact an additional, and often very harsh, punishment. Mr. Rafilovich had been sentenced to fourteen months' imprisonment for the convictions. He would have served twelve more months'

imprisonment in default of the fine in his matter, which would have almost doubled his time in jail. The right to counsel and the presumption of innocence are both enhanced by the *Rafilovich* decision. And in respect of one cross-section of our clientele, receiving an appropriate fee for our work has just become a lot less problematic.

CRIMINAL LAWYERS' ASSOCIATION

47th ANNUAL FALL CONFERENCE

NOVEMBER 15-16, 2019

Emerging Developments in DNA Technology – transference and trace evidence

PROBABLY CAUSE FOR CONCERN:

WHY DEFENCE COUNSEL SHOULD BE CHALLENGING PROBABILISTIC GENOTYPE EVIDENCE

JILL R. PRESSER,
PRESSER BARRISTERS

MOHAN CRITERIA

- RELEVANCE
- NECESSITY IN ASSISTING THE TRIER OF FACT
- ABSENCE OF AN EXCLUSIONARY RULE
- PROPERLY QUALIFIED EXPERT

THRESHOLD RELIABILITY IS ESSENTIAL

"A concern about the reliability of evidence is a fundamental component of the law of evidence. Threshold reliability plays an important role in determining whether proposed expert evidence is admissibile under the *Mohan* test. Reliability can be an important consideration in determining whether the proposed expert evidence is relevant and necessary; whether it is excluded under any exclusionary rule, including the rule that requires evidence to be excluded if its prejudicial effect exceeds its probative value; and whether the expert is properly qualified. Trial judges should be vigilant in exercising their gatekeeping role with respect to the admissibility of such evidence. In particular, they should ensure that expert scientific evidence that does not satisfy standards of threshold reliability be excluded, whether or not the science is classified as novel."

Report of the Inquiry Into Pediatric Forensic Pathology in Ontario, Recommendation 130

TYPICAL "OLD SCHOOL" DNA – STRAIGHTFORWARD ANALYSIS

SINGLE SOURCE

PREDOMINANTLY BODILY FLUIDS

HIGHER QUANTITIES OF DNA

THE "GOLD STANDARD": RANDOM MATCH PROBABILITY (RMP)

- A profile is deduced from the crime scene sample
- A profile is obtained from the suspect
- A comparison is made
- The analyst calculates how rare that profile is, based on databases estimating the frequency of the specific genetic markers in a given population
- The analyst then testifies to: (a) the rarity of the profile; and (b) whether the two profiles match
- This is an expression of a non-evaluative fact: the observed rarity of certain genetic markers

BUT HOW TO ANALYZE TRACE EVIDENCE???

HOW TO FIND QUANTITATIVE EVIDENTIARY VALUE OF TRACE EVIDENCE?

- SWABS OF OBJECTS AT OR NEAR CRIME SCENE
- SMALL SAMPLES
- MORE THAN ONE PERSON'S DNA
- POORER QUALITY OF DNA

SOLUTION: PROBABILISTIC GENOTYPING

ALGORITHMIC PROGRAMS THAT INTERPRET THE RESULTS OF COMPLEX DNA MIXTURES

LIKELIHOOD RATIO (LR): IS A OR B MORE LIKELY?

LR compares the probability of two different hypotheses that seek to a explain a piece of evidence:

the likelihood that the suspect IS the source of some of the DNA in the mixture

VS

the likelihood that the suspect IS NOT the source of some of the DNA in the mixture

RELIABILITY PROBLEM :
LR DOES NOT TELL HOW OBJECTIVELY LIKELY EITHER HYPOTHESIS IS

RELIABILITY PROBLEM

LRS DO NOT EXPRESS THE PROBABLE LIKELIHOOD OF THE TRUTH OF EITHER HYPOTHESIS

LRS DO NOT EXPRESS THE PROBABLILITY THAT THE DEFENDANT IS THE SOURCE OF THE DNA

BAYESIAN PROBABILITY ANALYSIS IS REQUIRED

National Research Counsel, in the Evaluation of Forensic DNA Evidence: "[t]he likelihood ratio is still one step removed from what a judge or jury truly seeks – an estimate of the probability that a suspect was the source of a crime sample, given the observed profile of the DNA extracted from samples."

To convert LR to a relevant probability, a Bayesian probability analysis must be performed.

Bayes' Theorem describes the process by which information relevant to the probability of an event is combined with the prior probability of an event to produce a posterior probability.

BAYESIAN ANALYSIS UNDERMINES THE PRESUMPTION OF INNOCENCE AND CROWN'S BURDEN OF PROOF BARD

We cant know the prior probability of the defendant's contribution of DNA to the sample. It must be assumed.

If we assume zero probability of the defendant's contribution of DNA to the sample, consistent with the presumption of innocence, the result will be zero posterior probability.

If we assume some probability that the defendant contributed DNA to the sample, we are presuming guilt. This violates the presumption of innocence.

"… If the presumption of innocence were factored into Bayes' Theorem, the probability of paternity statistic would be useless. If we assume that the presumption of innocence standard would require the prior probability of guilt to be zero, the probability of paternity in criminal cases would always be zero because Bayes' Theorem requires the paternity index to be multiplied by a positive prior probability in order to have any utility. In other words, Bayes' Theorem can only work if the presumption of innocence disappears from considerations."

-*State v Skipper*, 228 Conn. 610

RELIABILITY PROBLEM

THERE IS NO REAL WAY TO TEST THE RESULTS BECAUSE THERE IS NO UNDERLYING TRUE VALUE

RELIABILITY PROBLEM

It is the choice of the crime lab, working with the prosecution, as to what hypotheses are tested. There is no defence input. There is often more than one potential defence hypothesis available. Choice of hypotheses tested will impact on the LR that results.

RELIABILITY PROBLEM

The statistical, biological, and computer models used by different probabilistic genotyping programs (eg STRmix, TrueAllele) differ greatly.

Variations in the models of different programs result in different LRs

In *People v Hillary*: STRmix produced an inclusionary statistic while TrueAllele did not.

ULTIMATE ISSUE PROBLEM

- Complex math and science distract the trier from the true nature of probabilistic genotyping evidence: that is has no underlying true value
- This problem is heightened because it is cloaked with the credibility of science, the infallibility of DNA evidence

MORE BASES FOR CHALLENGE

***R. v. J.-L.J.*, [2000] 2 S.C.R. 600 – criteria for admission of novel scientific evidence:**

1. whether the technique has been and can be tested
2. whether the technique has been subject to peer review and publication
3. the known potential rate of error
4. whether the techniques has been generally accepted in the relevant scientific community

MORE BASES FOR CHALLENGE

See:

-USA v Gissantaner, United States District Court, Western District of Michigan, 1:17-cr-130, Oct 2019

-Bess Stiffelman, "No Longer the Gold Standard: Probabilistic Genotyping is Changing the Nature of DNA Evidence in Criminal Trials," 24 Berkeley J. Crim. L. 110 (2019)

-Katherine Kwong, "The Algorithm Says You Did It: The Use of Black Box Algorithms to Analyze Complex DNA Evidence," 31 Harvard J LT No 1, 271

-Exec Office of the President, President's Council of Advisors on Sci & Tech, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 2 (2016)

ENFSI GUIDELINE FOR EVALUATIVE REPORTING IN FORENSIC SCIENCE

A PRIMER FOR LEGAL PRACTITIONERS

This document is a primer on the ENFSI Guideline that can be downloaded from:

http://enfsi.eu/sites/default/files/documents/external_publications/m1_guideline.pdf

The ENFSI (European Network of Forensic Science Institutes, http://www.enfsi.eu/) is a key organisation in Europe bringing together more than 60 laboratories with a vision to share common quality standards and exchange knowledge and expertise. Twenty years after its foundation, ENFSI is now a pre-eminent voice on forensic science in Europe with privileged relationships with institutions such as the European Commission (with the privileged status of an EU-monopolist), Europol, CEPOL, Eurojust and Interpol.

European Network of
Forensic Science Institutes

With the financial support of the Prevention of and Fight against Crime Programme of the European Union European Commission - Directorate - General Justice, Freedom and Security

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ENFSI guideline for evaluative reporting in forensic science

A Primer for Legal Practitioners

This document is a primer on the ENFSI Guideline that can be downloaded from:

http://enfsi.eu/sites/default/files/documents/external_publications/m1_guideline.pdf

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(version 0.10 - 2016)

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Purpose of the Guideline

In Europe, there currently is no common framework for evaluating and reporting scientific findings to mandating authorities and parties. The practice is diverse, varies among countries and across forensic disciplines. It may even vary within institutions and laboratories.

A diversity of approaches in the assessment of the scientific findings

Compare these two statements taken from practice:

(1) *The matching glass fragments recovered on the garment of Mr S. are consistent with coming from the broken window.*

(2) *The matching glass fragments recovered on the garment of Mr S. are more likely to be found if Mr S. broke the window rather than if he had nothing to do with the incident.*

The first statement only considers the results given one version of the events and thus is unbalanced and potentially misleading. The second statement offers a relative assessment of the findings given two stated scenarios.

Such diversity is easy to observe among the members of the European Network of Forensic Science Institutes (ENFSI). The ENFSI working groups deal with areas of practice such as firearms, drugs, biological traces (DNA), marks (fingerprints, footwear), documents, microtraces (glass, fibres, hair, soils, plants), explosives, audio (voice), video (face, gait) and digital information, crime scene investigation, road accidents and fire investigation. These are the areas targeted by the ENFSI Guideline.

This diversity has adverse consequences. First, the lack of declared common criteria – and adherence thereto – for assessing and reporting scientific findings offers no guarantee that the scientific findings are assessed consistently and within a logical framework. For example, the same findings could lead practitioners to express conclusions that convey drastically different messages: from an undefined and prone to misinterpretation “match and consistent with” to a transparent disclosure of the weight to be attached to the findings. Ambiguous wording of scientific conclusions has been recognised as a factor leading to miscarriages of justice.

A diversity in formulating conclusions

Depending on the jurisdiction or practitioner, the reporting associated with the examination of a footwear mark against a pair of shoes may take the following forms:

- *The footwear mark found on the crime scene could have come from the right shoe belonging to Mr S.*
- *The findings in relation to the footwear mark strongly support the view that the mark on the scene was left by the right shoe of Mr S. rather than by an unknown shoe. By "strongly support", we mean that the scientific findings are approximately 2000 times more likely if the mark had been left by the right shoe of Mr S rather than by another unknown shoe.*
- *It is very likely that the footwear mark recovered from the scene originated from the right shoe belonging to Mr S.*
- *The footwear mark found on the scene matches the features of the sole of the right shoe of Mr S.*
- *The right shoe of Mr S. cannot be excluded as the source of the mark found on the crime scene.*

In addition, this variability in the expression of conclusions makes it more difficult to share forensic reports across the various European jurisdictions.

The ENFSI Guideline for evaluative reporting has been prepared in order to give forensic practitioners working within ENFSI laboratories guidance in reporting scientific findings in manner that is balanced, logical, robust and transparent.

Scope of application: evaluative reporting

Evaluative reporting, as it is understood in the Guideline, provides assessments of the relative weight to be attached to scientific findings in light of the hypotheses of interest to the instructing party or the investigating judge. As soon as the authority has to arbitrate between at least two opposing versions of events with the help of forensic science, the reporting of the scientific findings shall follow the principles of evaluative reporting expressed by the Guideline.

The Guideline does not apply to technical, investigative or intelligence reports that are purely technical or factual. Evaluative reports include some assessment of the weight to be attached to the scientific findings. Technical, investigative and intelligence reports do not offer such an evaluation of the scientific findings, but may also be probative in certain circumstances. Evaluative reports are generally produced to be used in court, and often also contain elements of technical reporting, whereas the other types of report are used throughout the other stages of the investigation.

Evaluative reporting differs from the above types of reporting in that it considers the findings given competing accounts of the events. It indicates the relative weight to be given to the findings.

Technical, investigative and intelligence reporting

Technical reporting gives results of a factual nature, e.g.:

- *The beige powder seized on Mr S. is composed of cocaine at a concentration of 27% (± 2%).*
- *A concentration of 1.9 gr/ml (± 0.1) of alcohol has been detected in the blood sample obtained from Mr S.*
- *The photograph on the questioned visa document is partially torn.*
- *The chemical processes applied to the seized firearm reveal a serial number that has been photographed.*
- *Attendance of the crime scene examiner allowed collecting and securing the following marks and traces.*

Investigative reporting will provide a list of possible sources or explanations, e.g.:

- *Particles compatible with gun shot residue have been found on the hands of the suspect. This could be explained by Mr S. having recently fired a firearm; by Mr S. having stood near somebody who discharged a firearm; or Mr S. having recently handled firearms.*
- *The fibres recovered on the victim's body are black acrylic fibres with physical features compatible with carpets found in cars.*

- *The paint flakes recovered on the street showed 3 layers typical of the paint systems used for cars. A list of potential makes and models is attached.*
- *The toolmarks found on the door and the footwear marks observed on the floor suggest the following ways by which entry was gained in the premises.*

Identifying key issues

The Guideline encourages forensic practitioners to identify the key issue(s) in the case and assess, before undertaking any examinations, how forensic science can help address these issues. The effective application of this Guideline thus seeks to ensure that forensic practitioners deliver the services, and only those services, that are suitable to help resolve the key issues within a given case in court. This requires the gathering by forensic practitioners of relevant case information from the instructing party, investigating judge or parties.

Case example: Identification of the key issue

The following case example will serve to illustrate aspects of the recommendations made in the Guideline. It is based on real circumstances but has been simplified.

A mobile phone shop has been burgled during the night. Access had been gained by smashing the front window using a large hammer. The hammer was left at the scene. A large bloodstain is recovered on the frame of the broken window. No CCTV was in operation. The same night, based on a description provided by a witness, the police arrest Mr S. A reference DNA swab has been taken from him and his shoes and garments have been seized. Belongings from his home have also been seized.

The items submitted to the laboratory are the hammer, a sample of the broken glass, the reference DNA swab and the garments (pullover and jeans) worn by Mr S., with the following request: (i) carry out DNA analysis on the bloodstain and the handle of the hammer and compare it with the DNA profile of Mr S. (ii) examine the clothing for glass and compare with glass from the smashed window.

After discussion with the instructing party or investigating judge, and in the

light of the account given by the defence, it transpires that the key issue is whether or not Mr S. smashed the window using the hammer.

To help with addressing the key issue, the forensic practitioner will have to consider the potential findings in the context of this set of activities.

It means that the forensic practitioners will not only focus on the comparative analyses of the biological samples and glass fragments, but will need to also consider their expectations to find such an amount of glass or DNA if the alleged activities occurred.

Evaluating scientific findings

The Guideline is based on scientific principles and methodological best practices that are fostered through fundamental and applied research by academics and practitioners and on insight drawn from confirmed cases of miscarriages of justice in various jurisdictions.

No scientific finding provides certainty. Even with the strongest associations such as the ones derived from DNA profiles or fingerprint comparisons, uncertainty is inevitable. The assessment of scientific findings is, hence, a matter of logical reasoning in the face of uncertainty, which, in turn, is governed by the rules of probability.

Probability is an expression of partial belief. For forensic practitioners, it quantifies, between 0% and 100%, the degree of belief they should have in the occurrence of scientific observations. Probabilities are assigned using numbers (or orders of magnitude). Forensic practitioners will not limit their notes to vague verbal qualifiers (e.g. this set of observations is 'very rare').

For example, the forensic practitioner may express the opinion that, based on the scientific data available to him, the probability of observing the number of glass fragment if the person broke the window is 80% or that the observed DNA profile will correspond to an unknown unrelated individual with a assigned probability of 1 in 1 billion.

The probabilities used by the forensic practitioners will be based on data (as defined in the Guideline) and both the probabilities and the data must be available in the forensic practitioner's case file.

Data used to evaluate

Contrary to the common misconception that probability assignment necessarily requires hard statistical data, probability, as used in the Guideline, is informed by various sources of specialised knowledge that can range from statistical surveys, experiments under controlled conditions and, in the absence of the above, opinions based on training and experience. The word “data”, as used in the Guideline, embraces that large spectrum of knowledge. The forensic practitioners have a duty of transparency regarding the basis upon which their probabilities have been assigned. The data used by the forensic practitioners and its limitations must be clearly stated as should any assumptions made. For example, when a claimed probability is based upon experience and anecdotal evidence, it is important that it be reported in a way that does not give the spurious impression of scientific and technical accuracy (i.e. of being based on published statistical data).

Case example: Data used by the forensic practitioner

Regarding the evaluation of the bloodstain recovered from the head of the hammer, the forensic practitioner will, in case of matching DNA profiles, make use of data from population genetic studies to assign the probability of a coincidental correspondence between the DNA profile obtained from the bloodstain and the DNA profile of Mr S.

The deposit of trace quantity of DNA on the handle of the hammer is the consequence of complex transfer mechanisms. Their evaluation goes beyond the mere assessment of the probability of a given DNA profile. The forensic practitioner will consider published research mimicking, in controlled conditions comparable to the case at hand (in terms of timing, nature of surface, donors), the transfer of DNA on manipulated objects such as a hammer. In the absence of such studies, the practitioners may conduct case specific experiments to assess the potential of transfer of DNA. In the absence of any structured documented research (published or unpublished), the practitioner may resort to expressing an opinion regarding the DNA transfer based on his experience. The basis and limitations of such opinions must always be clearly explained.

In relation to activities that may lead to the transfer of glass fragments, the forensic practitioner will take advantage of studies showing how many glass fragments are transferred, retained and recovered on garments. The known

circumstances of the breaking under investigation will be considered, including the type and size of the window, the way it was broken, the time elapsed and any intervening activity between the breaking and the seizure of the garments. In addition, they will consider data regarding the adventitious presence of glass fragments on garments of individuals coming to the attention of the police.

Note that the word transfer may refer to either primary transfer (direct contact between the hand and the hammer, or direct transfer of glass from the broken window to the garments), secondary transfer (the DNA from the individual has been transferred on the hammer through, for example the gloved hand of another individual, or the glass fragments were first transferred onto the garment of an unknown person who subsequently transferred them to the garment of Mr S) or even tertiary transfer.

"Data" is one example of terms used in the Guideline in a very specific way, often different from the common usage. The Guideline offers a glossary to help define common language not only among forensic and legal practitioners. Attention is drawn to the following terms: case file, data, evidence, explanation, findings, conditioning information, key *issue(s), probability, pre-assessment, (alternative) propositions, hierarchy of propositions, strength of support of the findings.*

The requirement for propositions

The weight to be attached to scientific findings cannot be assigned solely by looking at the probability of these findings given one account of the events. For example, saying that finding gunshot residues on the hands of a suspect is consistent with the account that the suspect fired the gun is useless from an evaluative point of view until the findings have been considered given at least one alternative account, for example that the suspect was in the close proximity to the shooting incident. Hence, the weight assigned to the scientific findings is relative. It is obtained by comparing the probability of observing the findings given at least two accounts of the events. In the Guideline, these accounts are referred to as propositions. The first will generally state the position of the prosecution; the second (the alternative proposition) will reflect the position of the defence. These propositions are based on case information

that is generally not available to the forensic practitioner in its entirety. Thus, it is not the duty of forensic practitioners to set these propositions, which are formulated by (or elaborated in discussion with) with those commissioning forensic testing. In the absence of clearly defined propositions, the Guideline invites forensic practitioners to limit themselves to technical reporting, limited to observations made on the analysed material, and hence abstain from evaluative reporting.

Forensic practitioners can assess their findings in the light of propositions that focus, for example, on the source of the material or on the activities leading to the traces. Neither of these levels (source or activity) determines the ultimate issue of guilt or innocence. Source level propositions concern who (or what object) left a given trace. Activity level propositions pertain to the mechanisms or behaviour through which the traces were deposited. Stated otherwise, source level is guided by questions such as 'Where does this trace come from?' whereas activity level is concerned with questions such as 'How did this trace get to where it was found?'. This distinction is crucial because the strength of forensic results given different kinds of propositions may vary drastically.

Case example: Source or activity level proposition

At this stage of the inquiry the issue in relation to the bloodstain is one of source. The forensic practitioner will assess his findings considering that either the blood originated from Mr S. or that the blood came from an unknown person unrelated to Mr S.

For the potential DNA profile that could be obtained from the handle of the hammer, the propositions considered will depend on the account given by both parties regarding the alleged activities. The prosecution alleges that Mr S. used the hammer to break the window while the defence asserts that he has nothing to do with the incident and has no knowledge of the recovered hammer. However, he indicates that he was in the area early that night, had a fight at the local pub, had a nosebleed, broke a couple of bottles and must have encountered the real offender.

With regards to the glass, the propositions put forward by the parties will also refer to alleged activities, either that Mr S. broke the window in the course of

the burglary or that Mr S. has nothing to do with this incident.

These propositions depend critically on the accounts given by both parties and may be subject to changes as the case progresses. Evaluative statements will then indicate for example: "My conclusions are based on the results of my laboratory examination and the information made available to me at this time. If any aspects of the case should change (in particular the propositions), then I am prepared to review my conclusion in the light of such changes".

The Guideline recommends that forensic practitioners assess findings at activity level whenever the assessment of the findings requires expert knowledge or information that the fact-finder does not possess. For example, in a case where three particles typical of gunshot residues are found on the right hand of a suspect, it is impossible for a layperson to know what these particles mean in relation to the shooting incident compared to other activities (e.g. being transported in a police car that might be contaminated with gunshot residues). The evaluation has to account for the number of particles obtained (in this case, three) and requires specialised knowledge regarding the quantity, distribution and persistence over time of particles on hands of people who discharge a gun as opposed to individuals who are transferred in a police car. The Guideline requires forensic practitioners to inform the fact-finder of the need to resort to specialised knowledge, and its impact on the evaluation of the findings, so as not to leave the assessment of such findings only to the uninformed intuitive judgement of the layperson.

Weighing and reporting scientific findings

Comparing the probability of the scientific findings given each of at least one pair of propositions, in the form of a ratio, generates what is known as a likelihood ratio. The likelihood ratio expresses the weight to be attached to scientific findings, that is the extent to which scientific findings provide support for one proposition against the stated alternative. For example, a likelihood ratio of 10,000 means that the findings are 10,000 times more probable if the first proposition is true than if the alternative is true. A likelihood ratio of 1 means that the findings do not change the relative probabilities of the two propositions (i.e., the findings are neutral). A likelihood ratio below 1 provides support for the alternative proposition against the first proposition. Evaluative conclu-

sions should take the form of a likelihood ratio. They should be expressed in the report. The likelihood ratio is sometimes complemented by a verbal equivalent. These verbal qualifiers are chosen by convention and may be ordered in the form of several levels that comprise a verbal scale. For example, a likelihood ratio on the order of a million may be translated on a verbal scale as describing findings that will provide "extremely strong support" for the first proposition rather than the alternative. It is important to keep in mind that this conclusion of "extremely strong support" has been reached on the basis of information, data and assumptions that may be subject to revision. Hence the Guideline suggests that all statements should indicate that any change in the conditioning information may require assessments, conclusions or propositions to be reviewed.

The number of qualifiers and the range of likelihood ratios covered by them is a matter of convention. The scale and associated numbers should be made available to the report.

Case example: Weight of scientific findings and reporting

In the burglary case, the forensic practitioner reported his findings as follows:

The DNA profiling results obtained from the bloodstain found on the frame of the broken window provide extremely strong support for the view that the stain originated from Mr S rather than an unknown unrelated individual. The profile is more than a billion times more probable if Mr S left the stain rather than if an unknown unrelated person did.

The DNA finding is on the order of 400 times more likely if Mr S was the person who handled the hammer rather than if someone else handled the hammer and Mr S's DNA transferred by secondary means.

The glass findings provide strong support for the proposition that Mr S broke the window rather than Mr S has nothing to do with the incident. 'Strong support' means that the findings are on the order of 2000 times more probable given the proposition that Mr S broke the window rather than the proposition that he had nothing to do with the breaking incident.

A key principle of the Guideline is that forensic practitioners should only express opinions regarding the probabilities associated with the scientific findings given (conditional on) the propositions. That is to say, probabilities relate to the evidence, not to the propositions themselves. Propositions of fact in issue in the proceedings are and must remain within the sole province of the

Case example: What the results do not mean

In the burglary case, it would be fallacious for the forensic practitioner to conclude that:

- *There is a probability below one in a billion that another unknown individual unrelated to Mr S is the source of the bloodstain.*
- *It is very likely that Mr S touched the hammer.*
- *There is a very high probability that Mr S smashed the window with the hammer.*

fact-finder. This precept encapsulates the principle according to which scientific findings should be placed by the fact-finder in the general context of the case.

Conclusion

Adopting the likelihood ratio approach to the evaluation of scientific findings does not derogate from the principle (familiar to most modern Civilian legal jurisdictions) of free evaluation of evidence by the fact-finder ("free proof"). Besides, the Guideline does not make suggestions on how the approach is to be used for assessing evidence types other than forensic science findings. Ultimately, the Guideline sets the scientific framework that should prevail in the evaluation of forensic findings and provides a guide for the practice of all ENFSI forensic practitioners.

Traces and Transfers
Feature Comparison Evidence

Criminal Lawyers Association
November 2019

David Rose
Ontario Court of Justice

Judicial Reviews of Expert Evidence Gone Wrong

- The Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin*, Volume 1, 1998 (Kaufman Report). See Chapter 2 re: Hair comparison analysis.
- *The Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queen's Printer for Ontario, 2008) ("Goudge Report").
- Hon. Susan Lang, “Motherisk Hair Analysis Independent Review” (2015) www.m-hair.ca

U.S. Federal Reviews of Forensic Science

"Strengthening Forensic Science in the United States – A Path Forward

https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf

~ Chaired by Hon. H. Edwards US Court of Appeals for DC ~

DNA is the Gold Standard for Identification Evidence.

Reviews state of Forensic Science in most fields outside DNA

- Fingerprints (Friction Ridge Analysis)
- Blood Spatter
- Bite Marks
- Arson
- Firearms and toolmarks
- Computer analysis

2016 President's Review

Report to the President by (PCAST)

https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

President's Council of Advisors on Science and Technology

- "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" ~ September 2016

Controversial Forensic Science and Experts
The Gatekeeper Role

- Expect questions from the bench during the qualification *voir dire* even if it is on consent;
- How much of the expert opinion has a subjective component;
- Is the area of expertise proposed been the subject to criticism, for what, and has the proposed opinion responded to that criticism;
- If the opinion comes with a subjective component, has the expert been tested for an error rate. If not, why not?
- Has the expert opinion in a given case has been "peer reviewed" - what exactly does that mean?

<u>Gene Genie: Why the Federal Use of the Criminal Law Power to Protect Our Genetic Information is Constitutional</u>

By Jill R. Presser, Presser Barristers

Science can now peer into the very code of life, the recipe that makes up who we are. DNA testing can tell, with a high degree of certainty, whether we are likely to fall prey to certain illnesses or transmit them to our descendants. Happily, in many cases, such testing means that diseases are revealed, identified, and treated, or even avoided altogether. In other cases of course, the science isn't there yet to cure, only to reveal disease or other genetic challenge.

The trove of information contained in our DNA may be of interest to us, our families, our healthcare providers, as well as to our insurance companies, banks, employers and others.

We are at a time where we could be compelled to undergo genetic testing at the behest of others. Or be required to share the results of such testing. Can our insurance companies require us to avail ourselves of it as a condition of insurance? Can our banks compel us to disclose the results of DNA tests as a condition of approving our small business loans or home mortgage financing? Can our employers terminate employment, or refuse advancement, on the basis of time-bombs lurking in our DNA revealed in such testing? Can '23 and Me' hand genetic information over to police investigating crimes?

On October 10, 2019, the Supreme Court of Canada heard the *Canadian Coalition for Genetic Fairness v Attorney General of Quebec et al* (SCC Case # 38478) *["Genetic Fairness"],* an appeal that squarely raises these questions.

At issue in the *Genetic Fairness* appeal is whether the *Genetic Non-Discrimination Act ["the Act"]*, SC 2017, c3, is a proper use of the federal criminal power. *The Act* makes it a criminal offence to compel anyone to undergo genetic testing, or to disclose the results of genetic testing, without the consent of the person who is the subject of that testing.

The Quebec Court of Appeal (2018 QCCA 2193), decided that *the Act* did not represent a constitutional use of the federal criminal law power. Instead, the Court of Appeal held that the Act has as its goal the regulation of the insurance industry and of property and civil rights in the province, not objects that properly fall within the realm of criminal law.

The Quebec Court's decision is now being appealed to the Supreme Court. The Appellant Coalition for Genetic Fairness takes the position that *the Act* is properly criminal law because it aims to prevent and punish genetic discrimination. Criminalizing generic discrimination will enable Canadians, safe in the knowledge that their genetic information is secure, to undergo genetic testing in greater numbers. This, in turn, will promote and protect health, which are proper criminal law purposes. In a complementary intervention, the Privacy Commissioner of Canada takes the position that *the Act* is indeed properly criminal because it aims to protect the privacy, autonomy and dignity of Canadians.

Regardless of whether the purpose of *the Act* is understood to be prevention against genetic discrimination, promotion of health, security of the person, or protection of privacy, autonomy,

and dignity, it is *intra vires* the feds' criminal law power. This is so even if the legislation also happens to touch on areas of provincial responsibility like insurance, or property and civil rights in the province.

The criminal law power has been held to be a broad plenary power that covers a potentially vast array of human activities (*RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199, para 28). To be validly criminal, legislation cannot meet only the purely formulaic requirements of prohibiting an activity and providing penal sanctions for performance of that activity. Rather, criminal legislation must also meet the substantive requirements of prohibiting and punishing for a "public purpose." Criminal laws must be directed against some "evil or injurious or undesirable effect upon the public," which may be social, economic or political, and the legislation must aim to suppress the evil or safeguard the interest threatened (Margarine Reference, [1949] SCR 1, p 49).

In this case, the *Act* satisfies both formulaic and substantive requirements of the criminal law. It prohibits compelling genetic testing and disclosing results of such testing without consent, it provides real penal consequences for breach, and it does so for meaningful public purpose. Compelled genetic testing and compelled disclosure of genetic information are socially undesirable evils. Our genes are the code for our very beings. There is no more biographical core of information about our essential selves than our DNA. So we need to be able to make decisions about it autonomously. Empowering Canadians to control our own genetic information and preventing others from depriving us of that autonomy does further health, security of the person, privacy, autonomy and dignity. These are central moral values, deserving of protection. It is appropriate for the federal government to legislate minimum standards for the use of this information and to give those minimum standards teeth in the form of the criminal sanction.

The Supreme Court has recognized that "[t]he criminal law must be able to keep pace with and protect our emerging values" (*R v Hydro-Quebec*, [1997] 3 SCR 213, paras 86, 127). The numerous fundamental issues that arise when new technologies are developed were unimaginable in 1867 when our federal system was created. The challenges arising from the availability of genetic information is but one example of fundamental moral issues that arise with the advent of new technologies.

In our modern post-tech-revolution world, we necessarily generate all kinds of information about ourselves - often inadvertently - when we seek to avail ourselves of the conveniences that technology affords. Using map and navigation apps for directions means we are creating detailed information about our movements in space across time that is in the hands of Google and Waze. Wearing devices to track our activities and sleep to encourage us to be active and healthy means that we are creating detailed information about our fitness, sleep, nutrition, location, in the hands of Fitbit. Using digital communications apps means that our thoughts and conversations are in the hands of these apps, and certainly in the hands of our telecommunications service providers. The same is true of our online movements and searches, and of our social media use.

In "The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power," Professor Shoshana Zuboff documents the process by which the information we inadvertently generate in the course of our online movements is captured by technology

companies, converted to predictions about our future behaviour, and sold to advertisers. They use it to influence our future behaviour. The information we create in cyberspace has also been collected, bought, and sold (often without us even knowing it) to influence our voting behaviour and the outcome of elections (think Cambridge Analytica).

Control over our own information and protection of privacy in it, are essential to the future of the human project. Privacy is a precursor right. It gives us the space to exercise other essential rights and freedoms, like the freedom to associate, practice our religion, vote. Technology makes it harder for us to keep control over our own information, to keep it private, to autonomously exercise our basic rights and freedoms. We need to try to protect these essential human values in the face of technology. The federal government needs to be able to legislate minimum standards for use and misuse of the information we put into the hands of third parties about us. The criminal law power is an essential way of doing that.

Our genetic information is one kind of new technology-enabled information, but an incredibly intimate and important one. The Supreme Court should uphold the constitutionality of the federal criminalization of misues of this information.

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The following comprise a handful of helpful references with respect to STRmix™, the Likelihood Ratio (LR) and DNA transfer and persistence. Distributed by Jack Laird, Biology Section Head, at the annual conference of the Criminal Lawyers' Association – November 16, 2019, Toronto.

STRmix™

Improving the Interpretation of Complex DNA Mixtures with Probabilistic Genotyping – A Guide to STRmix™ for Clients. 2017. Centre of Forensic Sciences Information Document (included herewith)

The Likelihood Ratio (LR)

Robertson, B., Vignaux, G. A. and C.E.H. Berger. 2016. Interpreting evidence: evaluating forensic science in the courtroom, 2nd edition. Chichester: Wiley

Butler, J. M. (2015) Advanced Topics in Forensic DNA Typing: Interpretation. Oxford: Academic Press.

DNA Transfer and Persistence

van Oorschot, R.A.H., B. Szkuta, G.E. Meakin, B. Kokshoorn and M. Goray. 2019. DNA Transfer in Forensic Science: A Review. Forensic Science International: Genetics. 38:140-166 (included herewith)

Evaluative Reporting in Forensic Science

Champod, C. et al. 2016. ENSFI Guideline for Evaluative Reporting in Forensic Science: A Primer for Legal Practitioners. European Network of Forensic Science Institutes (included herewith)

Improving the Interpretation of Complex DNA Mixtures with Probabilistic Genotyping – A Guide to STRmix™ for Clients –

- *STRmix™ is software that helps forensic scientists reliably interpret complex mixtures of DNA*
- *The software employs the same principles that have always been used for interpreting mixed DNA profiles at the CFS*
- *Forensic scientists operate and control the software, and apply their expertise in critically evaluating results throughout the STRmix™ process*
- *Implementing the software expands the number of mixed DNA profiles that will be considered suitable for comparison*

1. Introduction

Until recently the interpretation of DNA profiles generated from crime scene evidence has relied exclusively on the training and expertise of forensic scientists, performed in accordance with established, validated procedures. Although this approach is highly effective with the vast majority of samples, some DNA mixtures are too complex to interpret in this manner.

Following validation in accordance with applicable international standards and guidelines, the Centre of Forensic Sciences (CFS) has implemented an improved method for resolving mixed DNA profiles. The method, known as probabilistic genotyping, employs a specialized software application called STRmix™.

This guide is intended to provide a general overview of STRmix™ and its application to forensic casework at the CFS.

2. Considerations in the Interpretation of DNA Mixtures

First, it would be of value to remind readers of the key principles involved in the

interpretation of DNA profiles, which apply whether or not the software-assisted approach is used.

Mixture interpretation is a multi-step process. The scientist evaluates the DNA profile observed following the test and makes various assessments based on his/her knowledge of factors known to influence test results. In addition to the principles governing the structure of DNA and its organization/packaging within human cells, these factors include:

2.1 How DNA reacts, on an item of evidence, to various environmental conditions from the time it is deposited to the time it is collected and preserved for eventual testing

2.2 How DNA reacts during the extraction and PCR[1] steps performed in the laboratory, including how very small quantities of DNA react relative to larger quantities

In consideration of these factors, and in relation to the observed DNA profile, the scientist assesses the following:

2.3 *Which contributions to the DNA profiling result are potential by-products of the testing process itself, also known as artefacts?* The PCR method generates known and predictable by-products which may appear as alleles (true copies of DNA fragments) to the untrained eye.

2.4 *How many different alleles are detected within the profile at each test site?* This indicates the minimum number of DNA contributors to the mixture.

2.5 *What are the quantities of each allele observed in the mixture?* Relatively speaking, alleles from a person contributing more DNA would be detected in larger quantities than alleles from a person contributing less DNA.

2.6 *What is the overall quality of the DNA in the sample tested?* Relative quantities of alleles may indicate the presence of substances in the sample which inhibit the PCR process or may indicate that the DNA in the sample has been degraded between the time it was deposited and the time it was collected for testing.

Through these assessments, the forensic scientist can, for relatively simple mixtures, determine the genetic makeup (i.e. genotype) or DNA profile of one or more contributors. However, in some cases, the mixtures are too complex for analysis without the assistance of a probabilistic genotyping system. For some samples, especially those with larger numbers of contributors, and especially where there are very low levels of DNA and/or degraded DNA present, the complexity of the assessments outlined above is such that a scientist is unable to draw reliable conclusions as to the makeup of some or any of the contributing DNA profiles. Clients are likely familiar with the term 'not suitable for comparison', which has been reported in these and other instances.

3. What Does STRmix™ Do?

STRmix™ is a software tool that serves as a computerized extension of the interpretation process that scientists at the CFS have always employed. It helps the scientist in assessing the factors outlined above (see 2.3 to 2.6). Unlike the scientist, however, it is able to manage the increased interpretative complexities created by combinations of larger numbers of contributors, low-level and degraded DNA. In doing so, various combinations of individual DNA profiles which could account for an observed mixture can be reliably identified and ranked by probability. This, in turn, permits a comparison to be undertaken against a known reference profile, a conclusion with respect to whether the donor of the reference profile is excluded or not, and in the latter case, an associated weight to the finding informed by both the probability that the profile in question is a constituent in the mixture and, as ever, by the rarity of the profile in the general population.

4. How Does STRmix™ Work?

Probabilistic genotyping can be thought of as a form of reverse engineering. As with all forms of reverse engineering, it involves taking a finished product and figuring out how it was produced. In this instance, the finished product is the results of an STR analysis of a complex mixture. The programme derives the various combinations of genotypes that could produce that particular mixture having regard to everything that is known of the factors which affect forensic DNA analysis. The programme also assesses the relative probabilities of the different combinations (all of which could possibly produce the observed complex mixture).

More specifically, for any given mixture, STRmix™ works by simulating DNA test results for virtual combinations of DNA profiles, comparing those simulated results against the actual test results generated in the laboratory, and assessing how well the simulated results fit the observed data[2]. It does so hundreds of thousands of times for any given mixture (something a scientist on his or her own does not have the capacity to do), each time assessing whether the fit is better than the previous simulation. In this way, the software is able to narrow the field down to the best possible explanations (i.e. combinations of DNA profiles) for the observed test results.

In simulating test results for combinations of DNA profiles, STRmix™ relies on both DNA profile data generated by the CFS during validation studies and on scientifically accepted biological models to develop numerous permutations[3] regarding how test results might manifest for specific profile combinations. By doing so, the software is effectively able to account for all of the factors that may influence test results (see 2.1 and 2.2 above).

5. What is the Scientist's Role?

STRmix™ is operated under the control of the same qualified forensic scientists who routinely interpret DNA mixtures based on the very same factors underpinning the software. Each scientist has also received specialized supplemental training with

respect to STRmix™.

Critical evaluations of DNA profile data are necessary for successful interpretations and are undertaken by scientists before and after the STRmix™ process. The knowledge, skill and judgement applied by the scientist when using the software ensures: 1) that it is appropriately used within the range of mixtures determined through validation to generate reliable results and 2) that the outcome of the mixture interpretation aligns with scientific expectations.

6. Reporting Results – The Likelihood Ratio (LR)

Readers may be familiar with the random match probability (RMP), which is used to describe the statistical significance of an association between a crime scene DNA profile and a reference DNA profile from a specific individual. The RMP, however, is not suitable for use when describing combinations of individual DNA profiles in mixtures from more than one person. In such instances, another well-established measure, the likelihood ratio (LR), must be employed.

The use of likelihood ratios in forensic DNA analysis is widespread throughout the world. They are already used by the CFS to express the significance of familial DNA analyses as well as male-specific Y-STR associations. A LR is defined as the probability of the observed DNA test results given one proposition (proposition A) divided by the probability of the same observed DNA test results given a different proposition (proposition B). A LR equal to 1 indicates that the test results are equally likely under both propositions. A LR greater than 1 provides support for proposition A and the greater the LR, the greater the support. A LR of less than 1, on the other hand, provides support for proposition B.

In the context of a two-person mixture of DNA, the propositions to be assessed may be, for example:

A: The DNA mixture is comprised of DNA from the suspect and one unknown individual

B: The DNA mixture is comprised of DNA from two unknown individuals

Using this approach, it is possible to weigh various propositions. This provides a more versatile and, depending on the case context, a more meaningful way of assessing the significance of the DNA evidence.

7. Validation

STRmix™ has undergone both developmental validation[4], performed by forensic DNA experts who developed the software, as well as an in-house validation, performed by the CFS. Additionally, the software has been implemented for forensic casework in numerous accredited forensic labs throughout North America and in other parts of the world.

The Centre's in-house validation, performed in accordance with the SWGDAM guidelines[5], entailed an assessment of hundreds of mixed samples of varying quantity, quality and numbers of contributors in order to assess how the software performed in response to these variables. Assessments were also performed, where possible, to demonstrate that results produced using the software were in accordance with interpretations undertaken by scientists without computer assistance.

Validation studies performed at the CFS and elsewhere demonstrate that the software is fit for its intended purpose as an interpretation aid for a wide range of DNA profiles, including complex mixtures of DNA. Not only is it an excellent tool to assess the statistical weight of results when an individual is not excluded from a complex mixture, the validations, which include thousands of simulations, demonstrate that STRmix™ can reliably exclude individuals who could not be contributors to these same samples.

8. Applicability / Limitations

Advances in the sensitivity of DNA testing over the past decade or so have led to the increased testing of samples containing low levels of DNA, including samples commonly touched, handled, or worn over time by multiple individuals. Not surprisingly, mixtures of DNA are also detected more frequently. There are often inherent limitations in associating such profiles, even when they can be attributed to specific people, to specific activities or time frames related to a crime.

CFS scientists assess the scientific merits of pursuing testing strategies, including the use of STRmix™, in the context of the circumstances of the case and may decide that a test will not be performed if its associated limitations outweigh its probative value.

In addition to the above stated limitations, CFS scientists continue to apply their expertise in assessing whether the complexity of a mixture prevents a valid assessment of the number of potential contributors. In these instances, especially when results suggest more than four contributors of DNA in a sample, the software may be of limited to no value as an interpretation aid.

9. Further Information

CFS scientists can provide more information about this technology and its potential applicability to investigations. Should you have questions regarding a specific case, please contact the scientist assigned. If you would like more general information, please contact the STRmix™ program manager, Linda Parker (linda.parker@ontario.ca; 647-329-1547).

[1] The Polymerase Chain Reaction (PCR) is a key step in any forensic DNA testing. It involves copying specific target areas of interest on the DNA, while also tagging these copies to facilitate subsequent detection processes.

[2] This process is driven by what is known as the Metropolis-Hastings algorithm. Not unique to STRmix™, it is commonly used in similar testing to assess whether a simulated result is a 'good' or 'bad' fit relative to the actual result.

[3] These simulations are based on what is known as a Markov Chain Monte Carlo (MCMC) process, a widely used approach that has been used in other fields such as code breaking and engineering for many years.

[4] Bright, J-A, D Taylor, C McGovern, S Cooper, L Russell, D Abarno and J Buckleton. 2016. *Developmental validation of STRmix™,* expert software for the interpretation of forensic DNA profiles*. Forensic Science International: Genetics* 23: 226-239.

[5] Guidelines for Validation of Probabilistic Genotyping Systems. Approved Jun 15, 2015 by the Scientific Working Group on DNA Analysis Methods (SWGDAM)

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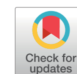
Review article

DNA transfer in forensic science: A review



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ABSTRACT

Understanding the variables impacting DNA transfer, persistence, prevalence and recovery (DNA-TPPR) has become increasingly relevant in investigations of criminal activities to provide opinion on how the DNA of a person of interest became present within the sample collected. This review considers our current knowledge regarding DNA-TPPR to assist casework investigations of criminal activities. There is a growing amount of information available on DNA-TPPR to inform the relative probabilities of the evidence given alternative scenarios relating to the presence or absence of DNA from a specific person in a collected sample of interest. This information should be used where relevant. However, far more research is still required to better understand the variables impacting DNA-TPPR and to generate more accurate probability estimates of generating particular types of profiles in more casework relevant situations. This review explores means of achieving this. It also notes the need for all those interacting with an item of interest to have an awareness of DNA transfer possibilities post criminal activity, to limit the risk of contamination or loss of DNA.

Appropriately trained forensic practitioners are best placed to provide opinion and guidance on the interpretation of profiles at the activity level. However, those requested to provide expert opinion on DNA-related activity level issues are often insufficiently trained to do so. We advocate recognition of DNA activity associated expertise to be distinct from expertise associated with the identification of individuals. This is to be supported by dedicated training, competency testing, authorisation, and regular fit for purpose proficiency testing.

The possibilities for experts to report on activity-related issues will increase as our knowledge increases through further research, access to relevant data is enhanced, and tools to assist interpretations are better exploited. Improvement opportunities will be achieved sooner, if more laboratories and agencies accept the need to invest in these aspects as well as the training of practitioners.

1. Introduction

1.1. Scope of review

This review will traverse what we know about DNA transfer and the associated elements of DNA persistence, prevalence, and recovery, sometimes collectively referred to as DNA-TPPR. It will consider the factors impacting transfer during different types of contact and the likelihood of detecting DNA from a sample of interest following a particular sequence of events. It will not, however, collate all the data available to provide probability estimates for specific observations in certain circumstances. Furthermore, it is not our intention to analyse the abundance of cases where indirect transfer has been a major issue, or the different types of scenarios that have been presented in court deliberations. This is therefore not a definitive account of all matters and information relating to the transfer of DNA within the forensic context. Instead, this review provides a snap-shot of the current knowledge, along with pointers to areas requiring improvements and a brief discussion on our readiness to utilise the available data to help address activity level inquiries. Activity level refers to the generally accepted hierarchy of propositions [1] for evaluation of evidence in forensic science. We refer to this as 'activity level reporting' or 'activity

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level assessments' for legibility. We wish to stress that whenever we refer to 'activity level reporting' in this review we discuss the evaluation of evidence *given* activity level propositions. By no means do we wish to endorse the practice of commenting by experts on activities given their findings (e.g. 'primary transfer is more likely given the results'). See Taylor et al. [2] for more information on formal methods for evaluation of evidence given activity level propositions.

This review will reference several papers that have significantly impacted this field. Although the review intends to capture the bulk of such papers, it is not exhaustive of all related publications, and since hands can be a major and highly contested source and/or vector for transfer of (often invisible) DNA containing material detected at crime scenes, the transfer of 'touch' DNA will at times have preferential focus. Those papers not included are by no means irrelevant, and we urge readers to consider these too when seeking information relevant to their specific needs. As the research activity in this field is ramping up, there is also a good chance that this review will be remiss of material published after the submission of this manuscript. Furthermore, this review does not intend to summarise all the details within the many references listed, rather, we urge readers to extract these from the relevant publications as deemed relevant to their needs.

We advocate the need for forensic scientists to equip themselves well, by constantly staying abreast of the available DNA-TPPR related knowledge, to facilitate activity level assessments. However, whilst we will be discussing the available data, we will not be providing details on how best to conduct activity level assessments, as this is the focus of another paper within this series by Taylor et al. [2]. We also hope this review will entice greater commitment and investment (from stakeholders as well as government and other funding bodies) towards further research to improve our knowledge of DNA-TPPR and its application to casework and legal deliberations addressing activity level questions. Note, the views expressed in this paper are our own and do not necessarily reflect those of our host institutes.

1.2. Why it is important to understand DNA transfer

The demonstrated ability to attribute a DNA profile to a specific person, and the increased sensitivity of the profiling systems to generate these profiles from decreasing quantities of DNA, has seen an increasing reliance on trace biological samples, especially from touched objects, to assist investigations of criminal activity. The increased sensitivity and the types of objects from which samples are collected, however, also means that many of the profiles generated are mixed profiles, that is, DNA from multiple contributing individuals represented together in the one profile. Consequently, the number of potential scenarios that may have led to the transfer and deposition of detected DNA have increased substantially. There is, thus, apart from the need to determine the identity of individuals whose DNA has become part of the evidence, an increasing need to understand how the DNA within a trace got to where it was collected from.

1.3. Brief history

The notion that, during a criminal act, an offender will both leave trace evidence at a scene and take it away on their person or clothes was raised by Locard almost 100 years ago [3], and further discussed by Inman and Rudin [4]. The pursuits of detecting these traces have spawned many forensic disciplines. Since the initial discovery of the ability to generate unique genetic profiles from biological materials and its application to address questions of identify to assist investigations of criminal activity by Sir Alec Jeffreys and his colleagues [5,6], the subsequent technological advances allowing relatively quick and affordable generation of extremely discriminating profiles from many sources of biological material [7–9], along with uniformity across jurisdictions and the construction of offender DNA databases with associated legislations [10–13], have seen DNA playing an ever increasing role in the identification of those who have committed criminal offences and exonerating the innocent [14–21]. The same methodologies have also played equally increasing roles in the identification of victims of disasters and missing persons [22–25]. The discovery that DNA can be detected from non-visible biological material left on a surface merely through touching it by hand [26], and the extrapolation of this observation to contact with skin in general, drastically broadened the types of items that could be targeted to obtain DNA profiles and the variety of situations in which DNA profiling could be applied [7,14,18,27,28]. This discovery of the ability to generate profiles from touched objects was initially met with disbelief by many within the forensic community, but once verified, became a welcome tool for law enforcement agencies. Within several jurisdictions, samples collected from touched objects now represent more than half the total number of samples processed for DNA profiling [16,29].

The notion that DNA could also be picked-up and transferred to somewhere else, and the potential implications thereof, was presented in the same *Nature* paper reporting the discovery of touch DNA [26]. The relevance of this aspect took longer to appreciate and propagate into forensic investigations and legal deliberation. Over the last several years an increasing number of cases no longer question 'whose DNA it is' but wish to know 'how or when it got there' [30]. Cases thus hinge on the relative likelihoods of the DNA of a certain person being deposited directly by that person or by someone, or something, else. Whilst very few studies were published in the first fifteen years post-discovery of indirect transfer of DNA by hands to help understand the variables associated with the indirect transfer of DNA [18,31–38], it has only very recently become more widely recognised that much more needs to be done to resolve the current paucity of empirical data on the variables that may or may not impact DNA-TPPR [39–43] and assist those tasked with addressing questions at the activity level [44–47]. It is thus timely to take stock of what we currently know about the transfer of DNA and consider the direction of required further efforts.

1.4. What is DNA transfer and the meaning of associated terms?

1.4.1. Direct and indirect transfer

Direct and indirect transfer relates to the routes by which DNA may be transferred (Fig. 1A–D). The terms 'direct' and 'primary' transfer are, and can be, used interchangeably. The terms 'indirect' and 'secondary' transfer are also used interchangeably, however, as a specific source of DNA may have been transferred multiple times, i.e. secondary, tertiary, quaternary etc. (multi-step transfer pathway), one needs to be clear on what is meant by secondary transfer within the context of the scenario at hand. For some, secondary transfer means any transfer event after the primary transfer; for others it only refers to the singular transfer step after the initial deposit. In addition, when referring to a specific contact event within a long sequence of multiple contacts, one may refer to the primary and secondary substrates involved in a specific contact even though they may not be the first or second substrates within the sequence of contacts. As in most case scenarios, when contemplating the possibility of direct versus indirect transfer, the number of indirect steps are unknown, therefore, we prefer using the term 'indirect transfer' rather than 'secondary transfer', unless the scenarios put forward by prosecution or defence, or known facts in the case, establish that the indirect transfer is based on only a single step after initial deposit.

A person's DNA can be directly deposited onto an object/surface or hand/skin of another person just by contacting it. Some examples of direct/primary transfer are:

- Person drops their blood after sustaining an injury, spits their saliva or ejaculates their semen onto a surface or someone.
- Person's DNA transferred when touching an object or surface with their bare hand.
- Person's DNA transferred when touching another person's bare hand with their bare hand.

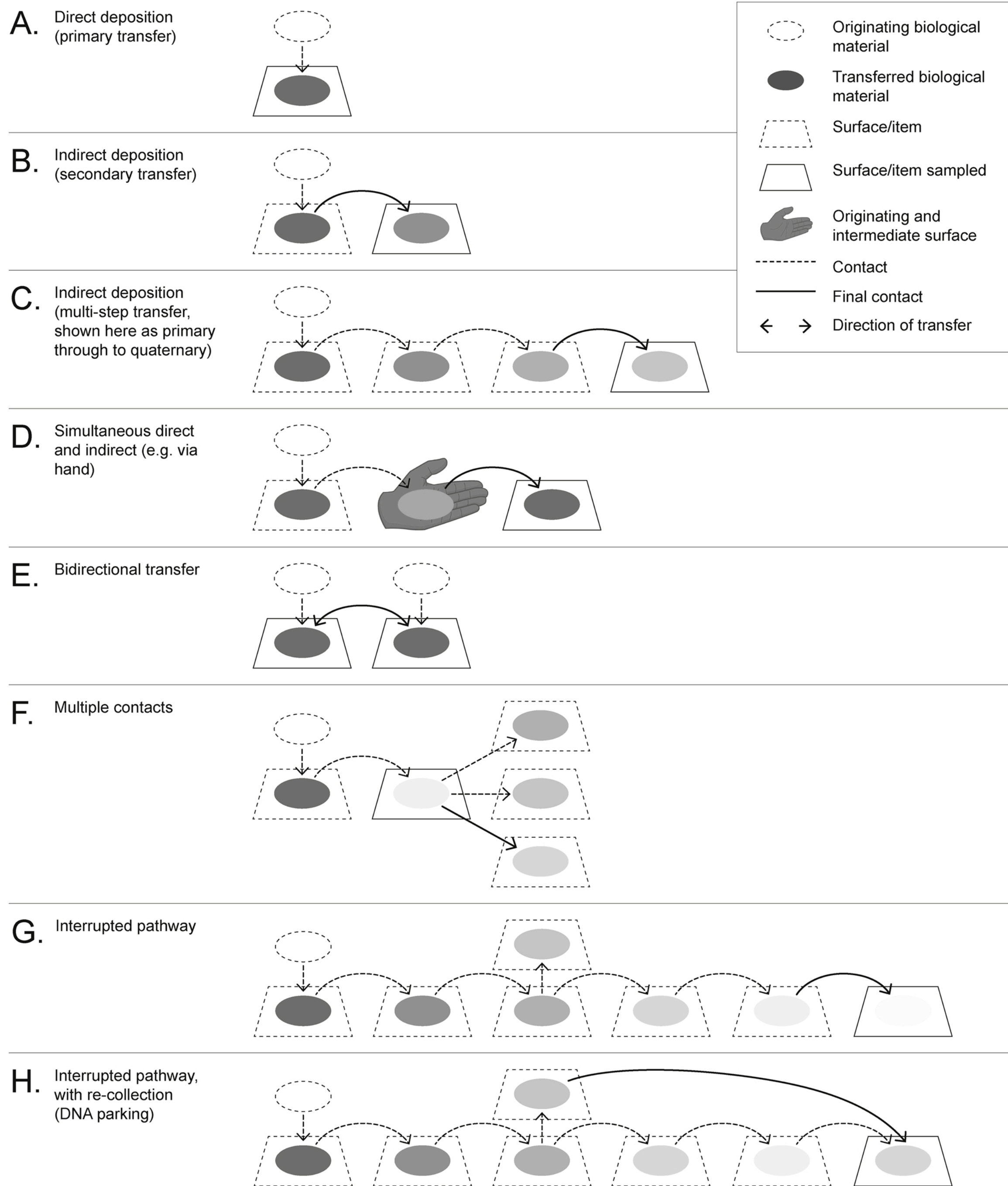

Fig. 1. Diagrammatic illustration of various modes of transfer.

- Person's DNA transferred to their clothing and jewellery contacting their skin whilst wearing it.

If the DNA deposited during direct transfer by any of the means outlined above is transferred again, an indirect transfer event has taken place. During indirect transfer, there is no direct contact of the original source of the DNA with the location/surface on which it is located. Some examples of indirect transfer are:

- Blood or saliva from an individual (person A) deposited on surface 1 is transferred to surface 2 upon the two surfaces coming into contact. DNA from person A is detected on surface 2 [38,48,49].
- DNA deposited on surface 1 by an individual handling it with bare hands (person A) is transferred to surface 2 upon the two surfaces coming into contact. DNA from person A is detected on surface 2 [37].
- DNA from one individual (person A) is deposited on a knife handle (object 1) when handling it with bare hands. DNA from person A is then acquired by a second individual (person B) when they handle the knife (object 1) with bare hands [50]. DNA from person A residing on the hand of person B is then transferred to object 2 when contacted by person B with bare hands. DNA from person A is detected on object 2 [50].
- DNA originating from, and residing on, the hand of one individual (person A) is transferred to the hand of a second individual (person B) during handshaking. DNA from person A residing on the hand of

person B is then transferred to object 1 when contacted by person B with bare hands. DNA from person A is detected on object 1 [51–54].
- DNA residing on a specific area of a collected item (object 1), that has been packaged along with a second item (object 2) in the same packaging, is transferred to another area of object 1, to another item (object 2), or to the inside of the packaging [55]. DNA residing on the external packaging is transferred to an exhibit during examination [56].
- DNA picked-up by gloves or tools coming into contact with various items and surfaces at a crime scene during the investigation, or an exhibit during examination, is transferred to another item or surface if gloves and/or tools are not cleaned or replaced in between use [57–62].
- During a social setting where multiple individuals and items are present, DNA from one individual (person A) is transferred to other individuals and items without person A having touched them [63].
- Within a work environment, DNA from co-workers is transferred to items and surfaces within a shared space during use. DNA from co-workers is transferred to the clothing worn by an individual (person A) through contact with items and surfaces within the shared space [64].

(Additional examples of indirect transfer are presented in later sections.)

1.4.2. DNA transfer vs. contamination

DNA transfer, as explained above, and DNA contamination refer to the same physical phenomenon of DNA movement from one surface/location to another. However, it is the timing of this movement that defines whether DNA transfer is associated with a crime-related activity prior to securing a crime scene (be it pre-, during, or post-criminal activity), or a non-crime related contamination event during, or post-, securing of a crime scene (see Rudin and Inman [65] for further exploration of this concept). In a forensic setting, non-crime related contamination can come in many forms and via different vectors. For example, a police officer at the scene, a scientist examining the evidence, a dirty examination tool, or a non DNA-free reagent used during sample analysis. Conversely, crime-associated DNA transfer refers to the movement of DNA from a source that may, or may not, be involved in the criminal activity, such as a perpetrator acting as a vector for the transfer of someone else's DNA to the crime scene while performing a specific activity relevant to the crime (e.g. handling an alleged weapon). This someone else's DNA could be that of an innocent individual (otherwise not associated with the offender, crime or crime scene) picked-up by the perpetrator during an interaction directly with that person, or an object that person had previously touched, just prior to the criminal activity taking place. While crime-associated DNA transfer occurs only before the crime scene is established by the authorities, contamination can only occur afterwards. See Section 9 for more on contamination.

1.4.3. Simultaneous direct and indirect transfer

One contact event can simultaneously include both direct/primary and indirect/secondary transfer events (Fig. 1D). Transfer of DNA during a hand contact can result in deposits of DNA of the person making the contact as well as any other DNA that may have been present on that person's hand. For example, following contact with a DNA-free surface, most of the self DNA deposited within the handprint may be considered a direct deposit, but the non-self component will have been indirectly deposited.

In some situations, the self component deposited by a hand may not have been generated by the hand itself, but acquired (through touching) from other parts of the person's body from where it was generated (Section 2.2.2) or from personal objects previously touched by the individual. One must be mindful of the various means a particular source of biological material could be deposited onto an item. For example, saliva on an item could have been deposited directly through contact with the mouth, or via a hand that had been placed in the mouth (e.g. to remove something, bite their fingernails, or wet a finger to flip a page of a book).

1.4.4. Bi-directional transfer

Transfer upon contact can be bi-directional (Fig. 1E). When two surfaces (be it an inanimate object or a person) that both have DNA on them come into contact, there can be an exchange of DNA material between the two. For example, when a hand of person A touches the hand of person B, then not only can the DNA on the hand of person A be transferred to the hand of person B, but DNA from the hand of person B can transfer to the hand of person A [52,53]. The same can be applicable for DNA, of different origins, on contacting objects.

During bidirectional transfer events, the total amount of DNA on the hands of persons A and B, or their objects, may increase, stay similar or be reduced. This would be dependent on the relative amounts of DNA on the contacting surfaces and the impacts of the variables pertinent during the contact event (including substrate types and manner of contact). The amount of DNA of the source originally present on the hand of person B, or the object, however, will have been diminished. (Unless, one happened to be dealing with a unique situation where the source of interest on the hand of person B, or their object, happened to have been the same as on the hand of person A, or their object.)

1.4.5. Multiple contacts and multi-step transfer

When multiple different contacts are made with an originating surface upon which a finite DNA resides (Fig. 1F), the amount of DNA remaining on the originating surface will diminish after each contact. The level of reduction will be dependent on the substrates and manner of contacts involved. Depending on the magnitude of the loss of this DNA, the amount remaining on the surface may become undetectable. Further, the same original amount could also become undetectable within a mixture during a bi-directional transfer, if the amount of DNA transferred from any of the contacting surfaces is sufficient enough to overwhelm the DNA on the original surface [66]. Alternatively, transfer from multiple different sources to the originating surface can result in a mixture of DNA of such complexity that renders it uninterpretable.

Conceptually, 0 to 100% of the DNA present on a substrate could be transferred to another substrate upon contact. Usually a proportion of the DNA will be transferred; how much will depend on a range of variables to be discussed in the following sections. During a multi-step transfer event (Fig. 1C), each subsequent step will involve diminished DNA amounts (a proportion of the initial deposit) and the amount of DNA recovered from an ultimate substrate will be dependent on the number and type of the sequential contacts in the transfer pathway [49]. If DNA from one or more different biological sources are present on multiple substrates contacted along a multi-step pathway, this "other" DNA may also be picked up and transferred further, complicating the interpretation of the DNA profile obtained from the ultimate surface/location, especially if these other sources are more prevalent [66].

If during any contact event within a series of contacts along a direct pathway, the portion of transferred DNA is very limited, then this becomes a limiting factor for what will be detected on the last substrate (within the sequence) from which a sample is collected. This is irrespective of the variables associated with the subsequent contact events within the transfer pathway, even if these variables are conducive to high transfer rates. The amount of DNA transferred during initial and subsequent transfer steps may be influenced by: the type of substrates contacting (Section 2.1) and/or manner of contact (Section 2.3), alignment of areas making contact (relative to where the sample of interest is located on the item), and the time and/or activities performed between contacts of interest (Section 5.3).

1.4.6. Pathway interruption

Any surface/object involved in the multi-step transfer pathway may come in contact with other surfaces/items not related to the direct pathway in question, resulting in multiple divergent transfer pathways. If the item within the pathway of interest, after receiving the biological material of interest, has been contacted multiple times, or has been cleaned or washed, prior to the item contacting the following item within the pathway, then the amount of DNA that can be transferred from that substrate further along the pathway of interest will have diminished. Therefore, the amount of DNA from the original deposit retrievable from an ultimate substrate at the end of the transfer pathway of interest is reduced relative to the amount transferred if no intersecting pathways were involved (Fig. 1G) (see also Section 5.3).

1.4.7. DNA parking

The term 'DNA parking' was first coined, and the potential thereof considered, in a study by Szkuta et al. [52]. 'DNA parking' refers to secondarily transferred DNA that is temporarily deposited on an object and recollected again prior to being deposited on the surface of interest (Fig. 1H). For example: DNA acquired by person A from an acquaintance (person B) during handshaking may be transferred to an object (object 1) (such as a cup, tap, phone) immediately after the handshake. Object 1 could remain unused for an extended period of time (possibly days) whilst person A continues to undertake a myriad of activities, consequently losing any remaining DNA of person B from their hand. At a later point in time, person A may contact object 1 and pick-up some of the DNA from person B that was deposited during the previous contact. DNA from person B may then be transferred to another item (object 2), that could potentially be involved in a criminal activity, via the hands of person A. Further studies by a subset of co-authors is currently being undertaken to further demonstrate the legitimacy of the phenomenon. This phenomenon should be closely considered together with aspects of persistence (see Section 4).

1.5. Terminology: trace, skin, touch, wearer, handler, shedder, background DNA

From a forensic perspective, '*trace*' can be, and often is, referred to as any substance collected for testing to assist investigations [67]. From a DNA perspective, this includes biological material from which DNA profiles may be generated. The term used this way does not imply anything regarding the quantity of the material collected or used for testing. Some have defined 'trace' more from a quantitative perspective, i.e. when the quantity of DNA available for testing is below a certain threshold at which the chance of obtaining a full DNA profile is low [7,18]. Such low amounts of DNA have been described as 'low template' and 'low copy number DNA' [10,68,69]. DNA, of otherwise sufficient quantity, that does not provide a full profile due to the presence of inhibitors affecting part of the profiling process (e.g. amplification), and/or degradation due to exposure of the DNA to adverse environmental conditions and/or time, is also often referred to as 'trace'. van Oorschot et al. [7] defined it more holistically as: 'any sample which may fall below the recommended thresholds at any stage of the process – detection, collection, extraction, amplification and interpretation'. Gill [42] redefined this to: 'any sample where there is uncertainty that it may be associated with the crime event itself—so that it is possible that the transfer may have occurred before the crime event (innocent transfer) or after the crime event (investigator mediated)'. Gill wrote that the definition is deliberately vague as it hinges upon an assessment of the relevance of a 'trace DNA' profile to the crime event. We feel that such a definition is inadequate for intended uses of the term.

The context in which 'trace' is used tends to make its meaning implicit, but where it may be ambiguous and relevant the intended meaning should be clarified.

'*Trace*' or '*trace DNA*' does not say anything about the source of the sample/DNA, the action of how it got to where it was collected from, or if it was deposited during a criminal act. Meakin and Jamison [39] defined '*trace DNA*' as 'DNA that cannot be attributed to an identifiable body fluid'. This could be refined to: DNA that has not been attributed to an identifiable biological material. Perhaps because a) no tests have been conducted, b) some were conducted and provided negative results, or c) only a positive presumptive test result is available which is not accompanied by a second more accurate test result, or the latter is negative.

'*Skin DNA*' is sometimes used to describe DNA collected from surfaces assumed to have been touched, thus trying to imply the source of DNA and avoiding any context associated with the action of how it got there. However, as discussed in later sections, the source of DNA on skin, especially hands, can be from multiple sources. So referring to 'skin DNA', without having performed confirmatory tests to establish the source, could be misleading.

'*Touch DNA*' is a term commonly used to describe DNA collected from a range of item types that are assumed to have been handled. The broader use of the term can include samples and/or DNA from marks made by contact with other areas of the skins surface (e.g. forehead, ears, feet, arm, breast, back etc.) and/or include the terms '*wearer DNA*' and '*handler DNA*' (see below). Usually, it relates to DNA from a biological source that is invisible and has not been tested for a source. Sometimes the source is unknown, but has been shown not to be semen, blood and/or saliva, making it more likely to be from skin cells or skin associated glands. Where the sample has been taken from an area verified, by the application of fingerprinting methodologies, to have been touched, the utilisation of the term 'touch DNA' may appear to be more applicable. However, as the DNA subsequently collected and profiled may include '*background DNA*' (see below) that was present on the surface prior to it being touched during the action of interest, which may have been deposited by other means (originating from the same and/or other individuals), as well as indirectly transferred DNA during the touching action, implying that all the DNA collected is 'touch DNA' could be misleading. Furthermore, the action of touch can take many forms, so where the specific details of the 'touch' is known, this should be made clear. Alternatively, limitations of the knowledge should also be conveyed.

The term 'touch DNA' is often used to describe trace samples of unknown cellular source, and/or mode of action associated with its deposition. Describing such a sample as 'touch DNA' can be misleading, as it implies a specific mode of action and, to some degree, also a type of biological source. Using a less descriptive term such as 'trace DNA' is a more appropriate term to be used in casework when the source and mode of deposition are unknown. If the source and/or action associated with the trace DNA are known (such as in research projects or mock simulations) then it is acceptable to use a term reflecting this.

Similarly, use of the term '*wearer DNA*' could be misleading, as it implies the action of wearing, associating a specific person as the person who wore the clothing from which the sample was collected. In casework, this is sometimes assumed rather than being verifiable (e.g. if the sample was of a shirt removed from an individual by investigators, and a reference sample of the individual matches the one collected from the shirt). Furthermore, DNA collected from clothing is often from multiple individuals that have been deposited by various direct and indirect means and, as such, could be of different sources (Sections 3.5, 5.2). The same issues are applicable in relation to the use of the term '*handler DNA*' used to describe DNA from handled items (e.g. knives, firearms, tools etc.) such that using this term could also be misleading.

'*Shedder*', and associated terms such as 'shedder status', 'shedder type', good shedder' and 'poor shedder', are terms used to categorise an individual with respect to the degree of DNA deposited on a surface when touched, usually relating to hands. However, there is currently no standard quantity of DNA left on a specific area when touched in a standardised manner, to help categorise an individual as poor, intermediate or good shedder, or to score them based on some kind of scale. It is currently just a term applied based on relative quantities among a

cohort of individuals. Further, the relative origins of DNA sources (shed skin vs. cells/DNA deposited in a medium, self vs. non-self, or directly vs. indirectly acquired DNA) within a deposit are not always known, or considered, when referring to someone's shedder status. As the term 'shedder status' (and its derivatives) are in common use, we will for now continue referring to this within the manuscript. However, as we advocate refraining from using terms that imply an action or source without knowing the ground truth, a more neutral term should be considered for use in the future. A more appropriate term may be 'prevalence status/index' with a prefix identifying the relevant surface being sampled, or from which the sample was derived, e.g. 'hand prevalence status'. Further, words being used to indicate quantity such as 'good' and 'poor' could be replaced with 'high' and 'low', preferable according to a still to be determined standardised scale. See section 2.2.3 for more information on shedder status.

'*Background DNA*' can have different meanings [42,70–73]: a) The DNA present on the surface prior to the deposit of interest being placed on the surface during the action of interest; b) The DNA of sources present within a sample other than the person of interest (POI); c) The DNA present within the sample derived from unknown individuals. Meanings 'b' and 'c' of background DNA may be inclusive of DNA from other sources that may have been deposited during the same action of interest, and/or pre- and/or post- action of interest. When we use the term 'background DNA' in this review, this relates to meaning 'a'.

Gill [42] has used the terms '*active*' and '*passive*' transfer. '*Active*' is used to distinguish DNA originating from the perpetrator being transferred during a criminal event, from DNA that is present due to events unrelated to the crime event. However, as perpetrator DNA could be on a surface of interest, not just because of direct transfer during the criminal activity, but also due to direct transfer while using the item prior to use during the criminal activity or indirectly transferred there by a vector before or during the criminal activity, the use of this term could be misleading. Further, '*passive*' could be read to mean' background DNA' on the item prior to the offence taking place and/or indirectly transferred DNA of innocent others that happen to be on the hands of the perpetrator. We therefore refrain from using these terms when discussing DNA transfer.

Many trace samples produce mixed profiles where the sources and actions of the contributors are different from one another. Using a term relating to the source and/or action of interest (which could relate to a major or minor component of a profile), such as the aforementioned terms, without acknowledgement of the other sources and/or actions could be misleading. In casework, when reporting DNA findings, it is important that the terminology used is neutral to the source and/or action when they are unknown or questioned. If terminology is used that does imply a source and/or action, then the supporting evidence should be made available. When the supporting evidence is not based on validated test results or verifiable action, but assumptions based on common uses, applications, and/or histories, then the potentially misleading terminology should be avoided or at least the limitations and/or assumptions made explicit to the trier of fact.

Throughout this paper, we will frequently be referring to 'biological material' (i.e. undefined source) 'deposited' on or 'transferred' (i.e. undefined action of contact) to an item/substrate by placing a hand on or handling it (i.e. defining the action of contact). We also use the term 'touch DNA', but only when referring to data from research experiments where the ground truth is known, i.e. that the DNA recovered is from touch.

2. Core factors impacting transfer

The core factors currently known to impact DNA transfer include the substrate of the contacting surfaces, the nature of the biological material on the contacting surfaces, the manner of contact between the contacting surfaces, and shedder status (for DNA transferred through contact with hands or other areas of the skin). Further, these variables do not affect DNA transfer in isolation and depending on the different variable combinations, different transfer rates will be achieved. This section will explore each of these factors.

2.1. Substrates

Goray et al. [37,38] demonstrated that the type of substrates/surfaces on which a biological material resides (primary substrate) and the type of substrates they come into contact with (secondary substrate) will impact how much is transferred. The authors demonstrated that less DNA will be transferred from a porous substrate than a non-porous primary substrate, while a porous secondary substrate will facilitate transfer from the primary substrate. For example, Goray et al. [38] found that < 1% of DNA from dried blood transferred from a porous cotton substrate to another cotton substrate or to a non-porous flat plastic substrate, when pressure with friction was applied. In contrast, far more of the deposit was transferred under the same conditions when on the non-porous plastic primary substrate and contacting another plastic substrate (~45%) or cotton (~16%). In all these situations, far less (0–3.4%) was transferred when no friction was applied between substrates (i.e. contact was 'passive' or 'pressure without friction').

The same study found that when the blood was wet on the plastic substrate, approximately half (44–64%) was transferred to another plastic substrate, and more (90–98%) to a cotton substrate, irrespective of the type of contact (passive, pressure, friction). When both substrates are non-porous, during contact, liquid biological material can equalise between the two surfaces; while with porous secondary substrates liquid will continually absorb into the surface until saturation is reached, resulting in an increased transfer rate. In contrast, when the wet blood was deposited on a porous cotton substrate, far less (≤3%) transfer was observed to the secondary substrate, irrespective of substrate type (plastic, cotton) or manner of contact (passive, pressure, friction) due to biological material absorbing into the primary substrate.

In similar experiments to the study above, Goray et al. [37] found that deposits of biological material from hands through the action of touching appeared to be impacted by moisture; however, in most instances these were insignificant. In this study, less DNA appeared to be transferred when touch deposits were left for 24 h prior to transfer than when the material was freshly deposited, in most of the pairwise combinations of substrate types contacting each other, during passive and pressure contacts. In contrast, more of the dried (~13-49%) than the fresh (~8–33%) appeared to be transferred when friction was applied.

When similar substrates were applied in secondary transfer experiments conducted by Verdon et al. [74] and Fonneløp et al. [60], results were consistent with those of Goray et al. [37,38]. Furthermore, studies by Goray et al. [37], Daly et al. [75], Fonneløp et al. [60] and Helmus et al. [76] also found differences in the quantities of DNA directly transferred by hands depending on the type of substrate, observing that more DNA was transferred to wood and fabric than glass, metal or plastic.

The initial studies by Goray et al. [37,38] used a single type of cotton fabric to represent a porous substrate and hard flat plastic to represent a non-porous substrate. Verdon et al. [74] explored a wider range of fabrics, with different compositions and types of weaves, and found that these impacted the transfer significantly. In transfer experiments by Buckingham et al. [50,77], DNA picked up by a hand, from a previously touched knife handle, that subsequently contacted a glass plate or a cotton plate was far less retrievable from the cotton than from the glass. The substrate difference influenced the transfer of the DNA to the secondary plates and/or the ability to retrieve DNA from the substrate given the DNA collection method applied.

Physical and chemical differences in contacting surfaces, including those relating to their topography, chemical compositions, fibre type, weave, thickness, electrical charge etc., are likely to impact transfer, persistence and recovery of biological materials and DNA from

substrates to varying degrees. Further research into the impacts of variables within such factors would be welcomed.

See Section 7 for a discussion regarding the impact of the interaction between substrate, collection method and extraction method.

2.2. Biological material

2.2.1. Source and freshness/moisture content

Biological material such as blood, saliva and semen are often transferred during altercations, whether while fresh or at some time after it has dried. Blood and saliva transfer at a similar rate [38], with wet/liquid biological materials being transferred more readily than dried deposits. When all other variables (substrates and manners of contact) are kept constant, wet/liquid biological sources had significantly higher transfer rates than when the same biological materials were dry [38]. Results of a study by Warshauer et al. [78] are consistent with these findings. Given the large difference in the relative quantity of DNA transferred between wet and dry substances (~44–100% and < 1% respectively, depending on substrate and manner of contact [38]), and because altercations can occur over extended periods, it becomes important to have an awareness of how quickly the material dries, and the duration between its initial deposition and contact with another surface. The moisture level of a sample at the time of contact will potentially impact the likelihood of its detection given alternate scenarios.

Blood dries relatively quickly depending on the temperature, humidity and presence/absence of wind [79–81]. A study by van Oorschot et al. [82] showed that blood (15 and 30 μl) on a hard non-porous substrate will dry within 30–60 min (quicker in warmer temperatures), and that the transfer rates of blood, 5 min after deposition, declines exponentially until the deposit is dry. Furthermore, drying rates did not differ among the different conditions tested (primary substrate is plastic; secondary substrate is cotton; contact manner is pressure; at temperatures of 4–40 °C). Lesser and greater volumes of blood (such as a small blood spatter stain created during a forceful event or a large pool of blood created when a body with a bleeding injury remains in the same position for a while) may have different reaction characteristics.

Drying of blood can induce flaking, and has been shown to impact transfer [74]. The extent to which biological substances flake and/or powderise over time is dependent on substrates [74]; its potential impact on transfer is poorly understood and requires more research.

DNA deposits by hand transfer at a different rate to blood and saliva [37]. Goray et al. [37] found that such DNA deposits transfer at significantly lower rates than blood and saliva; however, drying has little impact on touch (at least 24 h post deposit) and therefore increased transfer rates, but not necessarily total amounts of DNA, were noted for 'touch DNA' compared to dried biological liquids [37]. 'Touch DNA' is not present in a liquid medium and therefore a time delay post-deposit does not appear to play a significant role when considering transfer for this biological material. However, these experiments only investigated the transfer of DNA through touching ~24 h after deposit when blood and saliva deposits are dry but skin deposits are not. Further assessment of transfer of primary touch deposits after longer time periods may be useful. It would also be of interest to determine the drying patterns and transfer rates of other relevant biological materials, such as semen, and the impact different substrates may have.

2.2.2. Source of DNA within touch deposit

2.2.2.1. Skin derived DNA: epithelial contained DNA + cell free DNA. Following its initial discovery, skin-derived DNA was believed to originate from epithelial cells sloughed from the outermost layer of the skin's surface [83–86]. Morphological analyses of fingerprints established that the majority of deposited cells were nuclei-free corneocytes, with only a limited number of nucleated cells and stripped nuclei observed [87,88], suggesting earlier views regarding the transfer of shed epithelial cells may have been oversimplified.

Immunological staining of human skin from the neck revealed the granular layer of the epidermis comprised flattened cells with condensed nuclei that had lost their shape [89]. As described by Kita et al. [89], the nucleus disintegrates as epidermal cells (keratinocytes) move through the outer, cornified layer of the skin. Also in their study, Kita et al. reported the finding of fragmented DNA in samples taken directly from the skin's surface. They suggested that keratinocytes containing residual DNA are sloughed from the cornified layers and transferred onto a secondary surface by sweat. Others described the possibility of extracellular bodily secretions, such as sweat or sebum, as vectors for the transfer of cell-free DNA through the layers of the skin [90,91]. This latter point fits with an earlier suggestion by Linacre et al. [92] who noted an increase in the number of alleles in profiles obtained following omission of the extraction process, whereby free DNA acted as a template for direct amplification by PCR.

Excluding the palms of the hands and soles of the feet, sebum secreting glands, or sebaceous glands, are dispersed over the entire body within the dermis. In their study on human skin samples from autoptic subjects, Zoppis et al. [90] described the finding of fragmented single stranded DNA in the cells forming the sebaceous gland, but not in the epidermis layers. They concluded that secretions from sebaceous glands in the skin, which are abundant in the scalp, face and around apertures of ear, nose, mouth and anus, may act as a vector for DNA residing in the fluid, part of what is transferred upon contact with skin areas. The study implies that the variable activity of sebaceous glands, which are under hormonal control, and the different parts of their own body an individual touches with their hands, will influence how much DNA is transferred by hands (see also Section 2.2.3 regarding shedder status).

In contrast to sebaceous glands, sweat glands are located on all areas of the body, with the highest density in palms and soles. Quinones and Daniel [91] evaluated whether cell free nucleic acids (CNAs) could be detected in sweat and whether these contributed to the DNA recovered from a touched surface. They noted that the overall quantity of DNA retrieved within samples taken from sweaty hands increased when CNAs were present as opposed to those where CNAs were eliminated during processing.

The findings from these studies suggest that a combination of sources and factors influence what is deposition of skin-derived DNA through touch. While it is likely that sweat and sebum act as vectors for the transfer of sloughed-off nucleated (and non-nucleated) cells, stripped nuclei and CNAs, the transfer of nucleated cells to the hands from other parts of the body is also a possibility, as is discussed in the following section.

2.2.2.2. Source identification. Any biological material can be transferred. Material such as blood when transferred tends to provide a stain that can be identified as 'what appears to be blood'. However, stains or smears may be of a minute level that is not obvious to the eye and/or present on a surface type and/or colour that makes visualisation difficult. Stains of saliva and/or semen are less visible to the eye. Methods are available to visualise these stains, and to some extent provide an indication of the likely source of the material [93,94]. Various tests are available to determine the source of biological materials [95,96].

The source identification of skin is possible using mRNA techniques [97–101] or through microbiome analyses [102,103]. However, as suggested [18,95] and later demonstrated using RNA-based methodologies [104,105], touch samples may consist of more than just skin cells. Biological material from other parts of the body, and from within the general environment [106], can be transferred to the hands, thus complicating the characterisation of material and increasing the quantity of DNA residing on the hands. This has an impact on source identification, as well as shedder status (Section 2.2.3) and further DNA transfer.

Further, as the yield of DNA from a small volume of semen, blood and saliva tends to be greater than DNA collected from touched objects

[27,107], knowledge of the origin source of the DNA may assist with the interpretation of the profiles generated from a collected sample.

Source identification of the main biological substances can be highly relevant to the activity level assessment, either because the type of cellular material (1) will inform the probability of the material transferring, persisting or being recovered, or (2) may be informative regarding the alleged activity. Examples of the first are given earlier in this section (e.g. touch deposit by hand transfer at a different rate to blood and saliva). An example of the second could be taken from an alleged sexual assault case. Assume that a victim claims that the suspect has touched her inappropriately and has penetrated her vagina with his fingers. The suspect states that this did not happen, but that they have been dancing intimately in a club that evening. Determining whether any DNA from the victim found under the fingernails of the suspect was derived from vaginal epithelial cells [95] or another type of cellular material may be very informative towards assessing these findings given activity level propositions [2]. Associating a specific cell type to a specific contributor in a mixed stain may be very complex, particularly if there are no sex-specific cell types (e.g. semen or vaginal epithelial cells) or if there are multiple contributors of the same gender present in the mixture. Probabilistic assessment at source level, that is, assigning an evidential weight to source testing results, has been described by Taylor et al. [108], Taylor [109], De Wolff et al. [110] and de Zoete et al. [111,112].

2.2.3. Shedder status

The study by van Oorschot and Jones [26] indicated that the amount of DNA deposited by hands was dependent on the individual. Several studies since have observed that there is variation in the propensity of individuals depositing their DNA upon contacting an item [32–34,51,52,64,71,87,113–115].

Lowe et al. [32] and Wickenheiser [18] suggested that there are good and poor shedders. It appears that some individuals consistently deposit more or less DNA than others [113]; these individuals are often referred to as 'good shedders' and 'poor shedders' respectively. From the studies by Goray et al. [113] and Kanokwongnuwat et al. [115] that investigated a number of individuals for their shedder propensity, it appeared that most individuals landed in the middle of the range, with relatively few individuals consistently being either very good or very bad shedders. This phenomenon requires much more investigation.

A study by Szkuta et al. [52], in which different pairs of individuals shook hands prior to depositing a handprint on DNA-free glass plates, demonstrated the impact that the relative shedding ability of the persons involved can have on the type of profiles generated from the post-handshake deposits. Good shedders (whether depositor or contributor) could swamp poor to intermediate shedders, while the pairing of two good, two intermediate or two poor shedders could result in the detection of both individuals.

The shedder status of individuals associated with an item of interest will impact how much of their DNA is detected on the item and its relative contribution to a mixture profile generated from a sample of interest. This impact has been demonstrated by Fonneløp et al. [64], whose study also showed that this will depend on the type of the item and its use history (i.e. frequency and type of use).

However, it is yet unclear how best to categorise an individual into a shedder class, or how to allocate a shedder score on a sliding scale. It is also uncertain how one could best determine the shedder status of a POI at some point of time after the event of interest. Fonneløp et al. [64] described a simple, binary shedder test which distinguishes low shedders from high shedders, whereby, individuals held plastic conical tubes in their dominant hand for 10 s to deposit their DNA. Associated factors were also investigated including the effect of time since hand wash and of wearing gloves (both of which were not controlled), and gender. High shedders were assigned when the DNA quantities obtained were above the average concentration in deposits made by all participants and at least two profiles were of high quality, while all other participants were defined as low shedders. They also provided an example of incorporating shedder status in casework considerations by means of the Bayesian approach, which considers the evidence in relation to the probability of secondary and/or direct transfer given shedder status. Counting the number of cells (within a specified area) deposited by a finger on a glass slide visualised by Diamond™ Nucleic Acid Dye [115] is an avenue worth considering further. Further studies are required to gain appreciation of the frequency of different shedder categories within specific populations and how this knowledge can be applied in casework deliberations.

While there is evidence that some people shed more than others, the factors influencing this are somewhat uncertain. Warshauer et al. [78] and Oleiwi et al. [114] demonstrated that the quantity of DNA shed from the palm surface is significantly less than from fingers, which, as previously suggested, may be linked to the prominence of sweat and sebum secreting glands in different areas of the body [90,91]. Skin conditions that increase the proliferation rate of the skin cells, such as dermatitis and psoriasis, may also result in the deposition of higher quantities of DNA through touch [116]. Further, studies have shown that younger individuals tend to deposit greater quantities of DNA compared to those that are older [117,118], while males may be more likely to be classified as heavy shedders compared to females [105,117,119]. Determining the extent to which genetic factors and various non-genetic factors (e.g. behavioural traits, health situation, and/or environmental conditions), and their potential interactions, impact shedder status, as well as identifying and understanding their underlying properties, warrants further investigation.

As indicated in the previous section, other sources of DNA may be present on the hand and contribute to what is deposited. The extent to which this occurs would be dependent on an individual's behaviour and habits, and would likely impact one's apparent shedder status. Warshauer et al [78] demonstrates this in their examination of transfer of saliva.

As shedder status may be a relevant factor when interpreting profiles in activity level assessments, further research focussed on shedder status is highly desirable.

2.3. Manner of contact/handling

van Oorschot and Jones [26] observed that substantial transfer of DNA material occurs during initial contact. Findings of others [18,60,120] concur with these observations. One may predict that there will be some accumulation of DNA on an object due to increased duration or frequency of contact. However, little is known with respect to DNA quantity accumulation profiles for objects of different types and substrates that may be dependent on duration and/or frequency of use; this requires further research.

How contact is made with an object will impact the level of transfer. As indicated in Section 2.1, Goray et al. [37,38] demonstrated that in most situations, when two objects come into contact with each other, more DNA tends to be transferred when pressure with friction is applied compared to passive contact or pressure contact without friction. Tobias et al. [121] confirmed that when surfaces were contacted by fingertips, increasing the pressure significantly increased the amount of DNA deposited, which resulted in the detection of more alleles from both the donor and unknown sources.

Different parts of a hand will contact different items in different ways. In some circumstances, it may be relevant to have an awareness of the impact of these differences on the amount of DNA deposited and the profiles generated. Oleiwi et al. [114] observed that less DNA was deposited by, or collected directly from, the entire palm area than by the combined total of the distal phalanges of the middle and ring fingers, despite the differences in surface area. The results of McColl et al. [122] concur with these observations. They observed that different parts of a hand appear to have proportionally more DNA, more non-self DNA, and may be more likely to pick-up and transfer non-self DNA, than others (especially fingertips relative to other hand parts).

Different objects are handled differently depending on their shape, size and use. Furthermore, identical objects may be used differently by different people. Therefore, different parts of an object may possess different levels of DNA, possibly from different sources. For example:

- Handles of most tools and weapons are used relatively similarly by different users, but objects such as a long pipe or stick, or a stretch of rope or tape, can be handled in different locations depending on use.
- The handle of a knife is handled by the stabber, and if done so by bare hands, tends to contain DNA of the offender, whereas the blade inserted into a victim will typically contain DNA from the victim.
- A chair seat and armrest are contacted as a matter of course when using a chair to sit on, but may be grabbed by its back legs (an area normally very rarely touched by hands or exposed to human legs), when the chair is used as a weapon of opportunity.
- A door may be pushed at different locations depending on the height of the person pushing the door.
- An adjustable lamp or instrument with handles on the right and left side, may be grabbed solely from one side depending on the handedness of the user.
- The switch or plug of a standing lamp may be targeted for the normal user, but other areas not frequently touched, like the lamp's stem, may be targeted for DNA from the intruder who is suspected of having grabbed it there to use as a weapon of opportunity, or the lamp's base targeted for DNA from the victim whose injuries are suspected to have been caused by contact with it during an assault.
- Inner collar and wrist areas of an upper garment are targeted preferentially to detect DNA from a potential wearer, whereas an external area of the upper arm or shoulder may be targeted to detect DNA from the person who grabbed them during an alleged assault.

Furthermore, the level of interaction (from a single static contact of a specific sub-area of an object, to multiple, frequent, varied manners and locations of contact) of a handled object with another object will also vary widely. A study by Pfeifer and Wiegand [123] demonstrated the impact of different intensities of handling a tool (intense mock break-in to a premises versus normal use of a tool according to its designed purpose) on the types of profiles subsequently collected.

An awareness of the common means of use/handling of items of relevance, in combination with knowledge of a) the specific histories of the item of interest, b) the contacts with the item relevant to the alleged criminal activity, and c) the differences in transfer rates by different parts of a hand (or other body part), may become useful when a choice needs to be made regarding which area of an object, or print, to prioritise when sampling.

3. Prevalence of DNA / background DNA

3.1. General considerations

It is reasonable to assume that most surfaces and items, unless new or cleaned, will have some DNA on them that has been acquired from previous use. This DNA is often termed 'background DNA'. This is especially so for personal items and shared items used regularly. Surfaces that are not regularly contacted may have less DNA on them. If items possessing background DNA are then used by others (i.e. the offender) during the course of an alleged criminal activity, mixtures from the usual user and offender can be expected [27,82,104,123–128]. For example, a study of background levels of DNA on common burglary entry points from 20 different premises (windows, doors) found 26% (n = 150) produced a DNA profile [129]. Furthermore, the authors observed the level of DNA on common entry points to be relatively low and suggested that, as windows are a common entry point for burglars, but have a low baseline level of DNA compared to other surfaces, these may therefore be a good target area for evidence recovery if a window was used to gain entry [129].

Background DNA may be derived from one person (mainly personal objects/environments) or from several individuals (mainly shared objects/environments, but also personal objects). When the sample of interest contains a substantial quantity of semen, blood or saliva that has been deposited on an item with a background of 'touch', or minute levels of other sources of DNA, then an appropriately collected sample of interest (the semen, blood or saliva) may provide a single source profile, as the quantity of DNA from this source can overwhelm that of the background. However, many such samples still provide mixed profiles. If the stain of semen, blood or saliva is itself at minute levels, one is more likely to generate a mixture profile that is inclusive of DNA from the semen/blood/saliva, as well as one or more individuals from the background DNA. This is illustrated in a study by Peel and Gill [130] who found that when dilute blood/saliva samples were deposited on a glass slide that had been handled before or after the deposit, DNA was recovered from both the body fluid and the handler; the respective ratios of which were dependent on the volume and concentration of the body fluid and the shedder status of the handler. If both the background DNA and the deposit of interest are 'touch' sources, then a mixed profile inclusive of owner and the second user is likely. However, the proportional contributions will be dependent on the levels of background DNA due to history of use, how the second user interacted with the surface, the duration of this interaction, and the shedder status of both users.

When dealing with 'touch' DNA as a background or a deposit of interest, the presence of non-self DNA on the hand of the individuals involved may contribute to a more complex mixed DNA profile. Furthermore, from a casework perspective, it may be relevant to assess whether the same unknown contributor has contributed to multiple traces. This is often difficult due to limitations in mixture interpretation. Developments in probabilistic models, including mixture deconvolution, may assist in identifying the same unknown in multiple traces [131].

3.2. Distinguishing background from deposit

Deciphering what was already on the object and what was added during the action of interest can become a contentious issue. Therefore, awareness of general levels of background DNA quantity, origin and quality may be useful. Further complicating factors are a person's shedder status and frequency of item use. This type of data is however very sparse and needs addressing.

Researchers are investigating means of distinguishing recent deposits from old deposits (background) and/or time since deposition. These include exploiting time dependent changes relating to nucleic acid degradation, mRNA, proteins, biomarkers and cell morphology [132–135].

Whilst not a prescribed policy in most jurisdictions, and often not possible, in some situations it may be useful to collect a sample from an area immediately adjacent to the area targeted for an evidentiary sample, thus revealing a profile that is possibly very similar to the background component of the target evidentiary sample [136]. The similarity, however, may have been compromised depending on the nature of the action depositing the biological substance of interest in the target area, as some of the background may have been lost from the primary surface to the contacting secondary surface (bi-directional transfer). van den Berge et al. [137] present data from a small example study considering the potential value of collecting post-activity background samples as a control to assist activity level reporting.

There was a time when such background samples, known as 'substrate controls' were taken alongside areas of body fluid staining, for example in the UK (and possibly other jurisdictions). However, these were for the purpose of checking for any potential interference from the substrate when using blood grouping tests on a specific area of body fluid staining. When DNA profiling superseded blood grouping, the value of such substrate controls for the purpose of detecting

interference was brought into question [138] and ultimately the taking of substrate controls ceased. Interestingly, although critical of the use of substrate controls for their original purpose, Gill also commented that the taking of such substrate controls could help with certain types of DNA interpretation [138].

Within the broader context, when the prevalence of a POI within a crime scene is relevant, one may benefit from collecting a range of samples, depending on the case, including: (1) an item for controls (for instance immediately adjacent to targeted area), (2) similar items (like knives from a kitchen), (3) items in the immediate vicinity of the item of evidence (like the pillow under which the gun was found), and/or (4) from the wider crime scene. Such samples would provide case specific probabilities for prevalence/background, which would be better than generalised probabilities based on experimental studies. From a cost/benefit perspective, such samples could be collected, but only analysed if they become relevant within the context of the case.

The availability of reference samples of known regular users/wearers of an object may also assist the interpretation of the profile, irrespective of them being the victim, POI, or an incidental non-associated individual.

Further research is required to understand the influence of any background DNA on the interpretation of mixed profiles.

3.3. Prevalence and origin of non-self DNA on hands

Several studies have detected the presence of foreign DNA on the hands of individuals [33,51,52,54,60,75,82,104,113,139–141]. For example:

- van den Berge et al. [104] found non-self alleles present in 83% (n = 20 profiles) of samples taken from the neck and 88% (n = 40) from hands, originating from up to 3 and 4 contributors respectively. The donor was present in all samples and was the major contributor in 100% and 93% of the samples, with an average peak height donor to background ratio of 7.6 and 8.8, respectively, in these sample sets.
- Goray et al. [113] found that 79% of samples (n = 236) generated from touch deposits of left and right hands (of 10 individuals three times a day on four separate days, without any prescribed action prior to placing deposit) onto DNA-free glass plates contained non-self DNA.
- Samie et al. [139] found non-self alleles present in 97% (n = 64) of samples of direct deposits by hands (after carrying out normal daily activities in their office environment) on DNA-free plastic knife handles (16 from each of 4 individuals). Three percent of samples were single source DNA profiles of the donor. The donor was clearly the major contributor in 83% of samples; 12% of the profiles were mixtures with no clear major/minor contributor; and 5% were deemed of insufficient quality.
- Meakin et al. [51] found non-self alleles present in 100% of samples of direct deposits by hands onto DNA-free plastic knife handles (3 from each of 4 individuals). The donor was also present in all samples as the major component. The non-self component contributed 1–3% of the total DNA on knives from three of the participants, but ~25% of the total DNA from the hands of the fourth participant.

Few of these studies tried to identify the origin of the non-self DNA, except for the following:

- The study by Samie et al. [139] tested for the presence of colleagues, of the donors of hand prints on glass plates, encountered during the day of the experiment, and did not observe their presence within the profiles generated from the plates.
- The prominent minor component reoccurring in the samples of one participant in the study by Meakin et al. [51], upon further investigation, was attributed to the romantic partner of the donor.

The extent to which non-self DNA is present on a person's hand, or is deposited upon contact with items, is dependent on the actions of the hands prior to sampling or depositing (see also Sections 5.1, 5.3). For example:

- Cale et al. [54] maximised the likelihood of transfer of DNA from person A to person B and then from person B to a knife handle by having the persons A and B wash and dry their hands, then wear a glove for 1.5 h prior to shaking hands and to shake hands vigorously for 2 min prior to handling a knife handle for 2 min. They found that the detectable DNA of person A transferred to the knife in 85% of occasions, and was observed as either the only or major contribution in 25% of occasions (n = 25).
- Szkuta et al. [52] also used handshakes between persons A and B (with bare hands and without any prior washing protocol) as a means of transferring DNA; however, they used a more realistic time of 10 s, followed by the subsequent immediate placement of a handprint for 10 s with pressure on a glass plate. They found DNA of person A was transferred to the glass plate by person B in 58% of occasions (n = 12). Person A was never observed as the major component in these profiles, nor were they observed as the sole contributor.
- Meakin et al. [51], also employed a 10 s handshake between persons A and B, but instead of person B touching a DNA-free object, they immediately picked up a knife handle they had regularly used previously and proceeded to stab a stabbing apparatus repeatedly for 60 s. In their study, person A was observed as a minor contributor (~10%) to the mixture profiles retrieved from the knives of three pairings, but not on knives of the fourth pairing.

In most circumstances within these studies, when person A was observed as a major contributor, the DNA of person B was still present as a co-major or minor.

However, in other studies where the circumstances were less controlled and/or optimised, the non-self component of the transferred profile was the major or only contributor in no more than 3% of samples [63,75,123,139,142,143].

These studies focused on elements of transfer that incorporated variables within their experimental design, such as specific actions prior to DNA sampling, use of pre-cleaned objects, reuse of the same cohort of participants in different combinations, and/or use of optimised conditions, which limit their relevance for casework investigative/evaluative purposes [144,145]. The overall numbers of samples are also low. To acquire more accurate probabilities of finding non-self DNA, and of the different relative mixture proportions within a deposit made by a hand, we need to collect more samples from random individuals in a wide range of situations. For many research laboratories, this will require more extensive ethical considerations.

3.4. Prevalence and origin of non-self DNA on body areas other than hands

Graham and Rutty [71] found non-self DNA present on the neck of 14 of 24 volunteers, with most non-self DNA being detected on the necks of volunteers who were married or lived with partners. In all instances the number of non-self alleles was fewer than the number of self alleles detected.

In a separate study by Graham et al. [72], surface swab samples collected from 12 face/neck sites and 20 body sites of 50 children less than 5 yr of age showed that overall, extremely small amounts of non-self DNA was present, with foreign DNA observed on 35% of swabs tested (most showing only a few alleles). Furthermore, their study found a high degree of variation between children and between areas tested.

Evaluation of findings, particularly in cases of sexual assault, often requires information on the prevalence of DNA on other body parts than the hands. Especially on the more intimate locations of the bodies of

both men and women. We do encourage, where possible, more research effort on the prevalence of non-self DNA on the bodies of both children and adults.

3.4.1. Fingernail samples

It is well established that foreign DNA can accumulate under an individual's fingernails [70,146–159], and this knowledge has been considered further in respect to its use in investigating crimes [39,42]. This DNA is relatively protected compared to other parts of the body that are exposed to physical contacts and actions. When evaluating DNA profiles obtained from under the fingernails in a forensic context, direct versus indirect contacts and normal everyday versus criminal activities are often assessed against each other when presenting this evidence in court. This assessment is further complicated when the victim and offender are known to each other, are in a relationship or live together. Understanding of the prevalence, persistence and type of foreign DNA profiles under the fingernails after different sets of circumstances can assist profile interpretation.

The incidence of direct versus indirect DNA transfer under the fingernails is difficult to assess as, to our knowledge, no studies to date have specifically investigated indirect transfer to the fingernails (for instance, by occupying another person's space for a certain amount of time). Currently, inferences regarding indirect transfer can only be made, to a degree, from the results showing the detection of foreign DNA in direct contact studies. Initial results show that there is a higher probability of finding full, good quality DNA profiles from simulated direct contact studies, than from indirect transfer of DNA in these persistence studies. However, one could also argue that fingernails are a site where non-self DNA could accumulate over time, and from several different types of actions. The potential quantity and quality of this relative to the quantity and quality of DNA from the same other individual, but from a single direct contact activity, needs to be researched.

Examples of various studies include:

- *General population*: Various studies have found foreign DNA in fingernail samples, with occurrence ranging from 5 to 41% of samples, and higher quality mixtures (as defined by the respective authors) detected in 6–14% of these [70,148,150,155]. Of the over 300 people tested within these studies, only one sample had foreign DNA detected as a major contributor, however this sample was taken from a participant who self-reported previous intimate activity. When these studies investigated factors affecting foreign DNA detection, time since last human contact, incidence of intimate contacts, participants' sex (increased detection in males), and in some studies, the length of the fingernails, were found to be significant. Notably, fingernail scrubbing/washing did not guarantee complete removal of foreign DNA [147,148].
- *Co-habitation*: A study by Kettner et al. [151] of the male quantification results in a scratching study showed highly significant differences in the amount of DNA between scratching and non-scratching fingers of females that scratched their partners, indicating that even if females are living with male partners, the amounts of male DNA can provide an indication of different types of contact taking place. Studies that look at cohabitating individuals, both in intimate and non-intimate relationships, found mixed DNA profiles in 14 to 37% of the samples (collectively n = 45 people), however only 6 to 17% were higher quality mixtures [146–148]. Interestingly, with non-intimate cohabitation, in one study, household members were excluded as the source of foreign DNA in all samples (n = 25 people) [148]. Most of the mixtures obtained in these studies originated from two people indicating that more complex mixtures are rare. Within these studies, there was only one reported instance of the mixture inversion, where the foreign DNA was detected as a major component, highlighting its rarity (< 1%) in fingernails sampled after everyday activities
- *Intimate activity and digital penetration*: A study by Flanagan and McAlister [147] observed single source female profiles and mixtures with the major female contributor in all male fingernail samples immediately after digital penetration. The female DNA was shown to decline over time; however, informative female profiles (more than 4 alleles) were still detected within a mixture with the male donor in 75% and 63% of the samples at 12 and 18 h post penetration, respectively.
- *Physical altercation/scratching*: A study by Wiegand et al. [152] of evaluating the impact of superficial scratching of arms, necks and scalps, detected more instances of foreign DNA in fingernail samples after scratching of necks and scalps than arms. However, fingernail samples from the scalp/neck scratching were collected with the less invasive sampling procedure (light sample removal avoiding abrasions to the fingernails versus extensive cleaning leading to abrasion of the fingernail and skin), which the authors suggest can possibly explain the result. A study by Matte et al. [148] of fingernails of 30 male/female pairs that scratched each other on the underside of the forearm detected foreign DNA in 37% of the samples. Increased vigour and number (x30) of scratches resulted in better quality foreign DNA detection. The foreign DNA under the fingernails diminished with time. The length of time that foreign DNA can still be detected after scratching was shorter than after digital penetration [147]. A study by Kettner et al. [151] that included vigorous scratching of the flank of the 34 participating males by their female partners showed that scratching fingers had significantly higher concentration of male DNA. However, in approximately 31% of all couples, no male DNA was detected after scratching, thus highlighting that a negative result does not necessarily indicate that scratching did not take place.
- *Casework fingernail samples*: A number of casework sample studies (including homicides and sex offences) reported mixed DNA profiles in the range of 13–35% of samples (n = over 300 cases); however, 'higher quality' mixtures were detected in 7–21% of these [148,149,153,156–158]. In several instances, the foreign component was detected as the major contributor. Note, as the ground truth knowledge within all these cases may not be fully known, these limitations should be made clear to the court when used in casework practice.

The above studies assess the impact of different activities performed prior to sample collection, and utilise different collection strategies and methodologies, which can complicate comparisons and use (Sections 7.4, 8.4.1, 8.4.2). However, in instances where the study differences relate to differences in methodologies post collection, the mixture proportions of donor to foreign DNA will in many cases likely hold true, as both will be lost and gained at a similar rate.

Samples taken from fingernail scrapings may be informative when evaluating findings given scenarios on the manner or timing of contact. There are differences found in both the persistence of DNA and the composition and quality of the DNA profiles after different contact situations. However, we also note a crucial gap in our knowledge. Specifically: a) acquisition of non-self DNA during regular social interaction (e.g. the defence position involving dancing in the case example in Section 2.2.2.2); b) indirect transfer by occupying another person's space for a certain amount of time. Hence we encourage further investigations into these aspects. These should include further investigations of the effects of personal habits, and an individual's shedder status, on detection of donor and foreign DNA under fingernails. Availability of more data would benefit assessments of findings given alternative propositions relating to innocent versus criminal contact.

3.5. Prevalence and origin of non-self DNA on personal items

Personal items and clothing are often collected as evidentiary or reference material. It is usually assumed that these will provide the profile

of the regular user/wearer, which they usually do; however, they often also contain DNA from other sources [64,82,104,123,137,160–164]. For example:

- van den Berge et al. [104] found non-self alleles present in all samples collected from exterior surfaces of trouser legs (n = 48) and armpits of shirts (n = 16) originating from up to 5 and 3 contributors respectively. The donor/wearer was present in all of these samples and was the major contributor in 60% and 100%, with an average peak height donor to background ratio of 4.4 and 5.3 in these sample sets respectively.
- Noël et al. [161] found that of 168 samples taken from underwear (n = 24) of children that had been regularly worn and washed with the rest of the family's laundry, 52% yielded interpretable mixtures of DNA corresponding to multiple family members (including fathers, brothers, sisters and mothers) post-washing and drying. DNA corresponding to the mother was detected in 51% of samples contributing 5 to 90% of the total genetic mixture.
- Stouder et al. [163] found that, for all 11 items of clothing (T-shirts and hosiery) that were worn for a day following laundering, DNA from the wearer was recovered as either the major or co-major profile. In the latter case, the other co-major profile was attributed to the wearer's spouse. Minor profiles on the other items were attributed to the respective wearers' spouses, but also to their children and to unknown sources.
- Magee et al. [164] observed the spouse of the wearer as a minor contributor in DNA profiles obtained from three of four garments sampled (from the collar or cuff) that had non-wearer DNA components, and for which reference profiles were available from the spouse.

One of the likely sources of non-self DNA on personal objects is transfer from the hands of the owner/user acquired by handling items belonging to and used by others. It is of interest to become informed on not only the extent to which non-self DNA resides on the hands/skin of an individual and their personal objects, but also of its origin.

Very few studies have focused on establishing the origin of the non-self DNA on personal objects. Awareness of likely contributions of various known associates of an owner/user of an item/space may assist understanding of contributions to background DNA and the interpretation of mixture profiles. We encourage further studies be conducted to improve our awareness of contributors to the non-self component of DNA retrieved from personal objects and occupied spaces. Such studies will require appropriate consent from relevant associates of primary volunteers, as well as adherence to relevant ethics protocols. Improved awareness of the probability of detecting specific known close associates (e.g. a family member, live-in partner, co-resident, friend and/or colleague) of the owner/handler/wearer/occupant of an item or space, given the history of the item or space, may identify common associates regularly found on specific types of items. This may highlight the need for reference samples to be collected from such close associates during casework to assist profile interpretation. During casework investigations, comparisons to reference/elimination samples from known potential contributors may assist interpretation of mixture profiles.

4. Persistence of transferred DNA

4.1. Persistence of deposit over time without further use

The DNA of biological samples, including those assumed be deposited by handling, can retain sufficient quantity and quality to generate full STR profiles for several years, even decades, which is being successfully exploited to assist cold case investigations [36,124,165–168]. The persistence of any biological material will be dependent on a range of environmental factors, including: temperature, exposure to UV, rain, wind, humidity and presence of micro-organisms on the surface.

Caseworkers have anecdotally collected trace samples, of unknown source assumed to be deposited by handling, from many items after various exposures. However, Raymond et al. [129] showed that the recovery percentages of naked DNA and buffy coat cells placed onto external painted wooden window frames of a residential building and collected at different times after deposit (1 day to 6 wk) declined more rapidly than the replicate samples on glass slides kept in a dark laboratory cupboard, with the naked DNA declining more rapidly than the buffy coat.

Wigand & Klieber [83] reported detecting DNA derived from the suspect in a sample taken from an area of the neck of a strangulation victim ~48 h after death.

A study by Meakin et al. [51], in which participants shook hands and then immediately stabbed one of their previously handled knives into a foam block, observed that indirectly-transferred DNA from the opposing 'handshaker' could be recovered from the knife handles for up to at least one week after the stabbing. Whilst the peak heights of the unique alleles attributed to the opposing handshaker significantly decreased over the course of the week, only minor partial DNA profiles were obtained at any time point [51].

4.2. Persistence of deposit after continued use

A study by Szkuta et al. [52] aimed to determine the probability of detecting DNA from person B on five glass surfaces contacted sequentially by person A either immediately or 15 min after shaking hands with Person B. Following immediate contact post-handshake, Person B was observed as a minor contributor, or as a contributor when no major was assigned, in 27% (n = 60) of profiles obtained. This decreased to 15% (n = 60) when contact was delayed by 15 min. Of these profiles, person A (the individual contacting the surfaces) was excluded as a contributor from three profiles (5%) obtained from the surfaces following immediate contact post-handshake and a single profile (2%) when contact was 15 min post-handshake. Regarding the latter, both bidirectional transfer and DNA parking were postulated as the mechanisms for transfer of person B. In a separate study, where the deposit after handshaking was onto a wood handle (firmly grasped while rotating the hand to create friction) 40 min, 5 h and 8 h after the handshake, person B was observed as a contributor (minor in all cases) were 25% (n = 12), 8% (n = 12) and 0% (n = 12) respectively [53]. Person A (the individual contacting the handle) was observed as a contributor on all occasions. Thus, in these studies, person B was observed as the only contributor in a single profile obtained following immediate contact post-handshake and was never observed as the major contributor in mixed profiles [52,53].

In a study by Graham and Rutty [71], saliva deposited on the neck of another person by licking appeared to still be detected in 3 of 5 samples of necks collected after a day of normal activity.

The quantity of biological source of interest present on any one item will likely diminish after each contact. One can expect this is also the case when considering self and non-self DNA on hands after touching multiple objects. This has been demonstrated in studies by van Oorschot et al. [35], Buckingham et al. [50,77], and Szkuta et al. [52].

4.3. Persistence of original user after use by another

As demonstrated by a number of studies, it is possible for the DNA of an original handler/wearer of an item to persist for lengthy durations after being used by a second person. For example:

- van Oorschot et al. [82] showed that DNA contributions from the original user (rubbed vigorously for a total of 210 s) and second user of a pen were approximately in equal proportions after 1–5 min through to 61–80 min use by the second person. The detectability of

the original user gradually declined as a pen was used more by a second person, but was still detectable at 15% of profile contribution after 90 min. In a separate experiment, the original wearer (worn for a total of 34 h) of elastic armbands also declined as they were worn longer by a second person, but was still a major contributor to the profile retrieved up to 28 h after wearing by the second person. It gradually declined to ~10% after 96 h [82]. A full profile of the original wearer was present in 57 of 60 armbands sampled after being worn by a second person. The remaining three, worn by the second person for 8 or 16 days, provided a partial profile of the original wearer. In another experiment, most of the profiles generated from 108 samples taken from a wide range of previously used personal objects (owned for different periods of time) from known individuals that had been temporarily used for various durations by known second persons, were mixture profiles inclusive of the original owner and second user [82]. The profile of the owner was present in 80% of samples. This included samples such as a fabric lanyard worn by a second person for 1 month (work days). Items where the profile of the second user completely replaced that of the owner included a lighter, eye shadow case, USB stick, hair clip, lip stick holder, lip gloss container and lid, pen and pen lid, sunglasses nose and ear bridge, and perfume bottle lid. Some of these had been used by the second user for relatively long and short periods. Full profiles of the owner were recovered from 39% of the non-porous substrate samples and 79% of porous substrate samples.

- Oldoni et al. [141] examined profiles generated from a wide range of items (including computer mouse, key, pen, watch, internal and external part of disposable glove, cap, bracelet, necklace) after sequential contact by two different users for different time periods. They found large variability in relative profile contributions depending on the duration of use by a second person, substrates of the items, and the individuals handling the items. Contributions of the second individual progressively increased relative to the first user with prolonged use. The second user was observed as the major contributor in ~15%, 33% and 55% of samples taken from a variety of items after 5, 30 and 120 min of use respectively. The first user was no longer detectable after use by the second person in 2 of 234 (0.9%) of samples (both were bracelets, one worn for 30 min, the other for 120 min by a second person).
- Fonneløp et al. [140] showed that DNA of an initial user of a personal regularly-used computer keyboard and mouse, can persist and detectable level transferred to hands of a second user, up to 8 days after 30 min of use per day. Differences in the ability to detect the initial user's DNA on the hands of the second user among participating pairs over time, was reasoned to be due to differences in shedder status.
- In simulation robbery tests conducted by Raymond et al. [124], wallets used for 1 wk by one person and then used by a second person for either 1 min, 1 h or 1 wk (n = 5 per handling time of second person, at normal amplification) all showed mixture profiles representing both persons, except for one sample (1 wk first person, followed by 1 min handling by second person) which contained DNA of the first handler only, and another sample (1 wk first person, followed by 1 h second person B) which contained DNA of the second person only.
- Pfeifer and Wiegand [123] studied the persistence of DNA on burglary-related tools (including screwdrivers, crowbars and hammers) that had been owned, or mock owned (i.e. used for 30 s in a manner the tool was designed for, 30 min after washing hands with soap, with the amount deposited deemed comparable to the amount found on real tools tested), by one person and then used by a second person. Tools were either used intensely in a mock burglary action (~30 s) (n = 30), or moderately as per normal use (30 s) (n = 30), with bare hands and without any prior handwashing protocol. They found the second user to be more frequently present than the first user (80% and 3.3%, respectively) in the profiles from the samples of the tools after the mock burglary situation, whereas, the second and first users were present in a similar percentage (64.7% and 52%, respectively) of profiles after moderate handling. It is to be noted that, apart from the manner of handling, the types of tools and the substrates of the contacted areas within the two sample sets were different; this may have contributed to the differences in profile compositions observed.
- In a study by van den Berge et al. [104], trouser ankles (n = 48) and armpits of shirts (n = 16) of known wearers were sampled after being contacted during dragging events by known individuals. The profiles contained 2 to 5 contributors and all indicated the presence of both the wearer and grabber. The peak height ratios of victim to background ranged from 0.7 to 29.8, and of grabber to background from 0.6 to 14.7.
- Poetsch et al. [120] found that of 84 sweat bands, sampled separately from the inside and outside, worn for 4 h to 3 days by a first wearer, followed by 10 min to 3 days by a second wearer, 92.9% provided a mixture profile containing both wearers. A single source profile of the first wearer was observed in only one sample. This sample was from the outside after being worn for the shortest period by a second wearer (1st wearer 4 h + 2nd wearer 10 min). A single source profile of the second wearer was observed in 6 outside samples and 5 inside samples. In each of these cases the sweatband had been worn for a far longer period by the second wearer than by the first wearer.
- In a study by Breathnach et al. [125] underpants that had been worn for ≥12 h by a male, were gripped at a specific location of the waist band (while unworn), with two hands for 15 s by a female (n = 63), then sampled from the whole waist band. Based on their suite of applied methodologies and internal interpretation guidelines they found that the probability of observing reportable DNA profiles to be 61.9%. In addition, the wearer was detected as a single source profile or part of a mixture in 50.8% of samples; the wearer when present in a mixture was always observed as the major contributor; the gripper was detected in 11.1% of samples; and the background DNA (non-wearer and non-gripper) was present in 87.3% of samples, with a reportable unknown profile observed in 14.3% of samples (as a major in one sample and as a minor in eight samples).

In respect to the study by Breathnach et al. [125], the authors themselves indicate that their observed rate of detecting the wearer, and presence as a major contributor, was lower than in another study, may be attributable to differences in sampling methods, RFU thresholds/interpretation standards and/or kit/instrument sensitivities.

Apart from the impact of these suggested potential contributing factors, the experimental designs of the studies discussed have features that will have impacted the outcomes and would thus also need to be considered when contemplating utilisation of data for interpretation of casework related profiles and events [169].

Overall, the above examples, whilst demonstrating that DNA on an item derived from an original user can persist after the use of the item by a second person, show differences in outcomes dependent on items/substrates, activities/action, and durations involved, as well as the interpretation methods utilised, thus illustrating the need to apply data from circumstances most closely aligned with the conditions of the scenario of interest.

4.4. Persistence of temporary user after original user resumes using the object

Within some casework scenarios an object of interest that belonged to, and was originally used by, one person may be temporarily used by a second person. This second person may be the POI, but rather than the object not being used again after an action of interest, it was used again by the original user, prior to securing the item for examination. For example, an accused may claim that they:

- Had been an incidental driver in a vehicle at some time in the past rather than at the time of the offence; i.e. that after they drove the vehicle, it was used again by the regular driver/owner.
- Borrowed and wore a balaclava at a fancy dress party once, and that after the party, it was returned to its owner and subsequently worn by a perpetrator during a robbery.
- Belonged to a group of individuals that commit burglaries, for which the accused was convicted in the past. The group shared tools like crowbars among themselves whenever they committed a burglary. Although the accused was active in the past, they claimed they had not committed any offence (including the one they are charged with) recently, and that one or more others must have used the item after the accused last handled it.

To our knowledge, no major study has been conducted to determine the persistence of the temporary user of an item after use by the original owner has resumed. Whilst one may extrapolate from the data presented in the studies mentioned in the previous section, and those mentioned in the following sub-section, further research on this aspect may be warranted.

4.5. Persistence after multiple users on non-personal items

When an item has been touched by multiple individuals in similar fashions one is likely to obtain a mixed DNA profile. For communal non-personal items, the last user is not necessarily going to be the major contributor. The mixture proportions generated from the item will depend on the shedder status of the individuals in question and the type and frequency of contacts by all users. This was observed in the initial study on DNA transfer by van Oorschot and Jones [26], and in subsequent studies under controlled [63] and non-controlled conditions [127].

A study by van den Berge et al. [104] of DNA profiles generated from public items (n = 51) such as railings at train stations, door handles and flush buttons of public toilets, handles of shopping carts and baskets, library books, coins and indoor handle bars, found that useful quantities of DNA were retrieved from the majority of samples with most profiles having multiple contributors. A major contributor was detectable in 17% of profiles. Of the banknotes (n = 51) and coins (n = 6) where the last user was known, the last user was not necessarily the major contributor to the profile obtained; they were the major contributor in 5 of 9 samples where a major contributor was detectable.

To determine which of multiple last known handlers of an item is detectable, Buckingham et al. [50] had sets of four individuals each consecutively handle a knife by simulating a stabbing action. They found that in each situation (n = 6) all four individuals were detectable, with the more recent handlers of a knife being the most prominent within the DNA profile generated from the handle. However, the last handler was not always the major contributor.

Greater knowledge would be welcomed of probabilities of detection, and relative contribution, of individuals to profiles retrieved from a wider array of shared objects and surfaces within confined shared spaces (e.g. homes, offices, cars) and public spaces, given known histories.

4.6. Persistence of sperm (and other foreign DNA sources) in the vaginal cavity

Sperm persistence in vaginal samples decreases over time, and is believed to result from vaginal lavage and drainage, menstruation, and general time-dependent cellular degradation. However, studies have suggested that phase of menstrual cycle is not a crucial factor [170,171]. Further factors considered during sperm survival assessment are the use of oral contraceptives and presence of vaginal flora that are known to affect detection frequency. The cellular sperm degradation in the vagina, assisted by the immune system, is also associated with increased structural fragility that can cause premature lysis of sperm cells during differential extraction and detection in the non-sperm fraction. In such instances, male DNA may not be detected with autosomal STRs due to high female to male DNA ratios.

Various studies have contributed to our knowledge of the persistence of sperm in the vagina post intercourse. This knowledge includes, but is not limited to:

- Morrison [172] detected spermatozoa 12 and 9 d after intercourse in the cervical and vaginal samples respectively, but noted that detection rate decreased progressively after 48 h.
- A study by Casey et al. [173] of the results of 1450 cases observed the longest sperm persistence in the vagina to be 96 h after intercourse with significant decline in detection after 18 h and again after 48 h. The same study noted that, on rare occasions, spermatozoa were detected in the anal and oral samples 48 h after the alleged offence, however rapid decline in detection was reported after 6 and 15 h respectively.
- Hellerud et al. [174] found very few sperms in samples taken at 96 h and no acid phosphatase (AP) positive reactions past 24 h.
- An analysis of 900 alleged vaginal penetration cases detected sperm in 29%, 12% and 4% of vaginal, anal and oral swabs with the longest recorded detection time of 83 h, 29 h and 12 h respectively [175].
- Another study based on casework samples showed that while most positive samples were taken within 6 h of the alleged offence, on occasion spermatozoa can persist for 24 h and on one occasion was detected in a sample from a deceased person taken 48–96 h after the offence [176].
- Willott et al. [177] detected spermatozoa in vaginal, rectal, anal and oral swabs 120 h, 65 h, 46 h and 6 h after the alleged offence, respectively.
- A study by Astrup et al. [178] of three different sites (external genitalia, posterior fornix and cervical canal) of 60 women post intercourse (all samples taken within 48 h) detected spermatozoa in 88% of women who reported ejaculation into the vagina and in 14% of women who reported that no ejaculation occurred. They detected significantly higher numbers of spermatozoa in the posterior fornix sites. The same study also reported observing significant inverse correlation between time since intercourse and the number of spermatozoa detected and observed a negative effect of the use of lubricants on sperm detection.

Some of the above data are from collated casework findings. For further studies, see also DiFrancesco & Richards [179]. As noted previously, limitations should be stated when interpreting collated casework data to assign probabilities as the ground truth is very rarely known. However, it is to be noted that the ground truth has many aspects. We tend to focus on those that are deemed relevant to the factors of interest in the case. Whilst overwhelmingly the ground truth of the full circumstances of a violent crime is unknown, there are different types of crime and different elements to a crime (biological and non-biological). There are circumstances where the ground truth of a relevant element is known. For example: a sexual assault case where the debate is about whether or not the act was consensual. The time of intercourse is not questioned, and may be used to infer persistence of semen in the case file study.

Olofsson et al. [180] showed that the detection and persistence of both sperm and trace male DNA in the vagina increased when using Y-STR DNA profiling. Further, a study by Hall and Ballantyne [181] showed that sperm persistence in vaginal samples taken at 0–6 d post intercourse analysed using a autosomal DNA profiling test detected male donors up to 12 h post-coitus, whereas Y-STR testing increased partial male DNA detection to up to 4 d.

Benschop et al. [182] compared post-coital vaginal sampling success using cotton and nylon flocked swabs and found improvements in

total male DNA yields and cell release during elution when using the latter. The authors suggested that nylon swabs may retain sperm cells more efficiently or vaginal cells less efficiently. Positive presumptive tests (PSA and RSID- semen) in this study were reported up to 60 h after intercourse; however, over 50% of the samples that were negative during presumptive testing produced male DNA profiles during autosomal typing, and Y-STR profiles were detected up to 84 h post intercourse.

Male DNA found in the vagina post intercourse could be derived from sperm within ejaculate and/or biological material (e.g. skin derived or saliva derived DNA) on the penis, fingers, tongue or object that entered the vagina [183–186]. McDonald et al. [183] in their study of persistence of male DNA, with no detected spermatozoa after penile and/or digital penetration, obtained Y-STR positive results up to 48 h post alleged offence, however as no samples were taken past the 48 h cut off the authors suggested that male DNA may be detected even later if tested. An analysis by Albani et al. [187] of 259 vaginal samples analysed for the background levels of Y-STR profiles showed that without intercourse, no profiles with three or more alleles were detected in the tested samples. However, 14% of these samples had between 1–2 non-reproducible alleles that did not correspond to the expected males and were likely introduced during sampling. In contrast, 93% of samples taken after unprotected intercourse produced partial and full Y-STR profiles up to six days later.

5. Other factors impacting transfer

5.1. Washing of hands

Lowe et al. [32] first suggested that handwashing may impact DNA transfer. They showed that the proportion of donor DNA, deposited on a clean DNA-free tube during a hold of 10 s, increased with increasing time since handwashing. At 6 h post-handwashing, all eight participants deposited full DNA profiles (detected using low copy number profiling of 34 PCR cycles); non-donor DNA was also recovered. Similarly, when comparing DNA recovered from clean tubes handled for 10 s at 15 min post-handwashing versus without controlling for handwashing, Phipps & Petricevic [33] observed a general increase in numbers of alleles when handwashing was not controlled.

Further effects of handwashing have been observed more recently. In particular, Zoppis et al. [90] only observed recovery of self and non-self DNA from fingermarks on glass slides that had been deposited prior to handwashing, as no DNA was recovered when participants touched the slides 10 min after either conventional handwashing with regular hand soap or deep handwashing with antiseptic soap. This study also suggested that handwashing may impact secondary DNA transfer. When participants rubbed their finger on a sebaceous skin area (e.g. back of the hand) of another individual and then touched a glass slide, mixed DNA profiles were recovered when hands were not washed first, while in the majority of cases (5 of 8) post conventional handwashing, only DNA from the other individual was recovered and not from the participant who touched the slide [90]. Addressing more than just DNA recovery, Stanciu et al. 2015 [188] considered the contribution of whole cells versus extracellular DNA to the DNA deposited via touch before and after handwashing with soap and water. They found that a greater quantity of extracellular DNA was transferred from unwashed hands (0–4.646 ng) than from washed hands (0-0.242 ng) on to clean tube held for 5 min. Interestingly, although they observed a greater transfer of whole cells from washed hands than from unwashed hands, these cell pellets resulted in very low DNA yields.

In contrast, a number of transfer-related studies that recorded when participants last washed their hands prior to placing a deposit did not observe an impact from handwashing. For example, Goray et al. [113] found no significant difference in DNA deposits recovered from handprints on glass plates between those left by individuals who had washed their hands less than an hour prior to the deposition (64 of 240) and those left by individuals who had washed their hands more than an hour prior (176 of 240). Similarly, Szkuta et al. [52] observed no connection between the time since handwashing and the contribution of donor DNA to the samples recovered from handprints on glass plates deposited after a handshake, even though time since handwashing ranged from as short as 5 min to as long as 6 h.

Given these mixed results, a greater understanding of the impact of handwashing on the amount and quality of DNA deposited from hands is required, particularly through further systematic study. Factors, such as different methods of washing hands, the natural accumulation of DNA on hands post-handwashing, and the different personal habits of individuals, and their effect on the accumulation of self and non-self DNA on hands need further attention.

5.2. Washing of clothes

Research has been conducted to examine the persistence of DNA on clothing after washing and the extent of DNA transfer to clothing during washing. Initial studies investigated the persistence and transfer of DNA from body fluids, such as semen, blood and saliva. For example, DNA profiles from semen stains were found to still be retrievable after washing and also retrievable from other co-washed clothing as well as the washing machine drum [161,189]. Similarly, reportable and/or informative DNA profiles from blood tended to be obtained from washed blood-stained cloths and from co-washed clean cloths [190–192]. In contrast, van den Berge et al. [104] found that the average persistence rates of DNA from both blood and saliva-stained cloths after washing were less than 0.001%, and the transfer of DNA from these stains onto the co-washed items was found to be extremely limited with only a very few alleles, if any, being detected. Whilst Kulstein and Wiegand [191] also obtained no reportable or informative DNA profiles from clean cloths washed with saliva-stained cloths, they found 52% of saliva-stained cloths gave reportable DNA profiles after washing. The reason for such different results between the studies is unclear, especially given that the starting volumes of blood and saliva in Kulstein and Wiegand's study were smaller than those used by van den Berge et al. (20/100 µl versus 500/1000 µl).

Further studies have started to address the transfer and persistence of skin derived biological material on washed clothing. DNA deposited onto cotton cloths via rubbing on the neck for 5 s gave full DNA profiles from 40% of cloths held under a running tap (with cold or hot water at different time points up to 10 min) and 56% of cloths submerged in water in a bathtub (with or without soap and at different time points up to one week) [193], but gave only partial profiles from 13% of cloths that were machine washed [192]. Kamphausen et al. [192] observed few alleles, if any, on the remaining cloths that were machine washed and similarly few alleles were recovered from co-washed clean cloths.

Although both van den Berge [104] and Kamphausen et al. [192] concluded that DNA persistence and transfer in a washing machine is very unlikely, further studies have found different results. Of unworn items washed in household washing machines with normal loads of dirty laundry, Voskoboinik et al. [194] found that 19% gave single-source or major DNA profiles matching that of a member of the household and Ruan et al. [160] found 76% gave single-source or mixed DNA profiles. As suggested by Ruan et al. [160], this increase in detection of DNA transfer could be due to the use of a profiling kit with increased sensitivity (PowerPlex21® as opposed to SGM Plus™). Voskoboinik et al. [194] also found that no detectable DNA was recovered from unworn socks washed alone or from swabs taken directly from the interiors of several washing/drying machines, suggesting that DNA transfer occurs via the dirty clothes within a washing machine rather than via the machine itself.

These studies demonstrate that background DNA can be acquired on clothing via various means, including washing. Ruan et al. [160] raise the valuable point that whilst we assume that the observed DNA transfer occurs within the washing machine itself, there are other opportunities

for DNA transfer during the whole process of washing and drying clothes, such as via the mixing of clothing in a laundry basket prior or after washing and the varied modes of drying clothes. A wide range of possibilities may therefore need to be considered during the DNA evaluation process, depending on the scenarios under consideration.

5.3. Activities between activities

When considering the likelihood of transfer from one area to another, with a hand as the vector, one tends to focus on the variables potentially impacting transfer associated with the original deposition of the sample of interest onto a primary substrate and its pick-up by the hand, then consider those associated with the contact of that hand with the item of interest from which a sample was collected. However, it would be deficient if one did not also consider the known facts and/or probabilities of that hand contacting things in the period of time between those two actions of interest, given:

A.) Knowledge that loss of DNA, and the potential gain of DNA, can occur upon every contact. Thus loss of DNA, and/or acquisition of more own and/or other DNA, from intermediary contacts, will impact the likelihood, quantity and relative proportions of the DNA of interest detected from the final surface of interest.
B.) Studies have shown that a person's hands will contact many surfaces (including themselves, objects they own, objects they share, and/or non-personal objects) within a very short period of time, in a range of everyday general activities [195] as well as during criminal activity [196].

Any contacts by a hand in the interim period will impact what may be found in the collected sample. Similarly, an object that acquires biological material of a POI during one activity, and sometime later biological material from a second POI, could have had nothing contacting it and not be exposed to any detrimental environmental factors in the interim period, or could have been contacted by one or more individuals or other objects with or without other DNA on them, to different degrees, and/or exposed to detrimental environments, causing loss of existing DNA and/or gain of other DNA in the intervening period.

5.4. Flies

Transfer of human DNA associated with criminal activities will usually be through direct contact between individuals, an individual and an object, or between objects. However, in some settings it may be relevant to consider the possibility of transfer via animals. One example is the possibility of transfer of human DNA via flies. Flies will be attracted to blood, semen, and dead bodies and feed from them. Their artefacts (defecation and regurgitation) deposited later, at the same site or elsewhere, can contain sufficient human DNA to generate full profiles [197–199]. Sampling of fly artefacts in the absence of a body and/or stains due to removal/cleaning, as the only remaining potential source of DNA associated with a POI, may thus be of assistance. However, as artefacts can be deposited on surfaces some distance away from the feeding site, and because their detection and distinguishing features can be difficult [197,200,201], they could also be collected as an incorrectly assumed stain source, misdirecting profile interpretations and relevance to the crime event.

Human DNA can also be profiled from the excreta of adult human crab louse [202] and from mosquitos after feeding from humans [203–205].

6. Complexities of trace DNA dynamics

When assessing the probability of detecting DNA of interest (Section 11) within a scenario incorporating multiple contact events where transfer may have occurred, one first needs to determine the order of contact events within the pathway of interest and then to consider the impact of the variables present at each event. All of the variables mentioned in the earlier sections need to be considered for each contact event within a sequence, as well as any potential inter-variable effects. Even factors which at first may not appear to be relevant in the process of committing a crime may still have a very significant impact on the ability to identify the POI associated with the criminal activity. This includes consideration of what might have been happening to the sample of interest in the interim period between assumed key contact events.

It is relevant to consider available knowledge of DNA quantities and profile types at the starting point, intermediate points, and final point of transfer pathways. This is assisted by having access to data on: how much DNA is typically present on a wide range of common surfaces/items (when handled in common ways, and in manners associated with specific criminal activities); and the profile types and/or whose DNA is present on surfaces/items given the use, shedder status of users, and environment within which the item is used and stored.

One can assume that the amount of DNA present on a final substrate that is derived from an original deposit on a preceding substrate at the beginning of a transfer pathway will, after having been transferred multiple times before landing on the final substrate, be less than was originally deposited on the primary substrate at the beginning of the transfer pathway. The total amount of DNA collected from the final substrate could, however, be similar or greater than what was on the primary substrate due to background DNA presence on the final substrate, additional DNA being added along with the source DNA of interest derived from the original deposit by the contacting vector, and/or a larger sampling area.

Factors that may contribute to the reduced transfer from one substrate to the next, other than the type of substrate and the persistence of the biological material, may include the relative areas and manner of contact (i.e. the extent to which the secondary substrate overlaps the whole, or only a portion of, the area of the primary substrate where the relevant biological substance is located).

Goray et al. [48] performed a few mock case scenarios involving multiple transfer steps and compared the expected transfer percentages, given the then available knowledge of the impacts of substrate, manner of contact and biological material on transfer, with what was observed. In some instances, they were similar; however, major differences were also recorded between the observed and expected transfer percentages, as well as among repeats of the same scenario, implying that other variables were having an impact. Some of these relate to the need for a better understanding of the elements of the core variables impacting the transfer of DNA, and may also relate to the interactions among these variables. Other factors discussed in earlier sections may also have influenced the differences detected, as may other not yet identified factors. This all points to the need for further research to understand the variables influencing transfer.

DNA, through various combinations of direct, indirect, bi-directional, multiple contacts and pathways, can end up in unexpected places. Some of these pathways and contacts are difficult to decipher without ground truth knowledge of all the actions, and associated relevant details, involved. For example:

- Goray and van Oorschot [63] in their study where three individuals participated in a social interaction of sitting at the table and drinking from a communal jug of juice, found DNA of an individual who did not directly contact a surface and postulated several multi-step transfer pathways to explain the finding.
- Taylor et al. [127] observed the DNA of individuals in areas of a laboratory they did not frequent.
- Forensic scientists deal with case scenarios on a daily basis that require consideration of the various pathways and contacts that could have led to the DNA evidence observed, even with limited

scenario information and in the absence of ground truth knowledge. This is illustrated by cases such as that of Meredith Kercher [43], Daniel Fitzgerald [206], Farah Jama [207], Phantom of Heilbronn [208], Dirk Greineder [209], and Steven Wayne Hillier [210].

7. Recovery

7.1. Impact of different recovery methodologies

Different laboratories use different methods to collect DNA from similar items. The main methodologies applied are swabbing, tape lifting or direct extraction via excision [7,211]. There are however many types of swabs and tape-lifts, and means of their application, with significant differences in retrieval rates [7,212–221]. Some other methods are available such as a wet-vacuum system [222] or sampling of individual skin flakes [167], but these are less commonly utilised. In some special situations, DNA recovery is aided by soaking the item in solutions, for example fired cartridge cases [223]. Furthermore, there are a wide range of methodologies applied to extract DNA from collection devices or directly from the substrate the sample is on, with varying degrees of efficiency [9,224]. A number of studies have also shown that direct amplification of trace quantities of sample from swabs, small items and fabrics can provide profiles as good as or better than using traditional methods [92,225–229].

Section 2.1 showed that the transfer rates at interactions between two surfaces are dependent on the substrates involved. However, the observed transfer rates can also be impacted by the efficiency of the sampling methods applied and the efficiency of the extraction methods applied to extract the DNA from the collection device.

Verdon et al. [74] showed that the amount of DNA retrieved from different amounts of biological material on the same and different substrates, using the same collection and extraction methodology, can differ significantly. They indicated that these differences should not be ignored when analysing and interpreting results from transfer perspectives. They demonstrate the application of a correction factor for extraction efficiency when comparing results of samples collected from different substrates after similar transfer events, and go on to suggest consideration of applying appropriate correction factors where relevant. The generation of correction factors, for a range of suites of conditions, could conceptually be an avenue to allow fairer comparisons of data, and their application, to address a range of situations. Utilisation of correction factors has also been advocated by others [47,143,164].

7.2. Targeting

Targeting the sample of interest to gain the best possible profile to assist investigations is not always an easy task, especially when that sample is of a minute nature. Poor targeting can affect the quality of results obtained. For example, sampling beyond the boundaries of the sample of interest heightens the risk of collecting more of the background DNA, thus increasing the likelihood of mixed profiles and reducing the proportional profile contribution of the POI. Furthermore, if one collects within the boundaries of the sample of interest, but only collects a small proportion of it, then this could lead to a partial or less informative profile.

Some touched surfaces and objects sampled for DNA have initially been examined for fingermarks using methods to visualise the contacted areas. Many other objects sampled for DNA are sampled from target areas, where the object is logically assumed to have been contacted (e.g. weapon and tool handles). However, with some objects, assumptions of areas contacted are less straightforward (e.g. grab impressions on clothing [230]). In these latter instances, it may be beneficial to apply visualisation techniques, e.g. gold or silver vacuum metal deposition, fluorescent in-situ detection [231–234], to try to locate the areas of contact for increased sampling accuracy.

7.3. Differential sampling

As it is often the last deposit that one is interested in and not the background DNA that is present on the substrate, Verdon et al. [212] hypothesised that the last/fresher deposit may be somewhat layered on top of the background DNA and, thus, may be able to be differentially collected using subtle taping techniques. Their findings, however, did not demonstrate that this was readily possible, probably because of the extensive mingling of the different contributions to the biological mixture on the substrate.

More promising means of separating different cellular contributions to mixtures prior to DNA extraction are available to assist obtaining clearer profiles of the separate contributions. These include: differential lyses methods where the DNA from the non-sperm cell fraction can be separated from the sperm cell fractions [235], laser microdissection [236–242] and cell sorting [243–246]. Where cells of the same type are within a mixture, but derived from individuals of different sex, these too can be separately isolated [247,248]. Where cells of the same type within a mixture are from individuals of the same sex, use of fluorescently-labelled human leukocyte antigens may assist separation of cells [246].

7.4. Impact of different suites of methodology from collection through to profiling

A general comparison of success rates of similar samples collected from similar items demonstrate the impact different suites of methodologies may have on the success rates [27,29,249,250]. There is unfortunately a paucity of meaningful success rate data available for comparison. Several authors have advocated that more success rate data be collected and disseminated, and accompanied with all the relevant details in relation to the methods, processes and thresholds applied, to allow proper comparisons of the impacts of different suites of methodologies [47,251–253]. Such information allows for: assessments of impacts over time as internal methods/processes/training change; comparisons with performances of other laboratories for like sample types; identification of continuous improvement opportunities; improvement of sample targeting strategies and prioritisation; better work flow management; and equipping staff to better manage expectations of stakeholders (including crime scene officers, informants, legal fraternity). Reports by Mapes et al. [14] and Baechler [16] begin to demonstrate the value of success rate data collection and comparisons.

It is to be acknowledged, and considered, that as new methodologies, from collection through to profiling, are developed and applied, they may impact DNA-TPPR detection outcomes and thus influence probability assessments.

8. Data to be used in a case

8.1. General considerations

The primary source of information to rely on should be experimental/research data, where the ground truths are known, and where data on relevant variables and propositions are also well known. If there is ambiguity surrounding severity of impact of a specific factor within a sequence of events, then available research data on the variables potentially impacting this factor should be taken into consideration. Where such data are not available, consideration should be given to undertaking the research to acquire the necessary data. However, since time and resources devoted to a case may be limited, other sources of information may be used to assign probabilities to DNA TPPR [2]. We will discuss these sources in more detail below. See also guidelines from various agencies relating to evaluative reporting [44,254–256].

8.2. Knowledge of case specific information

For any proper activity level assessment, there should be an understanding of all the potential factors that may impact DNA-TPPR, and as much task-relevant case-specific information/details regarding these factors should be collected as possible and made readily available to the scientist conducting the evaluation of the findings. This includes those relating to:

A.) Event details
  a Pathway of alleged transfer events (including activities between and after those in focus – see also 'g')
  b Time line of events
  c Details of the items involved in each contact, including:
    i Type, size, substrate
    ii Areas of items making contact
  d History of each item prior to the action of interest within the pathway, including:
    i Amount of use, by whom, when
    ii If cleaned, and if so, how and when
    iii Environment (storage) when not in use
  e Details of the manner of contacts
  f Location of events, including:
    i History of location (occupation, cleaning regime)
    ii Environmental details (indoors or outdoors, weather conditions)
  g Details of what happened with the items of interest post criminal activity and prior to packaging of item or sampling of item, including:
    i Ongoing use by POIs or others
    ii Examinations conducted prior to packaging or sampling for DNA, including other types of examination (e.g. latent fingermark enhancement techniques)
B.) Relationships
  a Suspect with the items of interest and the locations of interest
  b Victim with the items of interest and the location of interest
  c Suspect with the victim
  d Known others not directly involved in the criminal activity, but associated with the suspect, victim, location or items of interest
C.) Packaging, storage and transport of items examined
  a Condition of item and biological material at scene (including if wet or dry, and whether dried, if wet prior to packaging)
  b Sampled at scene or packaged, transported and stored
  c Type of packaging
  d Transport conditions
  e Storage conditions
D.) Recovery of sample through to profiling
  a When recovery of the sample occurred relative to alleged criminal activity and exhibit creation
  b Area sampled
  c Method of sampling
  d Method of extraction
  e Method of profiling
  f Method of profile interpretation
  g Knowledge of biological materials from which the DNA was derived
  h Availability of reference samples of suspect, victim, known associates, background of area sampled

Not all details will be equally relevant, and not all may be relevant in a particular case. Those relating to C and D should be readily available from the examiners; B will be indicated by the informant, instructing parties or the court; whilst much of A will come from the crime scene attending and investigating officers, victim and/or witnesses. Alternative information may be indicated by other parties. Limited information may be available for elements associated with these points, especially A, due to practicalities and/or legal framework. We encourage efforts towards understanding the impact of the absence/presence of the types of information one relies on that may be gathered by the crime scene attending officer, and to consider means of improving the gathering of relevant information in an efficient and consistent manner.

8.3. Re-enactments and mock simulation

Scenario re-enactment or mock simulation testing, incorporating all the relevant factors and potential variables within each as accurately as possible, relevant to the scenarios being investigated, is highly desirable. Care must be taken that any simulations truly address the questioned issues in the case given two or more competing scenarios. However, these case specific experiments can be very time consuming and costly, and the design/execution and interpretation of results of these require their own expertise.

8.4. Research data

8.4.1. Same or comparable suites of methodologies

In the absence of data from case-specific re-enactments, the use of empirically collected research data on the impact of a wide range of variables, for a breadth of factors potentially influencing transfer, can be appropriate. Ideally, this is data produced using the same suite of methodologies as applied in the case under investigation. However, most experts trying to address activity level questions use data from studies that have used suites of methodologies dissimilar to the ones used in the case being considered. Differences in the suite of methodologies applied can make it difficult to compare the data from one source with that of another. For some questions, the dissimilarities in suites of methodologies applied are not that relevant, but for others they may be. For instance, if interested in the relative proportion of known contributors to a profile, then in certain circumstances differences in collection, extraction and amplification methodologies applied may not be relevant, yet differences in sensitivity, number of loci and discrimination power of the kit used, and the thresholds applied to allele RFUs during interpretation, may impact the results and interpretation, and subsequently an opinion on the potential for transfer. Alternatively, if the question relates to how much DNA from a particular source was collected from the area sampled, then differences in the methods applied to collecting the sample from the area, and how the DNA was extracted from the collection device, would be relevant, yet differences in amplification kit and profile interpretation would not. Further, some methodologies within each phase of the collection to profiling process may be very distinct from each other, and reliant on different technologies, but have been demonstrated to provide similar outcomes (e.g. different extraction methodologies providing the same quantity and quality of DNA from a specific type of sample and/or collection device). Alternatively, similar technologies may have different efficiencies (e.g. if both use a swabbing technique to collect the sample, but use different types of swabs and/or wetting solutions that impact directly the quantity and/or quality of what was retrieved, or interacts differently with the extraction method to affect the same). It is thus important to consider (and incorporate) the potential impacts of these differences during interpretation.

Apart from the impact of using different sample collection devices and strategies, and DNA extraction methodologies raised in Section 7, the quality of the profiles obtained can be dependent on the amplification/profiling systems applied (especially with respect to their sensitivity and discrimination power). A further complicating factor is the highly divergent interpretation and statistical methodologies used.

To illustrate these difficulties, Steensma et al. [143] examined the effect of laboratory procedure on the outcome of a DNA transfer experiment. Five sets of 20 cable ties bound by different volunteers were distributed to four participating laboratories. These laboratories then

sampled the cable ties, extracted the DNA, amplified and profiled the extracted DNA, and interpreted the resultant profiles, all according to their standard operating procedures. The results of the study showed that there were statistically significant differences between amounts of DNA recovered by the four laboratories, as well as different success rates in DNA profiling. The reportable profiles further showed differences in the number of mixtures versus single source profiles that were obtained. Steensma et al. [143] also demonstrated that packaging, transport and/or time delay before sampling of the items impacted the quantity of DNA retrieved and profiles generated, and thus potentially the interpretation of experimental results.

Furthermore, an inter- and intra-laboratory exercise on the assessment of complex autosomal DNA profiles showed variation within and between laboratories indicating that interpretation outcomes are impacted by differences between internal guidelines and methods available, as well as the need for improved guidelines and training within laboratories [257]. These findings are corroborated by Butler et al. [258], although it is likely that probabilistic genotyping in time will reduce the impact of the human factor in DNA profile interpretation [259]. Assessing the impact of interpretation guidelines may be difficult when relevant details of the suites of methodologies applied in relevant studies are not available or clear. It is thus desirable for future publications of DNA-TPPR related data to be inclusive of relevant details of the methods, protocols and thresholds applied to generate the data presented [73].

8.4.2. Experimental designs generating transfer data

Much of the available research data on DNA transfer incorporate experimental designs to ascertain if a particular factor impacts transfer and the general direction of that impact. These experiments did not aim to generate probability estimates of specific quantities of DNA transferred, or of the various profile types that may be encountered, in given situations. Furthermore, the circumstances being investigated in many of the publications thus far, have been elementary and not focussed on commonly encountered crime-related situations, or lack consideration of aspects of background DNA, prevalence or recovery methodologies, making translation of the data into real life situations less applicable/straightforward. This even extends to simple things; the samples in many reported research studies are collected relatively soon after the action of interest, which is quite different from casework samples that have been packaged, transported and stored for a period of time. The impact of these simple actions could be multiple and potentially profound [55,143]. Whilst some recent studies are starting to address the need for such data, there remains a substantial void to be filled.

When considering the use of published data, one must, apart from considering the impact of the suite of methodologies used, also consider the experimental design and the potential implications/limitations they may have on their utilisation when interpreting the case scenarios at hand [144,145]. For example, if assessing the probability of detecting DNA of person B from a full handprint on an object left by person A immediately after a handshake with person B, the factors requiring consideration should include: what persons A and B did with their hands prior to shaking hands; shedder status of persons A and B; manner and duration of handshake; object shape and substrate on which a handprint was placed; and the manner and duration of handprint deposit. Each of the available studies focussed on this type of scenario [51,52,54] incorporate different variables of the factors and combinations thereof (see Section 3.3 for some details). Similarly, each of the studies focused on determining whose DNA is on a knife handle [50,51,54,139] apply different scenario conditions within their experimental design. Hence, the outcomes of each of these studies may not be as directly relevant as the others to inform probabilities on DNA-TPPR in the case in question.

The interpretation of results in any specific casework scenario will depend on the subset of available data used during interpretation. One needs to utilise the data that are most fit for purpose. The choice of data used (and the associated limitations), plus the available relevant data not used accompanied with the reasons why, needs to be transparent to the trier of fact.

The different factors influencing DNA-TPPR will also impact each other to varying degrees depending on the set of circumstances. Contemplation and weighing the potential impacts of the multitude of potential interrelated factors within alternative scenarios/propositions can be very difficult. The use of Bayesian networks can facilitate such analyses (Section 11). A number of recent papers have collated the best available information to determine a specific probability and have applied it to specific scenarios, e.g. [53,64,108,125,139,143].

There is a need to utilise probability estimates that closely relate to the factor of relevance and are as accurate as currently available data permit. Even if the variation is large then this needs to, and can, be incorporated within the Bayesian networks through modelling distributions and/or performing sensitivity analyses. Wide variation signals that other factors are influencing outcomes. Identification of these other factors can lead to creation of additional/separate nodes within Bayesian networks. However, any data analysis is only as good as the quality and quantity of the data it relies on; thus, unless sufficient data is utilised, results generated could be less accurate than desired and potentially result in an uninformative opinion.

Separately, the sourcing of the experiment participants is not always representative of the general population. Furthermore, the total number of participants or replicates within reported studies is often limited. Those relying on this type of data for activity level assessments would benefit from more expansive studies to help establish more accurate probability distributions for relevant factors impacting transfer.

8.5. Collating casework data

Laboratories examine many cases involving similar items in similar situations. For some, the ground truth is not contested and can be reasonably assumed. Where probabilities of obtaining a particular type of profile within a given situation is required, there is value in collating in-house casework information to determine the frequency of particular profile types from similar objects in similar situations, especially if there are a reasonable number of relevant cases and where the suites of methodologies applied are the same. Any use of this type of data should be transparent and the relevant data made available to other relevant parties in the case if and when appropriate.

8.6. Casework experience

DNA transfer expertise requires an understanding of the effects of different combinations and single variables affecting DNA transfer that comes from experimental results with known ground truths. In day to day casework practice, it may be found that no, or very limited, current data are available that align closely enough with the case at hand to be of any use. In these circumstances, the expert may refrain from providing an opinion, or, whilst acknowledging the caveats, resort to informing the court based on their expertise with forensic analysis of biological traces and DNA. Experience with casework DNA profiles which results from the interplay of many different real life variables is of value when determining someone's expertise in the topic of DNA transfer. Experimental data generated from transfer experiments allow researchers to see the impact of known variables, including what the profiles are likely to look like given the known variables. In casework, the ground truth knowledge is usually unavailable and competing hypotheses are often provided to explain the DNA evidence. There can be great differences between the DNA profiles generated from experimental samples and real casework data. Effects of background DNA, environmental conditions, presence of inhibitors and interpretational complications, such as assumptions of known contributors, allow casework scientists to accumulate knowledge of the complexities of real life casework profiles. With experience, DNA interpretational case

managers are usually exposed to thousands of profiles generated from a wide variety of biological materials and item types, accompanied with some knowledge of scenario components, established through casework relevant information. A case manager may also elicit accumulated experiences from other case managers. If different methodologies are applied within a laboratory, any impacts of these differences may become obvious to an experienced caseworker. In such situations the ground truth regarding the application of different methodologies is known and therefore the elicited knowledge regarding the impact may be considered slightly more reliable. When using elicitation as a source of information, proper procedures should be adhered to, to avoid confirmation or observation bias [260]. Utilisation of elicited casework experience must, like all data utilised, be transparent to the court.

Thus, both casework and experimental experience and understanding have their benefits and limitations, and in order for a court going biologist to be in the best position to assess a complicated issue such as DNA transfer, exposure and experience in both is beneficial when addressing the subject.

However, the fact remains that in most casework circumstances the ground truth is not known. Furthermore, human cognitive abilities to effectively accumulate, and weigh, all the relevant data without unconscious biases, are limited. We thus reiterate that elicitation of probabilities of DNA-TPPR based on general casework experience is a poor substitute to probabilities informed by structured analyses of collated casework data, when no experimental data are available.

Jamieson and Bader [169] noted that experience as a source of reliable scientific opinion on the probability of DNA transfer has been challenged, and question the validity of this approach. However, they support the conduct of research to determine the accuracy of 'experiential' assessment relative to 'experimental' assessment. We concur that such research would be useful. See Taylor et al. [2] for further discussion of the merits and limitations of expert elicitation.

8.7. Awareness and transparency of limitations of the data utilised

As noted above, one needs to use the best currently available data and be transparent about the potential limitations of these data (and potentially counter these limitations with other supporting evidence/data). Reporting guidelines should require disclosure of the data on which an evaluative opinion is based upon request, especially in cases where that particular opinion is in dispute. This has been noted previously when considering both case-specific data [261,262] and unpublished data that may be shared among scientists working for one 'side', but not with those working on the other [41]. The limitations of the data and/or methodologies used to provide probabilities of alternative scenarios should be known and taken into consideration when utilising the data, and also need to be clear and understood by the trier of fact [263,264].

8.8. Accessibility and sharing of data

The limited published DNA-TPPR research data are presented in different formats, not all of which are readily accessible. Studies generally aim at presenting data to inform on the research question, and additional information (e.g. on number of contributors, DNA quantity etc.) may not be fully explored and/or presented. The data from unpublished in-house research and/or casework data collections are even less accessible to others. The paucity of available data limits the accuracy of probabilities and opinions provided.

There is thus a need to consider the potential value of having a quality controlled open access depository of relevant DNA-TPPR information, which can be easily mined for the various purposes that it could accommodate. Furthermore, if deemed of potential value to an array of stakeholders, then consideration of the potential means of establishing such a depository/database/portal is required [73].

9. Transfer as a contamination risk

Addition of DNA to a sample post-criminal offence activity (by investigation personnel, tools, equipment, etc) can complicate the interpretation of a profile and/or misdirect investigations. The contaminating source is usually from individuals who are not a POI (e.g. investigator or other person attending the scene or examining laboratory). However, depending on the what, when and how the contact causing the contamination occurred, the contaminating source could potentially be a POI within the case under investigation, or a POI in an unrelated case. Distinguishing the post-criminal activity contribution of DNA from background DNA, originally present prior to the sample deposited during the criminal activity, further complicates the interpretation of the generated profiles.

Contamination of DNA profiles through transfer events post crime scene establishment can occur through various means, including:

- Direct transfer by handling an item to be sampled without wearing gloves.
- Direct transfer through the air whilst talking or coughing over an item, when not wearing a mouth mask [265,266].
- Direct transfer through the air, from a person moving when not wearing any protective clothing [266].
- Indirect transfer from item to item when packed together within the same packaging, or from one area of an item to another area of the item when inappropriately packaged [55].
- Indirect transfer from the external packaging to the internal packaging and/or exhibit during handling and transport [56].
- Indirect transfer via gloves, because: gloves were not DNA free when purchased [267]; the box of gloves was not kept DNA free during use; gloves were not replaced after picking-up DNA by touching something with DNA on it prior to touching the exhibit (especially an area from which is to be sampled) or an area that was designated to be and remain DNA free (such as a bag of DNA-free tools to be used later) [58,60].
- Indirect transfer via dirty tools or equipment. For example, scissors or forceps not appropriately cleaned between uses [58,59]; fingerprint brushes reused to powder different sites in the search for fingermarks within and over multiple scenes without cleaning the brush in between [57,62]; having multiple items being fumigated simultaneously within a superglue chamber and/or the chamber not being appropriately cleaned after each use [268]; handling of dirty equipment such as a magnifying lamp, camera, torch whilst also handling the exhibit with the same gloved hand [269].
- Indirect transfer due to sharing of equipment among colleagues, such as a camera, without appropriate handling and/or protocols adopted [270]
- Indirect transfer due to placement of exhibits on unclean surfaces [270].
- Indirect transfer by handling of non-exhibit items during examinations without awareness that they contain DNA, such as the packaging and casefile notes [56,127].

Such events may occur due to: absence of proper procedures and/or poor compliance to them; poor training; ineffective cleaning procedures and/or compliance to such; and absence of environmental monitoring procedures [57,127,128,271–276].

Contamination events can be mitigated by: having proper procedures relating to crime scene access, examination laboratories, and exhibits; wearing, appropriate use and replacement of personal protective clothing; effective training and competency assessments; use of validated effective cleaning procedures and regimes; application of effective contamination monitoring procedures [168,211,266,270,271,277–285] and use of certified DNA free consumables where possible [286,287]. However, with respect to use of certified DNA free consumables one needs to be wary of the tests and standards applied by the manufacturer, relative

to your use of the product [272,288] and where possible conduct control tests using in-house suite of profiling methodologies.

Furthermore, procedures should be in place that allow detection of contamination events if they occur, so that the profiles can be interpreted accordingly. This should include controls and checks for item to item transfer during examinations and sample processing. This must also include having an elimination database, against which each evidentiary profile is compared to assess if any of the profiles on this database is clearly present within the profile generated from the evidentiary sample. The elimination database should be inclusive of all those who: attend a crime scene; handle an exhibit from which a DNA sample may be collected, either during examinations or just handling packages containing the exhibit; work in areas where the exhibit is stored and/or examined, including those entering these areas for the non-scientific reasons such as general cleaning, maintenance or repair [270,271,277–286,289].

In order to allow the laboratory to improve their work practices and the confidence stakeholders have in the DNA evidence presented, appropriate contamination minimisation procedures must be used and monitored, with all contamination events being fully and transparently investigated [277,279].

Contacts with an exhibit, especially the areas to be sampled, are not just risking contamination, but are also potentially reducing its probative value through the reduction of the amount of DNA material remaining for collection. When dealing with trace quantities of sample, any loss could reduce the ability to generate a full profile, thus lessening the probative value of the collected sample.

There are several high profile case examples of the impact of lack of, or inappropriate, contamination mitigation and detection procedures that emphasise the relevance of maintaining proper contamination minimisation procedures. These include the ‘Phantom of Heilbronn’ [208] and ‘Farah Jama’ [207] cases. See Taylor et al. [2] for some further cases.

10. Readiness of those addressing transfer related questions

Most laboratories conducting forensic examinations and reporting evidence do so under accreditation rules and guidelines, which require those performing these tasks to be deemed competent in doing so having undertaken appropriate training and be deemed knowledgeable of the relevant information/methodology and able to apply it competently. It is expected that those working within the same crime laboratory receive the same level of training according to established training units, demonstrate equal levels of competency, and apply them in the same manner as each other when confronted with the same set of circumstances.

It is often the expert interpreting the DNA profiles obtained from collected samples with respect to the identity of the person(s) from whom the sample was derived (i.e. sub-source level issue), who is then also asked about the relative likelihood of their findings given alternative means of how it may have gotten to where it was collected from (activity level issue). It is incumbent on those addressing such questions to be willing [290] and competent in doing so. This requires contemporary awareness of the available relevant knowledge and how to apply this knowledge in an appropriate unbiased transparent manner. In order to do so, training is required according to approved training modules, which are aligned with relevant procedures/protocols/methodologies and include appropriate competency assessments.

Where possible, opinions should be based on empirically collected and analysed data (Section 8) using appropriate methodologies and tools (Section 11). Training of scientists should include becoming familiar with a multitude of profiles where the ground truth is known, generated using different multi step transfer scenarios and a variety of different variable conditions. Furthermore, there should be regular refresher training and regular proficiency testing of authorised individuals.

Testing of some DNA reporting officers, including many with experience in reporting on DNA transfer, on their general understanding of DNA-TPPR and ability to identify key factors that could impact transfer probabilities, has demonstrated differences between individuals (from between and within laboratories) in their levels of comprehension of DNA-TPPR [291].

Anecdotally, it appears that the training of those required to address DNA transfer activity level issues in legal settings is limited and ad-hoc. Further, some accrediting bodies do not identify the expertise required as distinct from other aspects of DNA collection, profiling and interpretation at sub-source level. Specific requirements are thus limited. There is also an absence of readily available proficiency tests to assist checking of the ongoing competencies of authorised individuals.

There is a need for the forensic community to acknowledge that addressing activity level issues requires separate skill sets and thus separate training programs, competency testing, authorisations and ongoing proficiency testing. Such programs could be composed of different levels to cater for different needs (e.g. from basic awareness, through intermediate, to expert). Standardisation within and among jurisdictions should be a major goal. Useful guidelines on evaluative reporting, including in relation to activity level assessments, have been published [44,254,255]. Some jurisdictions are already progressing well down this path. For example, the UK’s Forensic Science Regulator, with guidance from statisticians, forensic scientists and judiciary representatives among others, is currently developing an evaluative interpretation standard to standardise activity level interpretations of trace evidence [292].

11. Tools to assist activity level assessments

There are many aspects to consider when evaluating forensic genetics findings at the activity level, including those alluded to above. The different aspects can also impact each other and the overall outcomes, to varying degrees. For example, the relative presence of sources of DNA other than the source of interest may inform the overall interpretation. Guidance and tools are becoming available to assist in these endeavours.

Some guidance has been published on evaluative reporting [44,254]. These guidelines stress that reports providing opinions at the activity level should conform to four basic quality criteria. The evaluation should be;

(1) *balanced* (e.g. address at least two competing propositions), (2) *logically correct* (e.g. logical fallacies, like transposing the conditional, should be avoided), (3) *robust* (the interpretation should not be overly sensitive to small variations in the parameter values) (Note, we have substituted the meaning stated by The Association of Forensic Science Providers, i.e.: ‘*should withstand scrutiny by the court or other experts*’ [254], with this meaning as we feel it is more appropriate), (4) *transparent* (the line of reasoning and supporting data should be clearly stated).

Bayesian networks are becoming the *de facto* standard tool used in activity level evaluations in forensic science [293] and can assist experts with their compliance to these four criteria. Bayesian networks allow the expert to model all relevant parameters and their dependencies. The graphical visualisation of complex Bayesian formulations enhances the transparency of the expert’s reasoning. The model also explicitly requires experts to assign probabilities to all modelled parameters, thereby avoiding implicit assumptions. Sensitivity analyses on relevant parameters can further provide clarity on the robustness of the evaluation. The structure of the Bayesian network, particularly if based on existing template structures (e.g. Evett et al. [294]; Taylor et al. [45]), will also guard against logical fallacies, and will enforce balance in the evaluation since at least two propositions need to be specified.

Bayesian networks are flexible and can be used for different aspects relevant to assessment of DNA TPPR. In casework, they can be used to

perform a proper case assessment [295] or to evaluate forensic genetic findings given propositions at activity level [53,296,297]. They may also be used to direct research efforts through clarifying, by sensitivity analysis, which parameters require more data [47]. See Taylor et al. [2] for more information on the use of Bayesian networks, and evaluation of forensic genetics findings given activity level propositions in general.

12. Where to from here

As noted by others [40,41,44,46,144,145,298], activity level questions concerning DNA need to be addressed. Forensic scientists with expertise in DNA-TPPR are therefore in a responsible position to provide guidance on the probabilities of specific evidence given specific scenarios using the information that is available at the time.

This review demonstrates that over the last few years we have become aware of several factors affecting DNA-TPPR, but much more research needs to be undertaken to understand the impact of the many variables, build the data necessary to determine probabilities of different profile type occurrences in different situations, and to improve the accuracy of the profile interpretation given the uniqueness of each case scenario to be considered. As the number of potential scenarios in which DNA-TPPR are to be contemplated is infinite, there will be reliance on extrapolating from research findings. The research thus needs to be of high quality, broad scope, and sufficient quantity. Sensitivity studies to identify the factors and variables most likely to impact likelihood ratios within transfer related scenarios will help prioritise the focus of further research.

We encourage:

- pursuit of the various suggested means of building our knowledge and data sets;
- efforts towards making generated data readily accessible to improve awareness and utilisation by stakeholders;
- greater use of available methods and tools to evaluate likelihood of forensic genetics findings given case specific scenarios using available DNA-TPPR data and further development of user friendly interactive tools to assist their adoption; and
- harmonisation and, where possible, standardisation of methodologies.

Recognition of DNA activity level as a defined expertise requiring dedicated training and competency testing towards authorisation will assist the provision of sound opinion and guidance to the triers of fact. Apart from improvements in training of experts, further general education of all stakeholders in relation to DNA-TPPR would be beneficial.

We implore stakeholders to invest time, resources, funding and commitment towards enabling forensic scientists to provide high quality expert opinion and guidance to courts to accommodate the provision of a fair justice system.

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Contributory Orders for Legal Fees

- Contributory *Rowbotham* Orders
- ***R. v. Rose*, 2019 ONSC 4842**
- Contributory s. 684 Orders
- ***R. v. Josipovic*, 2018 ONCA 199**

Mandatory Minimum Sentence

- Impaired driving
- Indigenous defendant
- Mandatory Minimum violated section 12 of the *Charter*

R. v. Luke 2019 ONCJ 514

Sentencing Ceilings: Post-Verdict Delay

- The *R. v. Jordan*, 2016 SCC 27 presumptive ceiling ends at the time of verdict, but a new one is imposed for the sentencing stage
- Post-verdict delay is subject to a five-month ceiling
- What is the appropriate remedy when that ceiling is breached?

- ***R. v. Charley*, 2019 ONCA 726**

The Roles of Counsel and the Courts in the Post-*Jordan* World

- A never-ending resolution track
- Passive acquiescence by defence
- When all the participants become concerned too late
- Stay of proceedings
- ***R. v. Coutinho*, 2019 ONSC 1492**

Application of s.278.1

- Definition of “a record”
- All text messages, social media postings, photos or videos that involve any sort of discussion of sexual activity and/or sexual innuendo, require an application be brought prior to their admission into evidence.

R. v. M.S. 2019 ONCJ 670

Assumptions in Sexual Assault Cases

- Basing credibility findings upon assumptions about sexual behaviour and what complainants and accused may or may not do

- ***R. v. Cepic*, 2019 ONCA 541**

Keeping *YCJA* Records Too Long

- RCMP keeping Youth Court Records beyond permitted time
- S. 8 breach for police to rely upon the fingerprints
- ***R. v. Alstonl*, 2019 ONSC 5491**

Border Searches

- Search of cellular telephone at the border
- Border search power does not extend to searches conducted for the sole purpose of finding evidence of a criminal offence
- Evidence excluded

R. v. Singh 2019 ONCJ 453

Authentication of Electronic Documents and the “Presumption of Integrity”

- Section 31.1 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5
  - Person seeking to admit the document has the burden of proving its authenticity
  - The operation of s. 31.3 and the presumption of integrity
    - *R. v. C.B.*, 2019 ONCA 380
    - *R. v. S.H.*, 2019 ONCA 669

Asking Sureties What the Accused Told Them about the Offence

- Prohibited
  - ***R. v. K.K.*****, 2019 ONSC 1578**
  - ***R. v. Russell-Connelly*****, 2019 ONSC 2994**
- Allowed
  - ***R. v. P.N.*****, 2019 ONSC 2858**

11(b) and target trial dates

- Defence cannot be held responsible for the delay caused by refusing to set target dates where actual dates not being set because of missing disclosure

R. v. Jafour 2019 ONCJ 175

Voyeurism – Screen Shots During Consensual Webcam-Based Sexual Activity

- Whether a person behaves "surreptitiously" is determined partly from the perspective of the person doing the observing – an intention that the person not be aware
- Elaboration upon *R. v. Jarvis*, 2019 SCC 10

- ***R. v. Trinchi*, 2019 ONCA 356**

Highway Traffic Act s. 48 and Private Property

- Absence of articulable cause
- Evidence excluded
- ***R. v. McColeman*, 2019 ONSC 5359**

Interpretation of s.278.94(2)

- Examines the scope of Complainant's standing in 278 applications
- Extends beyond merely making submissions

R. v. Boyle 2019 ONCJ 253

NCRMD and the Sex Offender Registries

- The legislation violates s. 15(1) of the *Charter* for those found NCRMD and granted an absolute discharge.
- Avoiding or ending registration is easier for the convicted.
- ***G. v. Ontario (Attorney General)*, 2019 ONCA 264**

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Ethical Dilemmas: I can't do that! Don't ask me to do that! Here's why I did that!

ETHICAL DILEMMAS:
I CAN'T DO THAT! DON'T ASK ME TO DO THAT! HERE'S WHY I DID THAT!

RECENT DEVELOPMENTS IN ETHICS

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IRRELEVANT, BUT RELIED UPON

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RELEVANT, BUT PRIVILEGED

Trial Judge: You violated the rule in *Browne v. Dunn* by failing to put your client's version of the events to the complainant when she testified. You're an ethical lawyer. Why didn't you do that? Perhaps you didn't expect your client to say what he did.

Defence counsel: That is the reason, Your Honour. I expected something different than what I heard on the witness stand.

RELEVANT, BUT PRIVILEGED

Reasons of trial judge:

[I]t was an important point in the trial. It wasn't put to her. The reason it wasn't put to her was because your lawyer didn't know, and that is one of the very rare instances where this rule of *Browne and Dunn* causes me as a judge to say, "I can't rely as much on the evidence of Mr. Olusoga." The legal term for it is drawing an adverse inference, but the reality of it is simply saying "look, if this guy hasn't told his own lawyer what he's going to say on the stand, how much weight can I give it?"

R. V. OLUSOGA, 2019 ONCA 565

New trial ordered.

[14] We are satisfied that the breach of solicitor-client privilege, and the trial judge's use of that privileged information in his assessment of the appellant's credibility, occasioned a miscarriage of justice.

RELEVANT, NON-BINDING CASE LAW

A lawyer faced disciplinary charges in Saskatchewan for:

Failing to treat a judge of the Provincial Court with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court's attention during argument of a non-suit application.

RELEVANT, NON-BINDING CASE LAW

The Facts:

The accused faced a charge of driving while disqualified. At the conclusion of the Crown's case, counsel for the accused moved for a non-suit, based in part on the failure of the Crown to prove that the accused was not enrolled in an alcohol ignition interlock program. He contended that proof of non-enrolment was an essential element of the offence. He argued that proof that the accused was subject to a prohibition order was insufficient.

RELEVANT, NON-BINDING CASE LAW

The Code of Professional Conduct (Saskatchewan) provided:

When acting as an advocate, a lawyer must:

[R]epresent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect. " (*Code*, 5.1-1)

When acting as an advocate, a lawyer must not:

[D]eliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party (*Code* 5.1-2(i))

RELEVANT, NON-BINDING CASE LAW

In support of his argument, defence counsel referred to *R. v. Lariviere*, a Quebec Court of Appeal decision and *R. v. Liptak*, a 2009 Alberta Provincial Court decision. He drew those cases from Alan Gold's 2012 Annotated Code.

He did not mention *R. v. Whatmore*, a later Alberta Provincial Court decision, identified by Mr. Gold as a "contra" decision. The decision not to refer to *Whatmore* was found to be deliberate.

None of these decisions were binding on the trial court in Saskatchewan.

Ethical breach?

RELEVANT, NON-BINDING CASE LAW

Page 438 from Alan D. Gold, *The Practitioner's Criminal Code*, 13th ed (2012)

On a charge of operating a motor vehicle in Canada while disqualified from so doing, contrary to s. 259(4) of the Criminal Code, the Crown was required by the terms of s. 259(4) to prove, as elements of the offence, that the accused was not "registered in an alcohol ignition interlock device program established under the law of the province in which the [accused] resides" and, if the accused was so registered, that the accused was not in compliance with the conditions of that program.

RELEVANT, NON-BINDING CASE LAW

Footnote:

R. v. Lariviere (2000), 38 C.R. (5th) 130, [2000] Q.J. No. 3086 (Que. C.A.); *R. v. Liptak*, [2009] A.J. No. 1271 (Alta. Prov. Ct.); *Contra R. v. Whatmore*, 2011 ABPC 320, [2011] A.J. No. 1147 (Alta. Prov. Ct.) (onus on accused to prove registration and compliance with interlock program).

RELEVANT, NON-BINDING CASE LAW

Law Society Hearing Committee upheld the complaint against the lawyer, Ajit Kapoor. Its decision was upheld on appeal to the Saskatchewan Court of Appeal: *Kapoor v. The Law Society of Saskatchewan*, 2019 SKCA 85

1. The specific duty to disclose binding authority is not exhaustive of the duty of candour
2. It is valid to sound a cautionary note in finding misconduct based on the failure to cite non-binding cases
3. One must strike an appropriate balance in approaching these issues

RELEVANT, NON-BINDING CASE LAW

4. While a failure to bring an adverse case to the court's attention will not in all circumstances give rise to discipline, the failure here was, in the limited circumstances specific to this matter, conduct unbecoming a lawyer
5. The trial judge was clearly struggling with the authorities provided to him, and very much interested in the existing case law
6. Defence counsel, at least implicitly, held the *Liptak* case out as representing the law in Alberta. That was untrue.

RELEVANT, NON-BINDING CASE LAW

The Saskatchewan Court of Appeal further held that:

[52]… It may not have amounted to misconduct for Mr. Kapoor to have simply referred the trial judge to *Larivière* (this issue was not before the hearing committee), however, I cannot accept that it was an ethical tactical choice for Mr. Kapoor to have, in substance, held out *Liptak* as the law of Alberta, when he was aware that it is not.

RESILING FROM A JOINT SUBMISSION

The Facts

The Crown and Defence agreed that the accused would enter a guilty plea to manslaughter, with a joint submission as to penalty. On that basis, a guilty plea was entered to manslaughter on a new information, and the murder charge was withdrawn. On the subsequent date for sentencing submissions, defence counsel indicated that her client had instructed her to resile from the joint submission. She proposed that the original charge be resurrected, though she was prepared to proceed with a contested sentencing hearing on the basis of the guilty plea to manslaughter. The Crown laid a new information on the charge of murder. The Court considered whether defence counsel's conduct was unethical and whether she should be discharged as counsel in this matter.

RESILING FROM A JOINT SUBMISSION

Query the reasoning, though not necessarily the result

The Court's decision in *R. v. Yates,* 2019 SKPC 41:

1. Defence counsel could not accept the instructions received and back away from her agreement and simply expect everything would go back to the initial stages
2. Defence counsel was obligated to withdraw as counsel. In failing to withdraw, she acted contrary to the canon of ethics
3. If she carries on and advances a complete defence to the murder charge, after having obtained the client's admissions, she will violate the ethical rules
4. Agreements and undertakings between counsel are very serious and cannot be easily disregarded. By casually disregarding the agreement reached, defence counsel has acted contrary to the code of professional conduct
5. She must also be removed as counsel: she had a duty to comply with her undertaking and a second duty to withdraw. These ethical breaches would continue if she continued to act. She would also be a conflict of interest based on her current willingness to conduct the trial and assert a full defence

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

Incriminating Physical Evidence

5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Source: Rules of Professional Conduct

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

Commentary

[1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offence. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:

(a) considering whether to retain independent legal counsel to provide advice about the lawyer's obligations. If retained, the lawyer and independent legal counsel should consider

(i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and

(ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

(I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or

(II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

REVISITING THE "SMOKING" OR "PARTIALLY SMOKING" GUN

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

REVISITING THE “SMOKING” OR “PARTIALLY SMOKING” GUN

How should counsel proceed when the issue of incriminating physical evidence arises?

"THE DUTY TO GOOGLE"

The widespread use of social media means that parties to litigation have potential access to a tremendous amount of information about the opposing parties, and witnesses, including experts.

Counsel arguably have a duty to research a witness's background on the internet before cross-examining any witness whose credibility is in issue. – Chan & Magotiaux, Digital Evidence: A Practitioner's Handbook (Toronto: Emond, 2018)

Susan Chapman, "The Duty to Google" (Toronto: The Law Society of Upper Canada, 2015)

THE IMPACT OF SOCIAL MEDIA

Familiarity with s. 278.92 and s. 278.1 of the *Criminal Code*

R. v. Patterson, 2018 ONSC 4467: police access to the accused's Facebook – when does a reasonable expectation of privacy exist

R. v. Paxton, 2016 ABCA 361: Crown's duty respecting social media about the complainant

R. v. Marshall, 2015 ONCA 528: information posted on internet about the complainant was not fresh evidence given its availability to defence

R. v. M.S, 2019 unreported (Chapman Prov. Ct. J.): important discussion about 278.92 and 278.1

THE IMPACT OF SOCIAL MEDIA

Examples:

- Greater need to address reputational impact of court proceedings
- Relevance of social media to change of venue applications

- See *R. v. Durant*, 2019 ONSC 3169; *R v. Millard and Smich*, 2015 ONSC 6206; *R. v. Oland*, 2018 NBQB 253
  - Relevance of social media to jury selection, including the need for a lower threshold to question jurors or challenge prospective jurors for cause and a lower threshold to support a successful challenge for cause

ETHICAL DILEMMAS: I CAN'T DO THAT! DON'T ASK ME TO DO THAT! HERE'S WHY I DID THAT!

RECENT DEVELOPMENTS IN ETHICS

Mark Sandler

Rick Frank

THE VOICE OF
THE CRIMINAL
DEFENCE BAR

Mark your Calendars

2020 CLA PROGRAMMING

February 22, 2020	**The 5th Annual Mental Disorder and the Law Conference**
May 30, 2020	**2020 CLA Annual Spring Conference**
October 23-24, 2020	**48th Annual CLA Fall Conference**
October 25, 2020	**6th Annual Recent Call Conference**

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